RIGHT TO PERSONAL LIBERTY UNDER THE INDIAN CONSTITUTION - WITH SPECIAL REFERENCE TO JUDICIAL PROCESS

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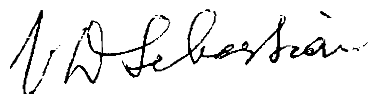

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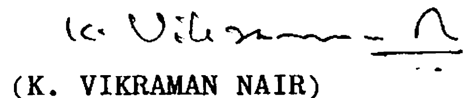

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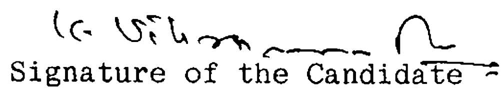

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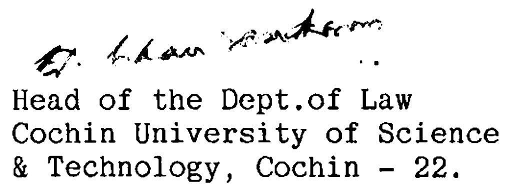

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Pondicherry **K. VIKARAMAN NAIR**

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INTRODUCTION

No society can possibly be built on a denial of individual freedom. If an organic society is to grow up its institutions should embody the respect for the individual and his rights. The creative impulse of man should be promoted by the political and social institutions. As Bertrand Russell[1] has put it, 'liberation of creativeness ought to be the principle of reform both in politics and in economics'. To be consistent with this principle of reform, any useful political theory must seek to incorporate into it two important principles: First, the growth and vitality of individuals and communities is to be promoted as far as possible; second, the growth of one individual or community is to be as little as possible at the expense of another. According to Bertrand Russell this principle it social reconstruction as applied impersonally in politics, is the principle of liberty.[2] Thus liberty in itself, he says, is

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1. Bertrand Russell, Principles of Social Reconstruction, London, George Allan & Unwin Ltd., 13th Impression (1954), p.6.

2. Ibid., at pp. 101, 157.

a negative principle. It tells us not to interfere. It condemns all avoidable interferences with freedom.[3]

But a society can hardly aspire to enjoy the individual freedoms and liberties under an exploitative political order imposed upon it by an alien rule. Disaffection towards such an established order is a natural offspring of unjust and arbitrary deprivation of the human rights and liberties of a whole people. Liberty, then, becomes a passionate and positive urge to liberate the whole people from such an unjust political order-an urge for self-government and democracy. Liberty, in this sense, becomes essentially the right to participate in public affairs[4] and to determine who shall exercise control over them. It is

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3. Ibid. J.S. Mill denounces restrainst on the action of the individuals and defines liberty as "protection against the tyranny of the political rulers". See J.S. Mill, On Liberty, Representative Government, the Subjection of Women: Three Essays London, Oxford University Press, 1971, p.5. See also Harlod J. Laski, Liberty in the Modern State, London, George Allen & Unwin Ltd., 1961, p.135. To Laski liberty means "there is no restraint upon conditions which, in modern civilization, are the necessary guarantees of individual happiness". See, also Lord Alfred Denning, The Changing Law, London, Stevens & Sons Ltd., 1953, p.3.

4. The concept of liberty in this sense was basic to the ancient Greek political thought. William Ebenstein, Modern Political Thought. The Great Issues, second edn., Oxford IBH Publishing Co., New Delhi, p. 148. See, also Laski, Encyclopaedia of Social Sciences, Vol.IX, p.442; Crains, Legal Philosophy from Plato to Hegal, pp. 28 et seq.

this aspect of liberty which Isiah Berlin[5] has described as the positive concept of liberty.

The facts of history teach us that we cannot assume that we have outgrown the fear of oppression by government merely by virtue of achieving national independence and self-government. As cautioned by de Tocqueville,[6] 'distrust of absolute majority or absolute plurality is as just, in reason and in experience, as distrust of the absolute personal ruler. Indeed, the latter may be given a pause by fear of an uprising which an entrenched majority need not fear'. Thus the principle of liberty in the sense of 'absence of restrainst' became increasingly relevant even in a democracy. The nationalist cry of "give me liberty or give me death", raised by the Americans in 1775; and the assertions they made in the Declaration of Independence of 1776 reflected the simultaneous urge for both the positive and negative concepts of liberty[7] - i.e., for a right to determine 'who shall control', and 'how much control' shall be there on their life and liberty. The Declaration of Independence and

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5. Isaiah Berlin, Two Concepts of Liberty (1958), as quoted in William Ebenstein, op.cit., p.151.

6. Alexis de Tocqueville, Democracy in America (1835-1840), as quoted in William Ebenstein, op.cit., p.231.

7. Isiah Berlin, op.cit., pp.176-189.

the adoption of a Bill of Rights in the Constitution of the United States were motivated by the basic political concept that the State exists for man and not man for the State. The Declaration proclaimed the rights of a people to abolish a government that failed to secure the people's 'inalienable rights', among which were "life, liberty and the pursuit of happiness".[8] And as Roscoe Pound[9] said, the liberty guaranteed by the American Bill of Rights "is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organized society to adjust relations and order conduct, and so are able to apply the force of that society to individuals". The protection for individual freedom from arbitrary and unreasonable exercise of power and authority of the state was sought to be secured by the constitutional command that 'no personal shall be deprived of his liberty without due process of law'.[10] And the scope and content of the requirements of 'due process of law' as determined by the apex court, armed with the power of

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8. See the text of the Declaration of Independence, 1776.

9. Roscoe Pound, The Development of Constitutional Guarantee of Liberty, p.1.

10. See the Fifth Amendent to the U.S. Constitution.

judicial review, through the process of constitutional adjudication had come to be the measure of protection for the liberty of the individual against the authority of the State.

Logically and historically, the adoption of a Bill of Rights in order to secure the protection of individual liberty against the authority of the State by the political order in India through its new Constitution of 1950 had also been akin to that of the United States.[11] The pledge for the national independence adopted by the Indian National Congress in 1930 reflected the sentiments of an oppressed people in the same manner as voiced by the American people earlier. Thus declared the Congress in 1930:

> "... We believe that it is the inalienable right of the Indian people, as of any other people, to have freedom, and to enjoy the fruits of their toil and have necessities of life, so they may have all opportunities of growth. We believe also that if any government deprives a people of these rights

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11. See, Ivor Jennings, Some Characteristics of the Indian Constitution, London, (1953), p.85. As regards the adoption of the Bill of Rights he comments that it is true that "the Indian reaction, like the American reaction, is a product of British rule".

and oppresses them, the people have a further right to alter or abolish it.... "[12]

Naturally, therefore, when the National leaders assembled to draft a new Constitution for Free India, they did not have any hesitation in guaranteeing a Bill of Rights to the Indian people. The guarantee of liberty in the constitutional law of a nation, as observed by Cardozo,[13] "... is the guarantee that claims and immunities conceived of at any given stage of civilization as primary and basic shall be preserved against destruction or enchroachment by the agencies of the government". Confronted with the basic political problem of securing an efficient and responsible government with ultimate authority in the Legislature representing the people but at the same time placing the liberties of the people beyond arbitrary interference from the government, the Framers of the Indian Constitution, like their American counterparts, attempted to resolve that problem by making the defined liberties of the people inviolable either by the legislature or the executive and bringing their sanctity under the protection of an independent judiciary equipped with the power of judicial review.

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12. See, Banerji, Indian Constitutional Documents, Vol.III, p.219.

13. B.N. Cardozo, The Paradoxes of Legal Science, p.123.

Among the rights which are declared as fundamental in Part III of the Constitution, the right to personal liberty which is, perhaps, basic to all other individual rights and freedoms, evoked a high degree of interest and anxiety in the Constituent Assembly. Like property, liberty too is a subject which, in its framing, had been considerably influenced by the concern with the immediate. Originally, in the Constituent Assembly, liberty was proposed to be guaranteed along with life and property and none of then could be taken away without due process of law. Though it had been welcomed by almost the entire Assembly, the original proposal underwent drastic changes at the instance of the prominent members of the Assembly who were also (significantly enough) at the helm of affairs and seriously concerned with the immediate problems posed by the them existing socio-political exigencies. The preoccupation with the massive programmes of land reforms and other social welfare measures and the grave law and order situation, threatening the very security and unity of the country had all been fully reflected in the final shape which the Articles dealing with liberty and property took. Thus, property was delinked from liberty; liberty itself was qualified by 'personal' in order to narrow down the scope and amplitude of the concept; and the expression "procedure established by law" was substituted for the 'due process'

clause in order to curtail the scope of judicial review in the field of personal liberty. As a result we have Art.21 of the Constitution in the present form according to which "No person shall be deprived of his life or personal liberty except according to the procedure established by law".[14] And the rest of the tale of personal liberty in India was destined to be determined by judicial process.

The nature and extent of protection secured to personal liberty has been a subject matter of great controversy and debate. The expression "procedure established by law" as a standard of protection for personal liberty has been looked upon as highly unsatisfactory and inadequate. For, unlike the specific attributes of liberty that are separately guaranteed under Art.19, 'personal liberty' as guaranteed by Art.21 does not obligate the Legislature to comply with the requirements of justice and reasonableness as and when it enchroaches upon that right. Though the concept of 'personal liberty' has received an evolutive and expansive meaning through judicial process, the standard of protection which the judicial process could secure to personal liberty through the interpretation of Art.21 has been far from satisfactory Even after four decades of judicial process in the interpretation of Art.21

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14. For the detailed analysis of the framing of Art.21, see chapter II <u>infra</u>.

the problem of evolving a just and adequate standard of protection for personal liberty in that Article continues to be a crucial constitutional issue, craving for a satisfactory solution. And the present study is a humble attempt to unravel this problem and to search for a reasonable solution.

Though the subject of right to personal liberty as a constitutional guarantee is very vast and multi-dimensional, the scope of the present study is confined to the inquiry as to the precise nature and extent of protection which Art.21 secures to that right as against the legislative authority of the State. And that inquiry is made with particular reference to judicial process. Judicial process, though by itself is a wide and abstract concept, in the context of this study implies (refers to) only the judicial interpretation of 'personal liberty' as well as the standard of protection secured to 'personal liberty' by Art.21. And here too the reference is mostly confined to the constitutional adjudications under Art.21 at the level of Supreme Court of India.

Methodologically, the present study is theoretical in nature. It is mainly based on the critical analysis of the materials drawn from the original sources such as the Constituent Assembly Debates the texts of the Constitution

and other relevant statutes, and the relevant cases decided by the Supreme Court. Other secondary sources such as books and Articles are also used.

Part I of this study deals with the emergence of the right to personal liberty as a constitutional guarantee in its historical perspective. The first chapter in this part gives a historical account of the development of personal liberty as a constitutional value in the United Kingdom and as a constitutionally guaranteed right in the United States. An attempt has been made in this chapter to clarify and emphasise the historical fact that liberty and justice are inextricably inter-linked and that the development of personal liberty as a constitutional guarantee has really been the development of the standard of 'due process of law' as a projection for personal liberty. The chapter also refers to the recognition of the requirements of 'due process of law' as a protection for the liberty of the individual by the international legal order.

In the second chapter an attempt has been made to inquire whether the India of the past and her ancient systems of political thought and culture have anything to offer to solve the present problems of liberty and justice. The chapter also briefly refers to the urge for justice and liberty during the freedom struggle; and to the negation of

rule of law and the deprivation of life and personal liberty of the people without 'due process of law' during the British regime in India. Also it elaborately deals with the framing of Article 21 of the Constitution of India in the Constituent Assembly with a view to ascertain the real intention of the Constitutent Assembly on the issue of securing the protection of 'due process of law' for personal liberty.

Parts II and III of this study discuss and evaluate the judicial process in the interpretation of Art.21. Part II, which deals with the judicial process during the period from Gopalan[15] to Shivakant Shukla[16], consists of the third, fourth and fifth chapters.

The third chapter deals with the concept of personal liberty in Art.21 and its meaning and content as evolved through the judicial process.

In the fourth chapter the judicial attitude towards the protection of personal liberty has been discussed elaborately and critically. The decisions indicating a persistent refusal to interpret the standard of protection for personal liberty in Art.21 as 'due process of

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15. A.K. Gopalan V. State of Madras, AIR 1950 27.
16. A.D.M. Jabalpur V. Shivakant Shukla, AIR 1976 SC 1207.

law' have been analysed. The restrictive interpretation of the expression 'procedure established by law' by the Supreme Court in Gopalan and the techniques and arguments adopted by the Court in defending its denial of 'due process' in Art.21 have been considered. The impact of the legacy of Gopalan on the protection of personal liberty has been evaluated with reference to the post - Gopalan cases.

The fifth chapter deals with a peculiar dilemma of the Court in the field of protection of personal liberty - the Court's obsession with the expression 'due process of law' on the one hand and its awareness as to the gross inadequacy of the standard of protection for personal liberty in Art.21, as determined by Gopalan, on the other. The chapter refers to the attempt that has been made by the Court in this regard to gather the elements of 'due process' from without Art.21 through a process of inter-linking Art.21 with Arts.14 and 19. This judicial attempt is termed in this study as the 'alternate strategy'.

Part III of this study, consisting of the sixth and seventh chapters, deals with the judicial process and personal liberty with reference to Maneka[17] and the - post - Maneka decisions.

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17. Maneka Gandhi V. Union of India, AIR 1978 SC 597.

In the sixth chapter a detailed analysis of the decision in Maneka has been undertaken, especially in view of the claim made in many quarters that Maneka has inducted the 'due process' clause into Art.21. The Court's failure to interpret the expression 'procedure established by law' as embodying the requirements of 'due process of law'; and its adoption of the 'alternate strategy' to evolve the 'just, fair and reasonable procedure' formula - the Maneka version of 'due process' - are closely examined. An attempt has also been made to show that the theoretical foundation of the 'alternate strategy' is not sound and stable; and that the 'just, fair and reasonable procedure' formula, based on such an unsound strategy, is only a poor substitute for a 'due process' clause in Art.21 as a protection for personal liberty.

In the seventh chapter a survey has been made of the post - Maneka cases wherein the Court seems to have displayed an unprecedented activism and creativity, presumably, proceeding on the assumption as to the existence of a 'due process' clause in Art.21 after Maneka. The survey also refers to the new rights and contents poured into Art.21 by the Court during this spell of due process dynamism. The chapter further points out the Court's failure to articulate and strengthen the theoretical

foundation for a 'due process' clause in Art.21, while reading into that Article the new rights and liberties. The second line of the post- _Maneka_ decisions such as _Bachan Singh_[18] and _A.K. Roy_[19], indicating the dwindling of 'due process' dynamism in the Court, have also been analysed.

Then, in conclusion the inferences drawn from the foregoing chapters are put together; and a few suggestions are also made in view of those inferences.

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18. _Bachan Singh_ V. _State of Punjab_, AIR 1980 SC 898.

19. _A.K. Roy_ V. _Union of India_, AIR 1982 SC 710.

PART I

PERSONAL LIBERTY AS A CONSTITUTIONAL GUARANTEE: A HISTORICAL PERSPECTIVE

CHAPTER I

DEVELOPMENT OF PERSONAL LIBERTY AS A CONSTITUTIONAL GUARANTEE

General:

Protection of individual liberty has been considered to be one of the fundamental duties of the State in many civilizations. That notion of duty is as old as the concept of the State itself. But the active protection of the liberty of the individual against the arbitrary interference by the State seems to be a later development. The further refinements in the means and methods of such protection leading to the emergence of constutional guarantee as a device to protect individual liberty against the State is certainly, still more modern.[1] The very idea of a 'guarantee' of liberty suggests the existence of some power above the ordinary law of the land to insure liberty as a special privilege.[2] The expression 'constitutional

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1. D.C.M. Yardley, Introduction to British Constitutional Law, 6th edition (1984), p.89.

2. Dicey, An Introduction to the Study of the Law of The Constitution, 10th edn., p.207 See also O.Hood Phillips Constitutional Law and Administrative Law, 6th edn., p.447.

guarantee', in its modern sense - the sense in which it is used in this study - presupposes, a written constitution, embodying a declaration of certain basic rights and liberties and providing for judicial review of legislative actions.[3] It is the protection of liberty by the constitution as against legislative action that constitues the essence of a constitutional guarantee. The earliest example of constitutional guarantee of liberty in this sense can be found in the American Constitution of 1787 with the first ten Amendments - the Bill of Rights - added thereto in 1791.[4] Many constitutions coming into existence thereafter, including that of India, followed this American example.[5]

It should not however be assumed that the ideal of personal liberty as a constitutional guarantee was developed indigenously in the United States by any abrupt or isolated process. The Americans had accomplished this idea to a very great extent as a result of and on the basis of the long and eventful history of constitutional developments and experiences in the United Kingdom.[6] It is true that the idea of liberty as a constitutional guarantee can not have much scope today in England because of the supremacy of

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3. O. Hood Phillips, ibid., at p.438.
4. Yardley, op.cit., p.89.
5. O.Hood Phillips, op.cit., p.446.
6. Ibid., at p.16

Parliament and the absence of a written constitution with entrenched provisions.[7] But it is also true that 'no country in history has made a greater contribution than Britain to the recognition of the rights of the individuals and their protection by an independent judiciary against government authorities.'[8] Hence it seems appropriate to allude briefly to the constitutional developments pertaining to personal liberty in the United Kingdom as a prelude to our discussion of this subject.

Personal Liberty under the English Constitutional System

From Magna Carta to Modern Times - A Historical Overview. Though there does not exist any one document which can be described as the British Constitution, there exists a body of law - consisting of a series of organic pieces of legislation judicially evolved rules and well-established conventions - which can legitimately be treated as the constitutional law of England.[9] A close scrutiny of the historical process through which this body of law had evolved would bring out, *inter alia*, two important factors which are particularly relevant to the present study. First, the value of personal liberty seems to be deeply

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7. *Ibid.*, at p.438; Dicey, *op.cit.*, p.207.

8. O.Hood Phillips, *ibid.*, at p.438.

9. S.B. Chrimes, *English Constitutional History*, 4th edn. (1970) p.5; Yardley, *op.cit.*, p.4.

entrenched in the constitutional law of England. There exists a series of documents of constitutional importance, containing formal declarations of the guarantee of personal liberty, limiting thereby the absolute powers of the King.[10] Secondly, judicial protection of personal liberty through the effective means of *habeas corpus* has received a high degree of constitutional importance, demonstrating thereby the efficacy of the judicial process and the due process of law in the area of personal liberty.

Now let us consider these two specific aspects of the British constitutional developments in some detail.

Personal Liberty and Magna Carta

When king John began exercising his powers arbitrarily, disregarding the principles of justice and liberty, the royal arbitrariness evoked a strong opposition from the powerful baronage. Then arose the 'basic constitutional problem' of how the King could be kept tied down to the letter of the law. The best solution which that generation could offer to that problem was contained in the 'Great Charter'of liberties obtained from King John in 1215.[11]

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10. For instance, Magna Carta, The petition of Rights, The Bill of Rights, and the Act of Settlement. See *infra*.

11. Chrimes, *op.cit.*, p.70; See also C.B. Adams, *Constitutional History of England*, Reprint (1911), p.128.

The most outstanding feature of the Charter came to be that part of it which dealt with the individual liberty and justice.[12] Chapter 39 of the Charter declared:

> "No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land". And chapter 40 ensured:

> "To no one will we sell, to no one will we deny or delay right or justice".[13]

The Charter as re-issued in 1225 had re-enacted the above chapters 39 and 40 as chapter 29.[14] Thereafter chapter 29 turned out to be the focal point of Magna Carta which has been resorted to and relied upon in subsequent centuries whenever state absolutism raised its head in English constitutional history.[15]

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12. J.C. Holt, Magna Carta, (1965), p.2; Adams, ibid., at p.136.

13. For the Translation of the Charter. see Holt, ibid., at p.327.

14. The Charter of 1215 was re-issued with amendments in 1216, 217 and in 1225 See Holt, ibid., at p.1.

15. Holt, ibid., at p.2, for the text of Chapter 29 of Magna Carta, see Annexure I, infra.

The guarantee of liberty in chapter 29 appears to have been aimed against purely arbitrary actions of the Crown such as arbitrary disseisin[16] at the will of the King or against arrest and imprisonment on an administrative order;[17] and has proved to have been "full of future law".[18]

Of course it is true that in 1215 the barons were mainly responsible for obtaining the Charter from the king; and it may be argued that the crucial clause 39 was a partisan instrument extorted from the King for the benefit of the feudal claims and privileges 'inimical alike to the Crown and to the growth of really popular liberties'.[19] Yet, as Prof. Lauterpacht[20] observes, 'the fact remains that in the history of fundamental rights no event ranks higher than that charter of concessions which the nobles wrested from King John'. The historical importance of the Charter lies more in the principles on which it was based rather

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16. Disseisin means wrongful dispossession of real property, see Concise Oxford Dictionary.

17. See Holt, op.cit., p.227.

18. See Pollock and Maitland, The History of English Law, Vol.I 2nd edn. (1968), p.171.

19. McKechnie, Magna Carta (1905), p.449. See also McIlwain, Constitutionalism and the Changing World (1939), p.87.

20. H.Lauterpacht, International Law and Human Rights (1968), p.131.

than in the specific provisions which it embodied.[21] The Charter not only declared the rights and liberties of the subjects, but it also embodied another equally important principle that if the King would not regard those rights he may be compelled by force, by insurrection against him, to do so.[22] 'It is upon these two principles', as Adams argues, 'henceforth inseparable, that the building of the constitution rested. It was through them that Magna Carta accomplished its great work for free government in the world'.[23] It was no wonder, therefore, that Maitland writing in 1895 extolled this Great Charter of liberties thus: 'this document becomes and rightly becomes a sacred text, the nearest approach to an irrepealable fundamental statute that England has ever had'[24]; and to him this document

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21. G.B. Adams, Constitutional History of England (1921), p.129. Stubbs also maintains that the Charter was not a selfish exaction of Privileges of the baronage; but it secured the rights and liberties of the whole people. See stubbs W., Constitutional History of England, Vol.I (1897), p.579.

22. See Chapter 61 of the Charter, 1215 under which a committee of 25 barons was to be established and authorised to distrain the king if he disregarded the Charter.

23. G.B. Adams, Constitutional History of England (1921), p.130.

24. Pollock and Maitland, The History of English Law, Vol.I, (1968) p.173; See also Adams, ibid at p.128. He describes the Charter as 'the most important constitutional document of all human history'.

established the most important of all constitutional principles that 'the king is and shall be below law'[25]

It is significant that the first formal declaration of personal liberty is to be found in such a great document of constitutional importance; and it is no less significant that the most prominent and enduring part of that document turned out to be that which deals with personal liberty.[26]

Personal liberty as embodied in the Charter has not remained an idle declaration; it has become a functional part of English law, to be confirmed and interpreted in parliament and enforced in courts of law.[27]

Parliamentary interpretations of Magna Carta and Personal Liberty:-

The Political disturbances of the 14th Century in England led to further developments of liberty as declared in the Great Charter.[28] During this period the principle of personal liberty in chapter 29 was subjected to many parliamentary interpretations which strengthened the spirit

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25. Pollack and Maitland, ibid at p.173
26. See J.C. Holt, Magna Carta, p.2.
27. Ibid.
28. Ibid., at p.9.

and widened the scope of the guarantee of liberty and justice in the Magna Carta.

The most important of these statutory interpretations, as summed up by Holt, are:[29] First, the phrase 'lawful judgement of peers' was interpreted to mean trial by peers and therefore trial by jury.
Secondly, the "law of the land" was defined in terms of yet another potent and durable phrase, 'due process of law'.
Thirdly, the words, 'no free man' were so altered that the Charter's formal terms became socially inclusive. In 1354 in the statute of Edward III, which referred for the first time to 'due process of law', 'no free man' became 'no man of whatever estate or condition he may be.[30]

These statutory interpretations have, thus 'accomplished a remarkable transformation in the form and content of the guarantee of personal liberty in chapter 29 of the Charter. If one may put chapter 29 in modern constitutional terms, it can be said to have laid down that 'no person shall be deprived of his life, liberty or property without due process of law'.[31]

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29. Ibid.

30. Ibid. See also Fath Thompson, Magna Carta, Its Role in the Making of the English Constitution, 1300-1629 (1948), p.92.

31. G.B. Adams, Constitutional History of England (1921), p.92.

The succeeding generations have taken these statutes not merely to be an explanation of the words of Magna Carta, but as the very words of the statute of Magna Carta.[32] The 17th Century constitutional developments in England along with the juristic interpretations of Magna Carta as laid down by Chief Justice Coke have led to many more strides in the development of personal liberty as a constitutional value.

The 17th Century Developments and Personal Liberty

Chief Justice Coke's interpretation of chapter 29 of Magna Carta added further dimensions to the already extended range of parliamentary interpretations of the 14th century. Coke found in the Charter the principal grounds of the fundamental laws of England and an affirmation of the liberty of the subject.[33] Coke openly asserted that chapter 29 of the Charter applied to villains. He also expanded that word 'liberties' so that it became synonymons with 'individual liberty'.[34]

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32. See the arguments of Seldon in Darnel's Case (1627) to this effect. Fath Thompson, op.cit., p.332; see also J.C. Holt, Magna Carta, p.10.

33. J.C. Holt, ibid., at p.3.

34. Ibid, at p.10. A harsh Criticism of Coke's 'common law interpretation of Magna Carta was made by Brady, Introduction to Old English History, (1684), p.76.

The worth and efficacy of Magna Carta and the guarantee of liberty contained therein along with its extensive interpretations were brought to light by the political events under the Stuart absolutism of the 17th century. The absolutist reign of James I and Charles I, characterised by abuse of royal proclamations, dissolutions of parliament and arbitrary arrests and detentions, had spread resentment and opposition among the subjects and in Parliament.[35] The high watermark of the clash between the royal absolutism and the liberties of the subjects was amply illustrated by the Darnel's Case in 1627.

Darnel's Case,[36] 1627: Charles I had resorted to arbitrary arrests and detention of a number of subjects who refused to contribute to a forced loan demanded by him without parliamentary sanctions. Of those detained five Knights sought their freedom by way of habeas corpus.[37]

The central issue posed by the case was whether the King did possess a power which superseded the 'law of the land' - the common law adjudicatory process - or was he always subject to a supervisory' judicial power to inquire whether his actions complied with the law.[38]

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35. See L.B. Curzon, English Legal History, (1968), p.37.
36. Or The Five Knights Case 1627 (3st. Tr.I).
37. See Sharpe, The Law of Habeas Corpus (1976), p.9.
38. Ibid, at p.10.

The arguments of the counsel for the prisoners in the case illustrate the extent of importance given by the lawyers of the 17th Century to chapter 29 of Magna Carta and its statutory interpretations of the 14th century. The defending counsel Seldon placed great reliance on Magna Carta and the Statutes of Edward III.[39] The imprisonment was challenged as illegal and unjustified in the light of chapter 29 of the Great Charter since the detentions were not in accordance with the 'law of the land' or the 'due process of law'.[40]

But the court, under the pressure of the political circumstances, decided the case in favour of the King and refused to bail the prisoners.[41]

Having failed to secure the supremacy of law and the personal liberty of the prisoners through courts as against the royal pre-rogatives, once again the English people were left with the problem of how far may the law restrain the King in the exercise of his powers.[42] This

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39. Ibid, at p.10; see also J.C. Holt, Magna Carta, p.10.

40. It was in the Statutes of Edward III the 'law of the land' in Cap.29 of Magna Carta was interpreted for the first time to mean as the 'Due Process of Law' See, Fath Thompson, supra, f.n.30.

41. The decision is also suggestive of the danger that if the judiciary is not independent it may not be possible for it to uphold the supremacy of law and the liberty of the subjects without fear or favour.

42. See L.B. Curzon, English Legal History, (1968), p.13.

time an immediate solution to this problem came from a determined Parliament which met and presented to Charles I a 'Petition' which he accepted in 1628.

The Petition of Rights, 1628:

The petition of Rights, under the effective guidance of Coke[43] who typified the 17th century interpretations of the Magna Carta, re-asserted the principle that 'the King is and shall be under the law'. It dealt with the main grievances[44] of the day against Charles I. Clause Five of the Petition set out the grievance about the arrest and imprisonment of persons by the special command of the King, signified by the privy council, without being charged with anything to which they might make answer according to law in a writ of _habeas corpus_. The operative part of Clause Eight simply provides that 'no free man in any such manner as is before mentioned be imprisoned or detained'. Thus the Petition of Rights appears to have reaffirmed the principle that the Personal

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43. During the debate on the Petition, Cap.29 of Magna Carta and the Statutes of Edward III were invoked and relied upon to a great extent. See Fath Thompson, _Magna Carta, Its Role in the Making of the English Constitution_, 1300-1629, (1948), p.86.

44. The grievances of arbitrary taxation, abuses through martial law and arbitrary arrest and imprisonment See G.B. Adams, _Constitutional History of England_, pp.292-3. For the text of the Petition of Rights, see Annexure II, _infra._

liberty of the subjects could not be deprived of except according to the 'law of the land' or 'the due process of law'.[45]

Another major document of constitutional importance, containing an affirmation of individual liberty, is the Bill of Rights which followed the Glorious Revolution of 1688.[46]

The Bill of Rights, 1689

The Bill of Rights - "An Act declaring the rights and liberties of the subject, and settling the succession of the throne"[47] - dealt with the specific grievances the realm had suffered under King James II and declared all those arbitrary exercise of powers as illegal.[48] The objects of the Bill, as it explicity set out, were to undo 'all which

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45. The Petition not only insisted the principle 'no arrest without cause shown', but also it associated this principles with habeas corpus. See Fath Thampson, op.cit., p.325; J.C. Holt, Magna Carta p.11.

46. The revolution which ended the Stuart absolutism has established once for ever that the sovereignty in the realm is vested not in the King but in Parliament; and has ushered into a new era in the constitutional history of England. See L.B.Curzons, English Legal History, pp.40 et.seq.

47. See Halsbury's Statutes of England, 3rd edn., Vol.6, p.489. For the text of the Bill of Rights, see Annexure III, infra.

48. Ibid, at p.358. The most prominent among those grievances during this period too appears to have been the arbitrary arrests and detentions of the subjects.

are utterly and directly contrary to the known laws and statutes and freedoms of the realm'; and to 'ordain such an establishment that their religion, laws and liberties might not again be in danger of being subverted'.[49] Another significant fact was that Parliament considered the passing of the Bill as 'the best means' for attaining the aforesaid ends and for vindicating and asserting its 'ancient rights and liberties'.[50] The Bill which is declaratory of the 'Known laws, statutes and liberties of the Kingdom', also specifically provided, inter alia, that 'excessive bail ought not to be required, excessive fines ought not to be impossed, nor cruel and unusual punishments inflicted'.[51]

The Bill of Rights gathered the results of the Revolution into a constitutional form, embodied in a formal document, and made them binding upon all future Kings.[52] In this sense the Bill of Rights is most nearly of the nature of a written constitution; and as such it affirmed in more specific language that the King had no right to violate the fundamental laws and liberties of the Kingdom[53] - a

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49. Ibid, at p.489.

50. Ibid.

51. Ibid.

52. G.B. Adams, Constitutional History of England, p.358.

53. Ibid.

principle asserted as early as in 1215 by Magna Carta and reasserted in 1628 by the Petition of Rights.

Thus in this long history of constitutional development from Magna Carta to Bill of Rights in England one can observe a parallel development of the principle of personal liberty as a constitutional norm. The degree of importance attached to the principle of personal liberty during this period is not only reflected in the formal declarations in the 'constitutional documents'; but also in the fascinating development of the most effective means to secure personal liberty - the writ of *habeas corpus*.

Habeas Corpus - Its Development and Personal Liberty

To begin with, in the early parts of the 13th century, the expression '*habeas corpus*' only meant a command issued by courts to have the defendant in civil action or the accused of a crime, as the case may be, before them.[54] *Habeas corpus*, thus, seems to have begun as a process to ensure the physical presence of a person in court on a certain day.[55] Besides, though the expression '*habeas corpus*' during this early stage was not connected with the

54. Sharpe, *The Law of Habeas Corpus*, (1976), pp.1-2.

55. *Ibid.*, at p.2. See also Fox, "The Process of Imprisonment at Common Law" (1960) 39 *L.Q.R.*, 46.

idea of liberty, it can be reasonably assumed that the process involved an element of the concept of due process of law in so far as it mirrored the refusal of the courts to decide a matter without having the defendent present.[56]

An opportunity for further development of habeas corpus was, then, created by the jurisdictional conflicts between the central courts of the crown and the local courts. Both the Comman Law and the Chancery Courts in their attempt to centralise administration of justice used to direct this writ of habeas corpus against the local courts of inferior jurisdcitions.[57] During this period, as Sharpe says, 'habeas corpus was becoming less and less an ancillary procedure, and more and more a remedy to secure release from imprisonment; and also, significantly enough, the writ came to be associated with the idea of testing the legality of cause'.[58]

The struggle between the Courts of Common Law and the Equity Courts had also contributed towards the growth of habeas corpus. Whereas the Equity Courts used the device of injunction to control common law litigation, habeas corpus

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56. Sharpe, ibid., at p.2; also see Walker, The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty, (1960) at p.16.

57. Sharpe, ibid., at pp.4-5.

58. Sharpe, ibid., at p.5.

became the principal weapon in the hands of King's Bench to release a suitor, committed for breach of such a injunction of the Chancery Court.[59]

Another significant development in the law of habeas corpus came with its use, in the 16th century, to test the validity of executive committals. The writ was used to release or to bail the persons detained by order of the privy council.[60] During this period the practice of using habeas corpus to secure the liberty of persons became so common and sufficiently trouble-some to the council to warrant a request that the judges state the principles upon which such prisoners were to be released.[61] As a response to this request came the Resolution of Judges in 1592. Though this Resolution acknowledged the power of the King and the Council to commit persons pending trial, it catagorically asserted the power of the judges to bail or discharge the prisoners on habeas corpus if the cause be not specified.[62]

Thus at the dawn of the 17th century, one finds that habeas corpus was generally accepted as available to

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59. See Pound and plucknett, Reading on the History and System of the Common Law, 3rd edn. (1927), p.197; also see Sharpe, ibid., at p.6.

60. Sharpe, ibid., at p.7.

61. Sharpe, ibid., at p.7.

62. Ibid, at p.8.

test the legality of imprisonment and that the writ became an essential aspect of common law.[63]

But this common law remedy of habeas corpus lost much of its glory when it came under the cloud of the Stuart absolutism. The courts began to show a certain lack of confidence in their treatment of challenges to executive or prerogative power. But, ironically, the political events of this period, as mirrored by the conflicts between the royal prerogative and the common law; and between the King and Parliament,[64] seem to have provided momentous opportunities for further development of habeas corpus as a constitutional remedy for the protection of personal liberty of the individual.

The common law remedy of habeas corpus was raised as a constitutional question before the court in the Five Knight's Case.[65] This case which involved the clash between the Royal prerogative and the common law illustrates precisely the extent of significance which habeas corpus had assumed by the early 17th century. The fact that such a dispute could be raised on habeas corpus shows that it had

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63. Ibid.

64. The constitutional conflicts of the 17th century were carried on in the courts as well as in Parliament. See Ivor Jennigs, The Queen's Government, p.153.

65. Or Darnel's Case, see f.n.36, supra.

truly become, as argued by Seldon, 'the highest remedy in law for any man that is imprisoned'.[66] Further, the reliance placed during the argument of the case on chapter 29 of the Magna Carta and on the statutes of Edward III which defined the concept of 'due process of law' clearly suggests the close link established between 'personal liberty', 'due process of law' and habeas corpus. Of course, the court's decision in the case sustained the action of the Crown. But irrespective of the actual decision of the court and its correctness or otherwise[67] the real importance of the case lies in the arguments of the lawyers and in the impact of the case on the subsequent development of hebeas corpus.[68]

Despite Parliament's valiant attempts to curb the arbitrary powers of the King through the Petition of Rights, (1628) which provided, inter alia, that 'no freeman be imprisoned without the due process of law, nor detained by the King's command without being charged with anything to which they might make answer according to law',[69] events

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66. See Sharpe, The Law of Habeas Corpus, p.9.

67. There is no unaminity on whether the court came to the correct conclusion on the basis of authorities. See, Sharpe, ibid., at p.12.

68. G.B. Adams, Constitutional History of England, p.269.

69. Gardiner, Documents, pp.66-70.

proved as early as 1629 that Charles I was able to evade the effects of the Petition.[70] Having realised the limitations of mere declarations of liberty and the inadequacies of the common law remedy of habeas corpus, Parliament met in 1640 and passed the Habeas Corpus Act with a view to curtailing the prerogative claim for the power of detention.[71]

The Habeas Corpus Act, 1640 abolished all the prerogative courts,[72] including the Star Chamber. It provided that anyone imprisoned by order of the King-in-council should have his right to habeas corpus and be brought before the court without delay with the cause of his imprisonment shown. Besides, the judges were required to pronounce upon the legality of the detention within 3 days and to bail, discharge or remand the prisoner accordingly.[73] A judge or any other officer who failed to act in compliance with the statute was made subject to heavy fines and liable in damages to the party aggrieved.[74]

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70. For instance, Seldon and several other members of Parliament were committed on the King's warrant, without expressing any specific charge upon which the prisoners could be tried - a situation just as in Darnel's Case and quite contrary to the Petition of Rights. See, Sharpe, ibid., at p.14.

71. Ibid., at p.15.

72. See ibid., at p.15; also L.B.Curzon, English Legal History.

73. Sec.6 of the Act, see Sharpe, ibid., at p.15.

74. Secs.4 and 5, see ibid.

But, in spite of the Act of 1640 there were instances of executive committals without any specific charges being made against the prisoners.[75] Moreover the Act itself was found to be wanting and procedurally defective on certain crucial matters such as the question whether or not the writ could be issued in vacation; the power of the common pleas to grant the writ in ordinary criminal cases; the practice of moving the prisoners from gaol to gaol making it impossible to serve the proper gaoler with the writ; and the practice of re-arrest of prisoners who were successful in their applications for the writ of *habeas corpus*.[76]

The Habeas Corpus Act, 1679,[77] passed by Parliament dealt with the subject of *habeas corpus* in minute details, rectifying many of the defects of the common law[78]

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75. For eg: *Lilburne's Case*, 1653 (5 st.77.371); *Cony's Case*, 1655 (5 St. Tr.935) - a case in which the Judges, threatened with loss of office by Cromewell, refused to bail the prisoner on habeas corpus. Thus executive excesses were found not only under Charles I, but also under the Common Wealth of the Cromewellian era. See. Sharpe, *ibid*., at pp.15-16.

76. Sharpe, *ibid*., at p.17.

77. "An Act for the better securing the liberty of the subject, and for prevention of imprisonment beyond the seas" - the preamble of Act, as quoted by L.B. Curzon, *English Legal History*, p.44.

78. Maitland, *Lecutres on Constitutional History of England*, pp.314-15.

and of the Act of 1640. The Act of 1679 attempted to ensure that the relief of the prisoner would not be thwarted by procedural inadequacies. It enabled the prisoner to obtain the writ at any time of the year, i.e., even during vacation;[79] from any of the courts or judges at West Minster.[80] The Act provided that the gaoler would obey the writ immediately,[81] that the judges would come to a speedy determination,[82] and that, if released, the prisoner would not be re-arrested for the same cause.[83] It further provided that prisoners would not be taken to places beyond the reach of the writ,[84] and that the gaoler would provide the prisoner with a copy of the warrant so that he could know the grounds for his detention and would be able to decide whether he should apply for the writ in the first place.[85] The Act also tried to ensure that even where a prisoner was not entitled to immediate release he would be brought to trial with as little delay as possible.[86] The

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79. The Habeas Corpus Act, 1679, Sec.9

80. Ibid., Sec.2.

81. Ibid., Sec.1.

82. Ibid., Sec.s.

83. Ibid., Sec.5.

84. Ibid., Sec.11.

85. Ibid., Sec.4.

86. Ibid., Secs.6, 17 & 18.

Parliament even went to the extent of providing in the Act that the judges would be personally liable for punitive damages in the event of their unduly denying the writ in vacation.[87]

The Act of 1679, thus virutually transformed the common law remedy of habeas corpus into a constitutional remedy to secure the personal liberty of the individual. The writ could gain a permanent place not only in the constitution, but also in the popular conception as a fundamental guarantee of liberty. The Act also amply demonstrated that abuses with respect to habeas corpus would not be tolerated.[88]

The efficacy of this writ and so also the liberty of the subjects was further strengthened by securing the independence of judges through the Act of Settlement, 1701 - "An Act for further Limitation of the Crown and better securing the Rights and Liberties of the subject".[89] The Act declared: "Judges' commissions shall be made quamdiu se

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87. Ibid., Sec.10.

88. Sharpe, ibid., at pp.18-19. He maintains that with the Act of 1679 writ of habeas corpus took its modern form at least, so far the substance of the guarantee is concerned. Adams also opines that the 17th century became the 'great age of perfection' of the writ of habeas corpus. See Adams, Constitutional History of England, p.269.

89. Halsbury's Statutes of England, 2nd Ed., Vol.4, p.2958.

bene gesserint (i.e. dependent on their good behaviour) and their salaries ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them".[90] Since then the independence of judges - a sine qua non for the protection of the rights and liberties of the subjects - has been looked upon as an essential aspect of the English constitutional system.[91]

This brief historical survey shows that the liberty and security of the individual has been the focal point throughout the constitutional developments in England. Right to personal liberty has been recognized with great enthusiasm in the basic constitutional documents such as Magna Carta, Petition of Rights and Bill of Rights. These formal declarations have been further fortified by the common law remedy of habeas corpus, which later on emerged as a 'great constitutional weapon for the protection of liberty of the subject.[92] Yet another vital aspect which

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90. Ibid. This provision has since been embodied in Sec.12 of The Supreme Court of Judicature (Consolidations) Act, 1925.

91. The want of judicial independence and the horrifying consequences thereof were experienced by the English people during the reign of James I and Charles I. The tenure of judges, then, was dependent not on good behaviour but on the pleasure of the King. The dismissals of Coke and Walter are only illustrative examples of that era.

92. Holdsworth, as quoted by Prof. A.L.Goodhart in Essays in Jurisprudence and the Common Law, (1931), p.177.

this survey brings to light is the dominant role of judicial process and the significance of judicial independence in protecting the personal liberty of the individual.[93] Thus right to personal liberty, the deprivation of which would be illegal unless it conforms to the 'due process of law', can be said to have clearly emerged as a basic postulate of the English constitutional system by the latter half of the 17th century.

Of Course, in spite of all that has been said above, one should not lose sight of the fact that these declarations of liberty in the constitutional documents; the guarantee of 'due process of law' and the habeas corpus; and the blessings of an independent judiciary are all available only against the executive and not against Parliament whose powers are legally unlimited. The Glorious Revolution of 1688 made parliament supreme. It is to be noticed that this supremacy was not only over the King; but also over the Common Law. Thus the guarantee of 'the law of the land' - the bulwark of personal liberty - also incidentally happened to be placed at the mercy of Parliament which can make or unmake any law. (The 'law of the land' has no longer the might and majesty of the common law:) Right to personal

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93. What happens to personal liberty of the individual when the judges take their orders from the executive was amply illustrated by the Darnel's Case - "a disgrace to King's Bench" as Lord Denning puts it in Freedom Under Law, p.7.

liberty, therefore, could not emerge as a constitutional guarantee in England, for it could impose no limitation on the powers of Parliament.

To have a correct assessment of this situation of supremacy of Parliament *vis-a-vis* the liberty of the subjects we should try to understand it in the light of the peculiar historical circumstance in England. It is not that during the 17th century the people could not, on principle, conceive of any limitations on Parliament.[94] But it was the sheer historical circumstances that led (or compelled), the English people to acquiesce in and to accept the supremacy of Parliament as the cornerstone of their constitutional system.

As we have seen earlier, the very genesis of liberty in England shows that it was against the royal absolutism that the people revolted demanding their rights and liberties. In the struggle between the royal absolutism and popular will, Parliament came to be an ally of the people. In the course of history the struggle between the King and the people became the struggle between the King and Parliament. It was Parliament that zealously fought for the liberties of the people and passed the Habeas Corpus Acts,

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94. See the views held by Coke in *Bonhams Case* and in *Foster's Case.* Also the views of Cromewell, see Sir Leslie Scarman, *English Law - The New Dimension*. The Hamlyn Lectures (1974), p.17.

Bill of Rights and Act of settlement - all intended to curb effectively the arbitrary powers of the king. In such a historical context it was but natural that the people had no suspicion whatsoever about their Parliament being a possible and potential danger to their rights and liberties. Thus when the Revolution of 1688 finally settled the Crown - Parliament conflict and Parliament emerged triumphant over the King, there was absolutely nothing to limit the powers of Parliament - either legal or political. The sovereignty of Parliament became an accomplished fact, the supremacy of Parliament a constitutional axiom. And the succeeding generations, being proud of their genius and traditions were complacent about their constitutional virtues.[95]

But of late there appears to have begun a re-thinking on the wisdom and propriety of having a Parliament of unlimited powers vis-a-vis the personal liberty and fundamental freedoms of the individual.[96] There seems to be a growing realisation that while the Glorious Revolution made Parliament supreme, it was also rendering the common law -- the practical genius of which was responsible for enriching the 'law of the land' and for building up a body of procedural guarantees and principles as encompassed by

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95. See A.V. Dicey, op.cit.

96. A significant contribution has been made in this regard by Scarman through his Hamlyn Law Lectures of 1974.

the writ of habeas corpus which 'protects the personal liberty more securely than any other system of law that the world has ever seen'[97] -- weak and vulnerable. This aspect has been forcefully brought out by Lord Scarman in his 1974 Hamlyn Law Lectures. He says:

> "When times are normal and fear is not stalking the land, English law sturdily protects the freedom of the individual and respects human personality. But when times are abnormally alive with fear and prejudice, the common law is at a disadvantage: it can not resist the will, however frightened and prejudiced it may be, of Parliament".[98]

Further, it may be true that the judges in England 'no longer take their orders from the executive'; but the fact remains that still they take their orders from Parliament.[99] This new shift in the thinking of English people is also influenced, in no small measure, by their impression about the virtues of liberty as a constitutional guarantee in

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97. Denning, op.cit., p.32.

98. Scarman, op.cit., p.15.

99. Regulation 18(b); Liversidge V Anderson, (1942) A.C.106, a case dealing directly with personal liberty; and the inablity of the court to correct the retrospective effect of the Immigration Act are all clearly illustrative of this aspect. See Scarman, ibid., at p.15.

America, and by the compulsions which they feel from the tremendous growth, both in volume and importance, of human rights at the international level. Thus it is increasingly being felt in England that the helplessness of the common law in the face of legislative sovereignty of Parliament makes it difficult for the legal system to accommodate the concepts of fundamental and inviolable human rights.[100] It is felt that it would no longer be enough to say with Magna Carta that no free man would be deprived of his liberty except by the 'law of the land'; but the legal system must ensure that the law of the land will itself meet the standards of human rights declared by international instruments, to which the United Kingdom is a party. This argument, in effect, calls for an entrenched Bill of Rights in a written constitution which it is the duty of the courts to protect even against the powers of Parliament. There seems to exist in England today an increasing demand to adopt a written Bill of Rights as a limitation on the powers of Parliament and to have the power of judicial review to enforce that limitation. To wit, the demand is to make liberty as a constitutional guarantee - a judicially enforceable limitation on the powers of Parliament.

It is a paradox that in England - a country which has made perhaps the greatest contributions to the world as

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100. See Scarman, ibid., at p.15.

regards the basic constitutional principles and philosophies and especially as regards the recognition of individual liberties and their protection by an independent judiciary against governmental authorities - this ideal of liberty as a constitutional guarantee still remains only as an aspiration, a demand. But it was in the American soil, for the first time in constitutional history, that the concept of liberty emerged as a constitutional guarantee.

Liberty as A Constitutional Guarantee in The United States

Liberty as a constitutional guarantee is distinctively American, as Prof. Corwin would claim.[101] But, the very idea of securing the liberties of the individual against the government and the means and techniques by which they could be secured as well as the substance of those liberties have all been derived by the American people from a variety of sources such as: the traditional common law rights of Englishmen; the great English documents of constitutional importance; the assertions of Coke, theories of Locke and commentaries of Blackstone; and of course, the post-Revolution Constitutions of the American States and the lessons of the American

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101. Per Corwin, Liberty as a "constitutional guarantee" means liberty as a constitutional limitation, enforceable by courts, upon the legislative branch of government, which he describes as a "Juridical concept". See, E.S. Corwin, Liberty Against Government, Greenwood Prees, U.S.A., (1948), p.1.

colonial experience. A brief account of the historical process through which this 'juridical concept' has evolved in the United States seems to be appropriate at this juncture.

The Colonies and the Common Law Liberties

The American colonies were established, as proclaimed in their charters, with a view to extend and enlarge the boundaries of the British Empire, as forming part of the mother country. Those colonies were intended to be governed by the same laws and entitled to the same rights.[102] Even according to the jurisprudence of the common law, the colonists were supposed to have carried with them all the laws of England applicable to their situation, and not repugnant to the local and political circumstances, in which they are placed.[103] This position was reinforced invariably by the charters, expressly declaring that 'all subjects and their children inhabiting those colonies shall be deemed natural born subjects, and shall enjoy all the privileges and immunities thereof'.[104] Thus the common law

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102. Per Lord Mansfield, Hall V. Campbell, Cowr.R.204, 212; Storey, Commentaries on the Constitution of the United States, Vol.I, DA CAPO Press, New York, 1970, pp.137-39.

103. Storey, ibid., at p.133;Blackstone, Commentaries on the Laws of England, p.107.

104. Storey, ibid., at p.139.

rights and liberties of the Englishmen, especially the rules of protection from personal injuries, the rights secured by Magna Carta, the habeas corpus and other remedial courses in the administration of justice were considered by the colonists as their 'birth-rights'.[105]

But the common law could protect these 'birth-rights' only against the King and not against Parliament. Another peculiar situation was that unlike the people of England, the American colonists were exposed not only to the arbitrary powers of the British Crown, but also to the legislative tyranny of the British Parliament. As a matter of fact, apart from being indifferent towards the denials of the common law liberties to the colonists by the Crown, Parliament itself had been indulging in legislative encroachments on the liberties of the inhabitants of the colonies.[106] The colonists, therefore, realised that in order to safeguard their common law liberties they had to fight against both the King and Parliament. Thus, the necessity of limiting the powers of the legislative branch of government was felt by the people of the colonies from very early times. They became acquainted with this idea due

105. Storey, ibid., at p.138.

106. This double standard adopted by British Parliament towards the colonists was mainly responsible for the colonial resistance to the authority of Parliament and ultimately for the Revolution.

common sufferings had made them acute as well as indignant in the vindication of their privileges. Thus the struggle was maintained on each side with unabated zeal, until the American Revolution".[112]

Paradoxically enough, it was to the traditional English sources[113] they looked for inspiration and guidance during this great struggle of the colonists against the British, in their search for a constitutional and philosophical basis for claiming protection of their liberties against the powers of Parliament. The Americans found in Magna Carta and in the 'common right and reason'[114] an idea of a 'Higher Law' to resist the pretensions of Parliament.[115] The idea of certain fundamental principles underlying and controlling government was thought to be expressed in Magna Carta.[116] The Great Charter was looked upon as symbolising the subordination of political authority to law.[117] The colonists were very much inspired by the

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112. Ibid.

113. Such as Magna Casta, Bill of Rights, the Habeas Corpus Acts, the arguments of Coke and the theories of Locke.

114. As asserted by Chief Justice Coke in Dr.Bonham's Case (1609')8 Co.Rep.107,188.

115. Robert K.Carr, The Supreme Court and Judicial Review, Greedwood Press U.S.A., 1942, p.42.

116. E.S. Corwin, The Doctrine of Judicial Review, Gloucester, Mass-Peter Smith, 1963, p.27.

117. Corwin, ibid., at p.27.

arguments of Coke in Dr.Bonham's Case that "when an Act of Parliament is against common right or reason, or repugnant or impossible to be performed, the common law will control it and adjudge such Act to be void".[118] They saw in this argument not only an idea of a 'Higher Law', but also the elements of judicial power to interpret and enforce the fundamental law against all authorities including Parliament.[119]

These 'acquired' ideas of the colonists found their first ever concrete expression in the history of American constitutional developments through the celebrated arguments of James Otis in the Writs of Assistance Case, 1761.[120]

In order to do away with the difficulties experienced by the British officials in enforcing the various Stamp Acts in the colonies, Parliament authorised the colonial courts to issue "writs of assistance" enabling the officers of the Crown to make house to house searches in their efforts to detect smuggling. Opposing the issuance of such writs by, Massachusetts Court, Otis referred to the

118. See, Corwin, ibid., at pp.41-42; also see T.F.T. Plucknett, "Bonham's case and Judicial Review" 40 Harv. L.Rev. (1926) 30.

119. See, ibid.

120. See Corwin, ibid., at p.29; Robert Von Moschzisker, Judicial Review of Legislation, pp.23-24.

existence of a fundamental law which knew no master,[121] and argued that if Parliament transgressed it the courts should not follow such legislation.[122] Taking the cue from Coke, Otis urged that any Act of Parliament authorising such writs was necessarily void as it was "against the constitution" and against "natural equity".[123] Then again Coke's dictum was resorted to in challenging the Stamp Act arguing that such legislation was contrary to 'Higher Law'.[124]

Besides the influence of Magna Carta and Chief Justice Coke, the American lawyers of those revolutionary days were also familiar with John Locke's theories of natural law and social contract and his idea of certain 'inalienable rights' of man against government.[125] The extent to which Locke's ideas got currency among the

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121. This argument reminds Coke's statement that, "Magna Carta is such a fellow that he will have no sovereign". See Corwin, ibid., at p.28.

122. Moschzisker, op.cit., p.24.

123. Carr, op.cit., p.42.

124. Corwin, "Marbury V. Madison and The Doctrine of Judicial Review", 12 Michigan Law Review (1914) 538.

125. As Prof.Corwin says: "Locke's is the last great name in the tradition of liberty against government that is common to our country and England". See Corwin, Liberty Against Government, p.51. In the same book at p.44 he further states: John Locke's Second Treatise on Civil Government of 1691, which is justifying one Revolution laid the idealogical groundwork for another. 'In this treatment of natural law, that concept transformed into the natural rights of Individual -the rights of "life, liberty and estate".

colonists during that period was, again, reflected by the arguments of James Otis. A few years after the Writs of Assistance Case, Otis in a pamphlet entitled "The Rights of the British Colonies Asserted and Proved,"[126] set forth an argument of enormous influence, convincing the colonists that, as Englishmen, they possessed certain inalienable rights which had been challenged by the recent enactments of Parliament. He said "The Supreme legislature cannot justly assume power of ruling by ex-tempore arbitrary decrees, but is bound to dispense justice by known settled rules, and by duly authorised independent judges.... These are their bounds, which by God and nature are fixed".[127]

Thus on the eve of the Declaration of Independence the American colonists became convinced that there were certain inalienable rights possessed by an individual, which no government had the power to infringe and that the only effective means to secure those rights lay in a written constitution, defining the fundamental law which would limit the powers of every branch of government, more particularly the legislative branch.[128]

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126. See Moschzisker, op.cit., p.24.

127. See Moschzisker, ibid., at p.25. See also Barna Horvath, "Rights of Man - Due Process of Law and Excis de Pouvoir", 4 American Journal of Comparative Law (1955) p,539.

128. Moschzisker, ibid., at pp.29-30; see also John A.Krout, "The American Bill of Rights" as Printed in Great Expression of Human Rights, ed.by MacIver, R.M., (1950), p.135.

In 1776 the American colonies had emerged triumphant in their great struggle against the British Crown and Parliament. They freed themselves from the yoke of the British Empire. The Declaration of Independence,[129] through the famous phrases of Jefferson, eloquently reflected the convictions of the American people. Soon thereafter, those convictions were given effect to by the colonies through adopting written consitutions, declaring their 'inalienable rights' and liberties. These state constitutions were looked upon as defining the fundamental or 'Higher Law', limiting the powers of all political authorities; and as providing the legal basis for state courts to invalidate legislations which showed clear violations of the fundamental law.[130]

In the decade separating the beginning of American Revolution from the Philadelphia Convention of 1787 there appears to have taken place in the colonies a fascinating synthesis of the liberties of Englishmen as declared in the Magna Carta and the 'inalienable rights' of individual as deduced from the theory of natural law. In England the two had been inimical. But in America they worked hand in hand. For instance, to cite only one example the Virginia Bill of

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129. For the tex of the Declaration, see Annexure IV, infra.

130. Moschziskor, ibid., at p.30. There were as many instances of judicial review of legislations by state courts.

Rights of 1776 called on Locke to assert in Chapter I that 'all men are by nature equally free and independent, and have certain inherent rights... namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety'. It also, in the same vein, called on Magna Carta in Chapter VIII to lay down that no man was to be deprived of his liberty 'except by the law of the land or judgement of his peers'.[131]

And it was in this setting that the colonies had come together and eventually evolved as a nation under a new constitution. Thus, when the delegates from thirteen colonies - the Founding Fathers of the American Constitution - met at Philadelphia in 1787, they seemed to have brought with them a rich variety of ideas and experiences such as: the idea of a fundamental law binding all political authorities; theories of certain inalienable and natural rights of individuals which were to be given primacy over government; the notions of judicial review; and, of course, their experiences and precedents which they had in their colonies both before and after the Declaration of Independence. Those sentiments and beliefs which were

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131. As J.C.Holt points out, ch.29 of Magna Carta had become a convenient formulation of natural right and that chapter had been embodied in the Bill of Rights of state after state and was carried on from the 18th to 20th Century. See Magna Carta, op.cit., p.15.

brought from various sources to the Convention, as they were discussed and developed, had become a body of principles, some of them being written down as the letters of the Constitution and others necessarily implied as essential to the carrying out the provisions expressed.[132]

Paradoxical though it may seem, the Constitution as finally adopted by the Convention did not contain either a Bill of Rights or any express provisions regarding judicial review - the two aspects without which the American Constitution would have become a poor and shrunken thing.

As regards judicial review, one should not forget, as Prof. Corwin points out, the historical background of the Philadelphia Convention and the contemporary ideas in which the framers had come to believe. The idea of a 'Higher Law' and the court's authority to declare a legislative act, repugnant to that 'Higher-Law' as void were the "common properties"[133] during the period when the constitution was established. The assertions of Coke in Bonham's Case and the arguments of Otis in Writs of Assistance Case were still fresh in the minds of the makers of the Constitution.[134]

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132. Moschzisker, op.cit., p.41.

133. Corwin, The Doctrine of Judicial Review, op.cit., p.2.

134. Ibid., at pp.28-29; Carr, op.cit., p.42.

Besides these revolutionary ideas the framers were quite familiar with the practice of judicial scrutiny of colonial legislations for compliance with English law by the Privy Council in London.[135] They were also presumably aware of a few cases in which the courts, under the newly established State constitutions after the Declaration of Independence, had invalidated state legislations on the ground that they were violative of the state constitutional provisions.[136]

Even in the Convention of 1787, though the issue of judicial review as such was not discussed, considerable attention was given to a proposal that a Council of Revision be created with authority to veto acts of Congress. The proposal was defeated; but it is interesting to note that the proposal was opposed by many of the delegates on the ground that the judiciary would then gain a double check over legislation.[137] It seems, those members had assumed that the courts would exercise the power of judicial review as part of normal judicial function, and so they refused to

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135. Carr, ibid., at p.43.

136. Ibid.

For eg. See Trevett V. Weeden, in which a Rhode Island Court in 1786 declared an act of the state legislature as null and void; Holmes V. Waltons a New Jersey Case of 1780; the Virginia Case of Commonwealth V. Caton These cases are cited in Moschzisker, op.cit.,pp.31-33.

137. Carr, ibid., at p.45.

confer any further power of similar character upon the judiciary.[138] Many scholars of American constitutional history also hold the view that a great many of the delegates intended that the courts should exercise such power.[139] The function of judicial review was almost invarilably related by the members of the Convention to the power of the judges as "expositors of the law".[140] Such an attitude was prevalent during the state ratification conventions as well.[141] Perhaps the most comprehensive and satisfactory answer to this issue can be found in the argument of Alexander Hamilton in the Federalist:

> "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body, and, in case of irreconcilable difference

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138. Ibid.

139. Ibid.

140. Corwin, The Doctrine of Judicial Review, op.cit., pp.43-44.

141. John Marshall, as delegate to Virginia Convention expressed the same idea as to judicial review as forming part of normal judicial function; also Oliver Elloworth in Connecticut Convention expressed the same view. See Carr, op.cit., p.52.

between the two, to prefer the will of the people declared in the constitution to that of the legislature as expressed in statute".[142]

As Prof. Corwin says, 'Hamilton was here, as at other points, endeavouring to reproduce the matured conclusions of the Convention itself.[143] Thus, to quote Prof.Corwin again, 'we are driven to the conclusion that judicial review was rested by the framers of the Constitution upon certain general principles which in their estimation made specific provision for it unnecessary.[144] The power of judicial review, therefore, seems to have been recognised by the framers as implicit in the Constitution as they adopted in 1787. And what was implicit in the constitution was made explicit in 1803 when Chief Justice Marshall had assumed and exercised the power of judicial review in Marbury V. Madison.[145] Eversince 1803 the power of judicial review has been treated as an essential feature of the American Constitution.

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142. Federalist 78, as quoted by Corwin, Judicial Review, op.cit., p.44.

143. Corwin, ibid., at p.44.

144. Ibid., at p.17.

145. Cr.137 (1803) Marshall's reasoning in this case has striking resemblance with Hamilton's argument in Federalist-78.

Let us now consider the issue of want of a distinct Bill of Rights in the Constitution, 1787. Unlike the case of judicial review, the matter of Bill of Rights was specifically discussed in the Convention. There were many members in the convention who felt that the concept of inalienable rights needed more specific definition. As a matter of fact, Elbridge Gerry of Massachusetts, prompted by George Mason of Virginia, moved that a Bill of Rights be drafted. But most of his friends did not agree to that proposal in the belief that the State declarations of rights were sufficient to guarantee the fundamental liberties.[146]

But during the state ratification conventions, as Joseph Storey observes, 'among the defects which were enumerated none attracted more attention or were urged with more zeal than the want of a distinct Bill of Rights which should recognize the fundamental principles of a free republican government and the right of the people to the enjoyment of life, liberty, property and the pursuit of happiness.[147] On the other hand, the Federalists offered two justifications to adopt the Constitution even without a Bill of Rights. First, it was maintained that there were

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146. John A. Krout, "The American Bill of Rights", as printed in Great Expressions of Human Rights, op.cit., p.136.

147. Storey, Commentaries on the Constitution of the United States, Vol.I, p.274.

various provisions[148] in the Constitution in favour of particular privileges and rights which in substance would amount to a Bill of Rights. Second, it was claimed that the Constitution had adopted, in its full extent, the common and statute law of Great Britain and hence many other rights, not expressed in the Constitution, were equally secured.[149] Hamilton argued:"The truth is that... the constitution is itself, in every rational sense and to every useful purpose, a bill of rights. The several bills of rights in Great Britain form its constitution, and conversely the constitution of each state is its bill of rights. And the proposed constitution, if adopted, will be the bill of rights of the Union".[150]

The Federalists nevertheless, could not succeed in their attempt to get support for the Constitution without a Bill of Rights. The spirited arguments in the States[151] in favour of a Bill of Rights, finally compelled the Federalist

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148. In this regard Hamilton referred to Art.I S.3 cl.7; Art.I S.9, cl.2;cl.3;cl.7;Art.III S.2 cl.3; Art.III, S.3 etc.

149. Hamilton, "A Bill of Rights", Federalist-84 quoted in Hamilton, Madison and Jay On The Constitution, - Selection From the Federalist Papers, (ed.) by Ralph H. Gabriel, The Liberal Arts Press, New York, 1954, p.190.

150. Ibid., at p.195.

151. Seven out of thirteen States went on record as favouring a Bill of Rights. See ibid., at pp.136-7.

leaders to admit that ratification could probably not be secured unless the delegates endorsed certain amendments 'to remove the apprehensions of many of the good people of the commonwealth'. By a clever device the resolution of ratification became simultaniously a demand for subsequent amendment[152] also, creating some sort of a 'moral obligation' which the new federal government promptly accepted.

The First Congress under the new Constitution had before it more than one hundred and twenty proposed amendments. They were seriously considered and finally twelve of them were accepted. By December 15, 1791 the first ten amendments were duly ratified by the States. And those ten amendments became the historic Bill of Rights in the Constitution of the United States.[153] Among the proposals which the Congress did not approve, there was one that James Madison regarded as an appropriate preamble to the Bill of Rights. It merits quoting, for, it encompassed the real spirit in which the American Bill of Rights was adopted. Here is the excerpt from that Resolution:

> "All power is originally vested in and consequently derived from the people... Government is

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152. Krout, "The American Bill of Rights", in Great Expression of Human Rights, op.cit., p.136.

153. Ibid., at p.137.

instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property and generally of pursuing and obtaining happiness and safety. There are certain natural rights of which, men, when they form a Social Compact, cannot deprive of or divest their posterity, among which are the enjoyment of life and liberty".[154]

Once it was decided to adopt a distinct Bill of Rights, there was little doubt about the primary sources from which those rights could be formulated. Prominent among the sources were the Magna Carta, the Petition of Rights, the Bill of Rights and the common law guarantees of civil liberty, besides the immediate precedents of the 'inalienable rights' as contained in the Declaration of Independence and the various bills of rights as contained in the state constitutions.[155] The extent to which the American Bill of Rights owes to the English legal tradition has been brought out succintly by Prof. Albert Abel thus:

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154. As quoted in ibid., at p.137.

155. Ibid., at p.138. See also C.H.Mc Ilwain, "Due Process of Law in Magna Carta" (1914) 14 Culum.L.Rev. 26; and Mr.Justice Johnson in Bank of Columbia V. Okely, 4 Wheat. (1819) 235, 244.

"The substantial portion of the (U.S) Bill of Rights was a "restatement of the law" rested on venerable... ancient English precedent. It is this which makes the grand documents of English constitutional history to American lawyers no less a part of their legal tradition than of England's. That Fifth Amendment's due process of law was a direct descendant of the lex terrae of Magna Carta was clearly established. Other provisions such as the "speedy... trial" provisions of the Sixth Amendment, and the jury trial provisions of that and the Seventh Amendment are also foreshadowed by phrases in Magna Carta. It may be that Magna Carta has been over-romanticized and was at its inception a cruder piece of class legislation than later ages have supposed, but in any event it was, and indeed still continues to be, for Americans a main strand in their constitutional fabric. The classic documents which issued from the constitutional struggle of the seventeenth century - the Petition of Rights, the Habeas Corpus Acts, the Bill of Rights - were also reflected in the American constitutional provisions. While they have not been elevated - or reduced - to the status of a charm, as the more ancient instrument has, they were familiar to and cherished by the

> generation which drafted the American Bill of Rights. Besides the habeas corpus guarantee, the provisions regarding excessive fines and bail, cruel and unusual punishment, quartering of troops and the right to petition are among those having clear antecedents in these documents. All these were rights of identifiable provenance".[156]

And the other common law liberties such as the freedoms of religion, speech, press, assembly and associations were also secured by the Bill of Rights.[157]

Thus, the rights and liberties secured by 'the common and statute law of Great Britain', which were held by Hamilton[158] as implied in the Constitution of 1787, were made explicit constitutional guarantees by the Bill of Rights in 1791. In the context of a Bill of Rights, the strategic significance of judicial review also appears to have been envisioned by the framers. On the question whether the Bill of Rights offered any special basis for judicial review, James Madison, piloting the proposals which

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156. Albert Abel, "The Bill of Rights in the United States: What has it Accomplished?" (1959) 37 Can. Bar Review 147, 154-55, as quoted in Stanley A Cohen, Due Process of Law - The Canadian System of Criminal Justice, (Toronto), 1977, pp.8-9.

157. See the First Amendment to the U.S. Constitution

158. See Federalist: 84. For the text of the Bill of Rights, see Annexure V, infra.

eventually became the first ten Amendments in the House of Representatives, urged that the Bill of Rights would implicate the judges in the defence of individual rights. He said:

> "If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights".[159]

The adoption of the Bill of Rights in the American Constitution, thus, marked the culmination of a continuous process of development of liberty against authority - a process which began with Magna Carta in 1215.[160] Among the rights guaranteed by the Constitution, perhaps the most prominent place is occupied by the right to personal liberty

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159. Madison, as quoted by Corwin, Liberty Against Government, op.cit, pp.58-59.

160. Both in Magna Carta and in the Bill of Rights the central theme is same; i.e. both are concerned with specific potential threats to human liberty and with the practical means of thwarting them. See Corwin, ibid., at p.26.

and security of the individual. The extent of importance attributed to liberty and security of the individual becomes evident from two factors. First, even in the absence of a Bill of Rights, various provisions were provided for in the Constitution of 1787 itself, securing the personal freedom of the individual. For instance, the privilege of the writ of *habeas corpus* was ensured;[161] Bills of Attainder and *ex-post facto* laws were expressly prohibited[162] fair and open trial[163] and trial by jury were also secured. As claimed by Hamilton,[164] these provisions securing the particular privileges and rights of individuals themselves were thought of as amounting to Bill of Rights. Secondly, even in the Bill of Rights, as was subsequently adopted in 1791 one finds that most of the first ten amendments dealt only with various procedural guarantees which were intended to safeguard the liberty and security of the individual, right to speedy trial, right to know the nature and cause of the accusation, right to cross-examine and to obtain witnesses, and right to have legal assistance have all been guaranteed,[165] to the accused in all prosecutions. Trial by

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161. The Constitution of the United States, Art I, s.9 cl.2.

162. *Ibid.*, cl.3.

163. *Ibid.*, Art.III, S.2, cl.3.

164. Hamilton, A Bill of Rights, in Hamilton, Madison and Jay *ON The Constitution*, (1954), p.190.

165. The Constitution of the United States, VI Amendment.

jury is ensured in all cases.[166] Excessive fines, excessive bail and cruel and unusual punishment were prohibited.[167] Also provisions were made against 'double jeopardy' and self-incrimination.[168] The right of the individuals to be secure in their persons, houses, papers and effects; and the freedom from unreasonable searches and seizures were guaranteed.[169] Quartering of troops in houses also is prohibited.[170] Thus, of the first eight amendments, barring the First Amendment, all others were meant only to deal with one or other particular aspect of personal liberty and security.

And having dealt with the various particular attributes of personal freedom, the Bill of Rights proceeds to guarantee, perhaps the most comprehensive formulation of liberty, as it came down to the framers from chapter twenty nine of the Magna Carta.[171] This chapter of the Great

166. Ibid., VI and VII Amendment.

167. Ibid., VIII Amendment.

168. Ibid., V Amendment.

169. Ibid., IV Amendment.

170. Ibid., III Amendment.

171. Prof. Corwin says: 'for the history of American constitutional law and theory no part of Magna Carta can compare in importance with chapter twenty nine', Liberty Against Government, pp.23-24; See also Blackstone, Commentaries on Laws of England, 424. He says, 'Ch.29 of Magna Carta alone would have merited the title it bears, of the Great Charter'.

Charter, which secured every freeman in the undisturbed enjoyment of his life, his liberty and his property unless forfeited by the judgement of his peers or the law of the land, appeared to the Americans as a convenient embodiment of Locke's'inalienable rights' of man against government. Not surprisingly, therefore, the guarantee of 'due process of law' of Magna Carta and the 'inalienable' rights to life, liberty and property' were integrated and incorporated in the Bill of Rights through the Fifth Amendment in the following words: "No person shall be... deprived of life, liberty or property without due process of law".

Thus, as a result of centuries of continuous process of evolution liberty has emerged as a constitutional guarantee, i.e., as a judicially enforceable value against all authorities, including the legislative branch of government, - a 'juridical concept' which is distinctively American, indeed. The development of liberty as a constitutional guarantee in the United States heralded a new epoch in the constitutional history of the world. The extent of influence which this 'distinctively American' concept of liberty has exerted in shaping the destinies of mankind in different parts of the world is remarkable. This American example has served as a source of inspiration and impetus not only to many of the modern national constitutions, including that of India, which valued liberty

and rule of law; but also to the international legal order in its efforts to develop and protect the 'human rights'.

Personal Liberty In International Legal Order: A Human Rights Perspective

Human right is a twentieth century name for what had been traditionally known as natural rights or, in a more exhilarating phrase, the rights of man'.[172] They are not rights which derive from a particular station; they are rights which belong to a man simply because he is a man.[173] The very term "rights of man" is of American origin.[174] But before the formulation as 'rights of man' in America, the history of human rights, as Prof.Baran Horvath sums up, was a "progressive discovery of inarticulate major premises, of changes in meaning.... Thus the feudal rights of English barons, expressed in the Magna Carta in 1215, became in due time the rights of Englishmen, as defined in the Habeas Corpus Act in 1629, the Petition of Rights in 1627, the Bill of Rights in 1688, the Act of Settlement in 1700, which in turn evolved into the 'rights of man' formulated in the

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172. Maurice Cranston, What are Human Rights? London, (1973) p.1.

173. Jacques Maritain, The Rights of man, (1944) p.37.

174. Barna Horvath, "Rights of Man-Due process of Law and Exces de Pouvoir", 4 American Journal of Comparative law (1955) 539-573, at. p.539.

Virginia Bill of Rights on June 12, 1776, in the American Declaration of Independence on July 4, 1776, and in the French Declaration of Rights of Man and Citizen, on August 20, 1789".[175] This process of historical evolution of the rights of man assumed a revolutionary phase when the U.S. Constitution of 1787 with the concurrent amendments of 1791 - the Bill of Rights - had categorically proclaimed the primacy of right of man over government and had defined these rights in greater detail. This American example had marked the beginning of a new era of the formal incorporation of these basic rights as part of the constitutional law of States and the possibility of their consequent protection not only against the tyranny of kings but also against the intolerance of democratic majorities.[176] And in the 19th and 20th centuries the recognition of the fundamental rights of man in the constitutions of states became a general principle of the Constitutional law of civilised States.[177] But, in spite of the 'guarantees' of these historic rights of man as the constitutional rights of the inhabitants in many countries, quite often the missing factor has been enforcement. If any particular government chooses not to enforce rights which it

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175. Ibid.

176. H.Lauterpacht, International Law and Human Rights, (1968) pp.88-89.

177. Ibid., at p.89.

is obliged to uphold under its own constitution what is there to be done about it? If a man is deprived of his rights by his rulers, to whom can he appeal? These questions loomed large in the minds of mankind when it was faced with the cruel realities of the World War II - the despair of the victims of totalitarianism, the total denial and deprivation of the worth and dignity of the individual, his life, liberty and security - a total negation of the human rights.[178] An answer to this question was found by the world community in establishing an international organisation - the United Nations - to 'save succeeding generations from the scourge of war; to 'maintain international peace and security; and to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person'.[179] The awareness of the international community as to the essentiality of respect for human rights for maintaining world peace and security finds adequate reflection in the U.N. Charter. Apart from the Preamble, Article 55 of the Charter stipulates that the U.N. shall promote 'respect for, and observance of human rights and fundamental freedoms'; and Art 56 requires that 'all members

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178. It was in that context the late Judge Lauterpacht argued, just after the World War II, that the protection of human rights depended largely on the institution of a new international body with this specific purpose. See ibid., at p.124.

179. See the Preamble to the U.N.Charter.

pledge themselves to take 'joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Art.55'.[180]

The human rights and fundamental freedoms' were defined, elaborated and catalogued by the historic "Universal Declaration of Human Rights", which was adopted by the U.N. General Assembly on December 10, 1948 -- a Declaration which was hailed, as Mr.Roosevelt, chairman of the Commission on Human Rights did, as "the international Magna Carta of all mankind".[181] For the first time in world's history the organised community of nations agreed on a declaration of human rights, setting forth what those nations conceive to be the inherent rights of every individual in the world.[182] The Universal Declaration of Human Rights, to which all member nations subscribe, sets forth a "common standard of achievement for all peoples and all nations",[183] and enumerates those rights which we call human.

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180. See Arts.55 and 56 of the U.N. Charter.

181. The Declaration was adopted by 48 out of the 58 members of the United Nations; 8 nations abstained from voting and 2 nations were absent in the Assembly; and none opposed. See, Great Expression of the Human Rights, ed. by Mc Ilvain, p.201.

182. See, Lauterpacht, International Law and Human Rights, (1968) p.394.

183. See the Preamble to the U.D.H.R.

The Universal Declaration,[184] in its first 21 Articles deals with the traditional 'civil and political rights'; and in the later Articles (Articles 22 to 28) deals with the so called 'social, economic and cultural rights'[185] Since our immediate concern is only with the concept of personal liberty as a human right, let us focus our attention on those rights which pertain to the liberty and security of the individual.

In order to uphold the "inherent dignity and worth of the human person" Article 3 of the Declaration proclaims that 'everyone has the right to life, liberty and security of person';[186] and the various (specific) attributes of personal liberty and security of the individual have then been elaborated by the subsequent Articles. Thus, the Declaration spells out freedom from 'arbitrary arrest, detention or exile';[187] right to a fair and public trial by an impartial tribunal if accused of any crime;[188] and right

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184. The text of the Declaration is given in Annexure VI, *infra*.

185. We are not at present concerned with the conceptual dichotomy between these two classes of rights, i.e. the 'negative liberty' and 'positive liberty'. But the emerging trend is to the effect that both these classes of rights are interdependent and complementary to each other.

186. The U.D.H.R. see Annexure VI.

187. *Ibid*., Art.9.

188. *Ibid*., Art.10

to be presumed innocent until proved guilty[189] accused of any crime; and right not be subjected to ex-post facto laws.[190] The Declaration prohibits slavery or servitude;[191] torture; and cruel, inhuman or degrading treatment or punishment.[192] It also recognises the right to privacy;[193] and right to freedom of movement both within the state[194] and abroad.[195] Besides it also names right to equality,[196] right to own property,[197] right to marry,[198] right to religious freedom,[199] speech,[200] assembly,[201] and asylum.[202]

The foregoing list of rights shows clearly the importance attached to personal liberty as a human right in

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189. Ibid., Art.11(1)
190. Ibid., Art. 11(2)
191. Ibid., Art.4
192. Ibid., Art.5
193. Ibid., Art.12
194. Ibid., Art.13(1)
195. Ibid., Art.13(2)
196. Ibid., Art.17
197. Ibid., Art.17(1)
198. Ibid., Art.16
199. Ibid., Art.18
200. Ibid., Art.19
201. Ibid., Art.20
202. Ibid., Art.14(1)

the Universal Declaration. The various aspects of personal liberty as well as the due process requirements for their protection have been articulated and reinforced by the numerous subsequent International Instruments as well. Following Art.3 of the Universal Declaration, the International Covenant on Civil and Political Rights,[203] the European Convention on Human Rights,[204] the American Convention,[205] and the African Charter[206] all declare that 'everyone has the right to liberty and security of person'. These subsequent documents, intended from the start to be legal documents, constitute a 'precise code' for what is and is not legitimate in the field of personal liberty and security of the individual.[207] Especially the Civil and Political Rights Covenant, which entered into force on March 23, 1976, elaborates the 'liberty and security' of person in greater detail and makes the respect for the right to liberty and security as an absolute and immediate obligation

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203. Art.9(1) The text of the Covenant is given in Annexure VII, *infra*.

204. Art.5(1), European Convention for the Protection of Human and Fundamental Freedoms (1950).

205. Art.7(1), The American Convention on Human Rights (1969).

206. Art.6, African Charter on Human and Peoples' Rights (1981).

207. Paul Sieghart, *The Lawful Rights of Mankind*, Oxford University Press, (1985), p.111.

on the states which are parties to the treaty.[208] The Covenant recognises the right of everyone to 'liberty and security of person;[209] and the right not to be subjected to 'arbitrary arrest or detention.[210] And it declares that 'no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'.[211] Further, when anyone is arrested, he must be told why;[212] he must then be brought 'promptly' before a judicial officer, and either released or tried within a reasonable time;[213] and he must always be entitled to test the legality of his detention before a court.[214] The Covenant also provides that 'anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'.[215] Even in cases of persons who are deprived of their liberty, the Covenant provides that they 'shall be treated with humanity and with respect for the inherent dignity of the human person'.[216] The Covenant also outlaws

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208. International Convenant on Civil and Political Rights was adopted in 1966 and entered into force in 1976. 77 countries are parties to the treaty, including India.

209. Civil and Political Rights Covenant, Art.9(1).

210. Ibid.

211. Ibid.

212. Ibid., Art.9(2).

213. Ibid., Art.9(3).

214. Ibid., Art.9(4).

215. Ibid., Art.9(5).

216. Ibid., Art.10(1).

slavery and servitude in all their forms;[217] torture, and cruel, inhuman or degrading treatment or punishment.[218] It also specifically provides for the due process requirements which are to be followed in the determination of any criminal charge against a person.[219] Of the right of the accused the Covenant names, inter alia, the right to fair and public trial by a competent and impartial tribunal;[220] the right to be presumed innocent until proved guilty;[221] the right to know the nature and cause of the charge;[222] right to reasonable opportunity to prepare his defence;[223] right to speedy trial;[224] right to be present in his trial and to defend himself and the right to legal assistance and even free legal aid in deserving cases;[225] right to cross-examine witnesses against him and to examine his own witnesses;[226] right not to be compelled to testify against

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217. Ibid., Art.8(1) and (2).

218. Ibid., Art.7.

219. Ibid., Art.14.

220. Ibid., Art.14(1).

221. Ibid., Art.14(2).

222. Ibid., Art.14(3), (a).

223. Ibid., Art.14(3), (b).

224. Ibid., Art.14(3), (c).

225. Ibid., Art.14(3), (d).

226. Ibid., Art.14(3), (e).

himself or to confess guilt[227] (i.e., right against self-incrimination); right against 'double jeopardy;[228] and right against _ex-post facto_ laws.[229] The Covenant also recognises the right to freedom of movement,[230] both within the individual states and abroad, right to marry;[231] and right to privacy[232] as deriving from 'the inherent dignity of the human person;[233] and protects individuals from arbitrary state interference.

Thus one finds that the personal liberty and security of the individual occupy a pivotal position in the entire scheme of human rights as have been defined and catalogued by the human rights instruments starting with the Universal Declaration. Personal liberty and security appears to have been treated as basic to all other human rights. Thus observes Thomas Bue-rgenthal:

> "In my opinion, an international consensus on core rights is to be found in the concept of "gross

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227. _Ibid_., Art.14(3), (g).

228. _Ibid_., Art.14(7).

229. _Ibid_., Art.15(1).

230. _Ibid_., Art.12.

231. _Ibid_., Art.23(2).

232. _Ibid_., Art.17(1).

233. _Ibid_., See The Preamble.

violation of human rights and in the roster of rights subsumed under it. That is to say, agreement today exists that genocide, apartheid, torture, mass killings and massive arbitrary deprivations of liberty are gross violations".[234]

In a similar vein, emphasising on this 'core' of human rights the U.S. Secretary of State Cyrus Vance stated in April 1977 thus:

> "First, there is the right to be free from governmental violation of the integrity of the person. Such violations include torture; cruel, inhuman or degrading treatment or punishment; and arbitrary arrest or imprisonment. And they include denial of fair public trial and invasion of the home".[235]

Personal liberty and security constitute a core value of human rights which has been recognized-or at least not denied-by all nations.[236] As Robert B.Mckay[237] maintains,

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234. Thomas Buergental, "Codification and Implementation of International Human Rights", as published in Human Dignity - The Internationalisation of Human Rights Ed. by Alice H. Henkin (1979) at p.17.

235. Quoted by Robert B.Mckay, "The Common Core of Human Rights," as published in Human Dignity, ibid., at p.68.

236. Prof.Buergental recognises the ideological neutrality of these rights as one of the reasons for their universal acceptance as a core value., see Buergental, op.cit., p.18.

237. Robert B. Mckay, op.cit., at p.67.

even the domestic jurisdiction clause of the U.N. Charter[238] does not immunize the nations guilty of gross violations of these basic and primary[239] human rights. No state, therefore, can any longer assert, as it could before World War II, that the manner in which it treats its own nationals is a matter within its domestic jurisdiction and that it is free from international scrutiny. This is really what is called 'the internationalization of human rights'.[240] Thus as a result of the continuous process of development of human rights jurisprudence, starting with the Universal Declaration of 1948, the right to personal liberty and security has emerged as a core 'value' of 'internationalized' human rights.

Of course, it is true that human rights may still be violated in many countries; and problems and difficulties may still be experienced in the full realization and effective implementation of these human rights. Nevertheless, apart from the legal obligations which human rights violations impose on the states, the very notion of human rights had served and still continues to serve as a

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238. Article 7(2) of the U.N. Charter.

239. For the recognition of the primary of these rights to liberty and security of the individual, see also Paul Sieghart, The Lawful Rights of Mankind (1985) p.107.

240. See. Prof. Buergental, op.cit., p.16; and Robert B.Mckay, op.cit., p.67.

catalyst[241] in legal and constitutional developments in national systems, inspiring national efforts to live up to the principles so universally acclaimed by the collective conscience of mankind.

Indeed, the Indian Constitution is itself a standing testimony to this catalystic effect of the concept of human rights. It is interesting to note that the Universal Declaration of Human Rights was adopted by the U.N.General Assembly at a time when the framing of India's Constitution was in its final stage of completion. It was a historical coincidence that the Indian Constitution happened to be the first major national constitution which incorporated the human rights and fundamental freedoms embodied in the Universal Declaration of Human Rights.[242] Thus the internaitonalised human right to personal liberty and security has become the fundamental right to personal liberty which the Indian Constitution guartantees to all persons in India.

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241. Barna Horvath, Right of Man, 4 American Journal of Comparative Law (1955) p.539; See also Roger N. Baldwin, 'The International Bill of Rights', as published in The Great Expressions of Human Rights, op.cit., p.203.

242. The Fundamental Rights in Part III and the Directive Principles in Part IV of the Indian Constitution correspond respectively, to the Civil and Political Rights and the Economic, Social and Cultural Rights in the Universal Declaration.

Let us now turn to the Constitution of India and see how the right to personal liberty has emerged as a constitutional guarantee therein.

CHAPTER II

PERSONAL LIBERTY IN THE INDIAN CONSTITUTION - THE FRAMING OF ARTICLE 21

Personal Liberty In Indian Thought:

Liberty in Ancient India was essentially an integral concept, embodying a natural harmony of spirit, mind and body.[1] The dignity and freedom of the individual, liberty in its widest sense, was valued very high in our ancient political system.[2] Freedom from physical and social constraints in pursuing the Purusharthas[3] - the legitimate goals or objectives of life - was the essence of individual liberty. And the protection of liberty in this comprehensive sense was the most fundamental duty enjoined

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1. Sri Aurobindo, The Foundations of Indian Culture, Pondicherry, (1968), p.2.

2. As the Mahabharata tells us 'there is nothing higher than man - na manusat srestha - taram hi kincit'. See, Dr.Radhakrishnan, Occasional Speeches and Writings, Third Series, p.309.

3. The four values which are recognised as the Purushartas or legitimate goals of life in Hindu Philosophy are Artha, Kama, Dharma and Moksha. For a detailed analysis of the Purushartas see S. Gopalan, Hindu Social Philosophy, Wiley Eastern Limited, Delhi, 1979.

upon the king by Dharma, the Supreme Law.[4] Dharma was considered a greater sovereign than the king and was held to be binding both on the ruled and the ruler alike.[5] The king in Indian political thought was only the guardian, executor and servant of the Dharma.[6] This subjection of the king (the sovereign power) to the supremacy of the sacred law was well brought out by the Coronation Oath[7] which emphasises not only the duty of the king to the people but also the dedication of his life to the service of the State.[8] The king was required to take the oath that he would protect the moral, spiritual and material well-being of the people entrusted to his care.[9] Further, among all the dharmas Rajadharma appears to have been given the utmost importance

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4. Santiparva of the Mahabharata, Manusmriti and Sukranitisara all refer to this aspect. See p.V.Kane, History of Dharmasastra, Vol.III, 2nd edn. pp.2-3.

5. See Sri.Aurobindo, op.cit, p.347, see also The Majesty of Law as described in Brhadaranyaka Upanisad, I. 4-14, as quoted by justice Gajendragadkar in his essay, "The Historical Background and Theoretic Basis of Hindu Law" in The Cultural Heritage of India, Vol.II (1962), p.414.

6. Sri Aurobindo, ibid.

7. For a detailed analysis of Coronation Oath, see K.P.Jayaswal, Hindu Polity, (1955), p.216.

8. See K.M.Panikkar, The Ideas of soveriginty and State in Indian Political thought (1963), p.27; also see Bhagwan Das, The Science of Social Organisation, 2nd edn. Vol.III (1948), pp.932-33.

9. Bhagwan Das, ibid.; also see Gajendragadkar, op.cit., p.422.

in the scared texts. Rajadharma is said to be the 'root of or the quintessence of all dharmas', because, in view of the Hindu thought, the fulfilment of their duties and responsibilities by rulers was of paramount importance to the stability and orderly development of society and to the happiness of the individuals in the State.[10] And among the Rajadharmas (the duties of the king) the first and foremost seems to have been 'paripalana' - the protection of the subjects.[11] Shantiparva as well as Manusmriti describe 'protection of the individuals as the highest dharma of the king.[12] The sacred texts state clearly that the subjects require protection against the king's officers, thieves, enemies of the king, royal favourites (like the queen and the princess) and the greed of the king himself.[13] The king was also dutybound to create conditions under which people can freely pursue the 'Purushartas' and can thus be at real state of liberty.[14] The upholding of justice was also

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10. P.V.Kane, History of Dharmasastra, Vol.III, 2nd edn., (1973), p.3. Santiparva (63.25) in the Mahabharata states: 'know that all dharmas are merged in rajadharma; that rajadharmas are at the head of all dharmas'.

11. See P.V.Kane, ibid., at p.56. 'Protection is the highest dharma of the king'. See Santiparva, 68-1-4; Manusmriti VII-144.

12. Ibid.

13. Ibid., at p.58.

14. K.M.Panikkar, op.cit., p.23, See Barhaspatya - Sutra (II.43); Sukranitisara (IV-4.39); P.V.Kane, op.cit., p.240.

considered an equally important duty of the king.[15] In Hindu thought 'justice is what binds society together, and is the great protective principle. Economic prosperity, moral welfare and cultural advancement are dependent on justice. Justice is the basis on which society exists and evolves and eternal vigilance is enjoined on the king as his own righteousness is dependent on the maintenance of justice.[16] The emphasis in the ancient system was on the duties prescribed by the sacred laws. It was on the due performance of duties by all that the happiness, good order and welfare of society depended. The king had to execute the laws and enforce the duties among the subjects. In turn, the king himself was obliged to perform his own Dharma and uphold the law. If the king disregards Dharma there is a political sanction. According to the Texts such as Mahabharata, Sukranitisara and Manusmriti, if the king ceased to be a faithful executor of the Dharma he is liable to be removed, and even be killed in extreme cases of royal cruelty and oppression.[17] The sovereign commands obedience of the subjects only so long as he faithfully performs his duty of 'paripalana'. In Indian political thought

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15. Ibid., at p.56.

16. Ibid., at p.58. For reference to Manu's view on Justice, see, pp.57 and 59.

17. P.V.Kane, op.cit., p.26, see also Bhagwan Das, op.cit., pp.891-93 and 937.

'protection' is the very purpose of and hence a limitation on, sovereignty.[18] The concepts of, 'absolute sovereignty' and 'autocracy' are alien to our tradition.[19]

Thus it follows from what we have stated above that the concept of liberty that existed in ancient India was a very comprehensive and compendious one, consisting of all aspects of human life such as physical and material values (Artha), emotional values (Kama), ethical values (Dharma) and spiritual values (Moksha). The Protection of individual liberty in this comprehensive sense was enjoined upon the king as his fundamental duty by Dharma, the Supreme Law which limited and regulated the powers of king and the state.

But it should also be remembered, as cautioned by many scholars,[20] that the above observations must not be misconceived as amounting or equivalent to the notion of a 'consitutional monarchy' or a 'guaranteed right to personal liberty' as it developed in the West. Any attempt to read

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18. K.M.Panikkar, op.cit., p.37 and pp.54-5.

19. Ibid., at pp.67-68; see also P.V.Kane, op.cit., p.62; Sri Aurobindo, op.cit., p.350.

20. P.V.Kame, op.cit., p.15. He critises both the Western Writers who under-rated the contributions of Indian thought to Political Science as well the Indian Writers who attempted to describe the Indian Polity as a sort of 'constitutional monarchy' in its Western sense. See also Sri Aurobindo, op.cit., p.341; and K.M.Panikkar, op.cit., p.8.

such modern concepts of western thought into the ideas and precepts of the Indian thought would be 'unhistorical' and an 'ill-judged' one.[21]

The concept of a 'constitutional monarchy' implies that the monarch's powers are absolute unless defined and limited by convention or statute. The essence of the theory is the original unlimited character of king's powers which has come to be limited in law, whether through conventions or through written constitutions. But in every case it is a limitation on the presumed absolute sovereignty of the king.[22] History shows that the claims of state absolutism, which still holds sway in different forms in Europe, arose, in a way, as a challenge to theocratic absolutism. The autocracy of the king in Europe developed as a rival claim to the church's vicegerency of God.[23] As against the Pope the Emperor claimed to be the agent of God for mundane affairs. Both the church and the state were united in holding that absolute power as derived from God existed in some authority either in the Emperor or in the Pope. They could not conceive of a society in which the absolute power did not exist somewhere. The exclusion of the church from temporal matters only transferred these claims to the

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21. Ibid.
22. K.M.Panikkar, op.cit., p.9.
23. Ibid., at pp.66-7.

secular state.[24] Even Hobbes, Bodin, Austin and others are thus the direct descendents in spirit of this concept of State. The State in Eurpope is supreme, it is not bound by any will other than its own and no conception of moral right (or duty) restricts its activity.[25]

By contrast, the Hindu thought never recognised such a concept of state autocracy. The theory epitomised in Louis XIV's statement, "I am the State", never found support in Indian thought. The king, in India, was only one of the seven 'prakrities'[26] (constituent elements) of the body politic and the State had essentially an administering character.[27] This composite conception of body politic and the idea of the king being only one of the seven 'angas' (limbs) and not the embodiment of the whole, as in Western thought, stood in the way of a theory of autocracy.[28]

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24. Ibid., at p.66.

25. Ibid.

26. Ibid., at the p.70; Kamanda-kiya-nitisara (IV-1-2), Manu (ix.296-297) Santiparva and Arthasastra are all of the view that 'State is an organism of seven limbs: The "swami" (or the Soverign); the 'amatya (officialdom); the territory (rashtra); the Kosa (treasury); the fort; the army; and the ally. See P.V.Kane, op.cit., pp.18-19.

27. The administering State had an immense organisation which was divided in 18 Departments, as described in the Rajatarangini (first Taranga V.120) See ibid., at p.67. Kautilya also despicts an administering state in the Arthasastra.

28. Ibid., at p.68.

Another feature in the ancient system was the clear separation between the state and the religion and the consequential secular nature of Indian kingship.[29] It was possible because religion in India was personal (individual) and not institutional and so it did not lead to an organised church. Thus, unlike in the West, the absence of an organised church backed by a powerful social hierarchy left the monarchy in India unperturbed by any centre of effective countervailing power raising rival claims to social obedience.[30] Such a situation, in turn, rendered the claim for autocracy or absolutism by the king uncalled for even as a political necessity.

Further, the essential idea underlying the autocratic state is that there is nothing beyond its legal competence. On this count also it is noteworthy that in India kingship never involved plenary sovereignty. It was, by its nature, limited by Dharma; and the king did not have the power or (right) to legislate. And it was impossible for the king to develop a theory of supreme authority in the absence of legislative power. Thus even the most powerful king could not make himself the combination of all the powers because such an idea was not only against Rajadharma

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29. Ibid., at p.78.

30. Ibid., at p.65.

but against the organisational character of the state.[31] The king was admittedly the sovereign and the protector of the people. But sovereignty, as Sukranitisara says, is merely the form and authority, only the method by which the king may protect and serve the people.[32] The king is not the creator, but only the servant and protector of Dharma-Dharma is always above the king.[32]

Similarly, as regards the notion of a 'guaranteed right to personal liberty also, a close study of the ancient system would reveal that such a notion in its modern sense was virtually non-existent in Indian thought. The Hindu theory does not seem to confer any right on the individual as different from the community.[33] It is the principle of 'protection' that is emphasised and as a result the subject in relation to the ruler has no legal rights beyond that of rebellion.[34] The restrictions on the king were ethical and based on Dharma. Of course, a ruler cannot override the laws of Dharma; but the fact remains that the individual cannot claim protection on the basis of a duty which the king is morally obliged to follow.[35] After all,

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31. Ibid., at p.68,69 and 79.
32. Ibid., at p.82.
33. Ibid., at p.75; See also Sri Aurobindo, op.cit., p.364.
34. See f.n. 11, supra.
35. K.M.Panikkar, op.cit., p.76.

liberty as a legal right in a state can only be maintained and upheld either by courts of law or other similar institutions, and not by mere ethical injunctions. Though the ideal of liberty in its most comprehensive sense was given the highest place in Indian thought,[36] liberty was not recognised as an individual right that could be enforced against the king. The Hindu state organisation did not leave any institutional remedy for the individual to prevent a bad king from ignoring his rights. Of course, systematic oppression can be remedied politically by rebellion or by resistence; but the concept of liberty involves not merely the vindication of public rights when violated on a large scale, but also when violated in the case of the poorest and the meanest individual.[37] That principle was unknown to Hindu theorists, and thus liberty as a 'juridical concept' to borrow the expression from E.S. Corwin, 'was virtually non-existent in Indian thought'.[38] Thus it is clear, from

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36. This aspect has been referred to earlier in this section.

37. K.M.Panikkar, ibid., pp.77-78.

38. Probably such a political conception of liberty could not have developed in Ancient India in view of the concepts of State, sovereignty, and Dharma as we have seen earlier. It is noteworthy that the ideal of personal liberty as developed in Europe was the outcome of long-drawn struggle between state' autocracy and royal absolutism on the one hand and the powerful baronage supported by the church on the other. Magna Carta itself was what the nobles with the support of the church extracted from the King. In India the guarantee of liberty was implicit in the very conception of state.

what we have stated above, that any attempt to project the western ideas such as the theory of 'constitutional monarchy' or the notion of a 'guaranteed right to personal liberty' into Indian thought would be unrealistic and misleading. Even without indulging in such an 'ill-judged' exercise, one can always, with pride and honour, expound and emphasise the valuable contributions of Indian thought which are still relevant to our constitutional jurisprudence.

But it is an irony of history that in spite of the rich and liberal traditions, the Hindu political thought became stagnant with the advent of Muslim invasion.[39] Even the short-lived Hindu political revivals as represented by Vijayanagar and Maratha states did not result in any real intellectual ferment. Then came the British occupation which, introduced, with still greater vigour and impact, western ideas, precepts and premises into the Indian political thought.[40] In the British period, significantly enough, the Hindu idea of kingship underwent curious changes. The importation of the European theory of state omnipotence by the British gave to the Indian monarchy a conception of autocracy totally opposed to Hindu ideas. The Indian king had come to possess not only the powers given to

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39. D.Mackenzie Brown, The White Umbrella, Jaico Publishing House (1953), p.8.

40. D.M. Brown, ibid.; also see K.M.Panikkar, op.cit., pp.98-99.

him by the Nitisaras, but also what the western legists had formulated in Europe.[41] Thus centuries of subjection of the Indian people to the foreign powers and their cultures did undoubtedly arrest, if not annihilate, the growth of Indian thought.[42]

Paradoxical though it may seem, even when India became free from the foreign yoke and became independent to shape her own destiny as a nation, the new Republic of India took most of its forms no less than its ideals from the political thought and experience of the western nations and not from the doctrines of Bhishma, Kautilya, Manu and Sukra. In fact all the major aspects of India's constitutional system are adopted from the West.[43] Of course, as Sri. Aurobindo[44] has observed,

> "It is unreasonable to expect the Independent India to fall back upon the ancient traditions and conceptions of state and social and political structures ignoring completely the intervening

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41. K.M.Panikkar, ibid., at p.99.

42. Ibid., p.102. The author observes that the Indian thought ceased to grow after the 13th century as it did not have new political experience of its own to guide it.

43. For instance, the federal structure, Parliamentary form, the cabinet system, the guarantee of fundamental rights, the instrumentality of judicial review etc.

44. Sri Aurobindo, op.cit., at pp.363-64.

political and legal expriences which it had during the British regime and claiming total immunity from the currents of thought that gazed the world around her. Experiences always enrich growth and in any process of growth and evolution from within there is bound to be a constant interaction between what is within and the experiences gained from outside - a constant process of acceptance and assimilation."[45]

Thus instead of the Hindu conception of state as envisaged in the sacred Texts,[46] India adopted in her new constitution a concept of constitutional government as it developed in the western political thought. And in the place of the conception of personal liberty as being implicit in the conception of state itself, unsupported by any institutional remedy but leaving it to the moral duty of the king, India adopted the concept of personal liberty in the Constitution as an individual right that could be enforced against the state through institutional remedies. That is to say, the right to personal liberty was conceived as an enforceable limitation on the State. Thus, in a way,

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45. For a detailed discussion of this aspect, see Sri. Aurobindo op.cit.

46. Reference to this aspect has been made earlier in this section.

the right to personal liberty, for the first time in the history of Indian political thought, has emerged as a constitutional guarantee in its modern sense as it developed in the West.[47] It is, therefore, obvious and inevitable that any meaningful discussion of the right to personal liberty as guaranteed in the Indian Constitution can be made today only in terms of the premises, precepts and conceptions of the western legal and political thought and not in terms of the traditions and conceptions of the ancient Indian thought.[48]

But, again, this is not to say that Indian political thought has no value and relevance today or that India of the past has nothing to offer to us in the field of political and constitutional thinking and practice. It would be rather unreasonable to expect a system of thought and values which had dominated a people's ideas so long would totally disappear as a result of the acceptance and adaptation of new ideas and forms from abroad.[49] Despite the adoption of many western ideas and models in the Indian

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47. For the explanation of liberty as 'constitutional guarantee' in its modern sense, see O.Hood Phillips, Constitutional Law and Administrative Law, 6th edn., p.438, Yardly, Introduction to British Constitutional Law, 6th edn., p.89, E S.Corwin, Liberty Against Government.

48. For a similar view, see Subhash C.Kashyap, Human Rights and Parliament (1978), p.20.

49. K.M.Panikkar, op.cit., p.104.

Constitution, one can also find in it certain obvious and important remnants of ancient Indian political thinking and experience.[50] A special emphasis on those aspects of Indian thought which are particularly relevant to personal liberty may not be out of place here.

Indian political thought can not be isolated from the main body of Hindu philosophy. The great works of Indian polity are only one facet of a vast and integrated system of reasoning which poses and interprets the very problem of human existence.[51] Both in Indian philosophy and in political thought the central concern has been the individual.[52] It is the fundamental belief of Hinduism that every human being has in him a spark of the divine, that it is in the nature of man that he can, by right conduct and by right knowledge, attain illumination and reach Godhead directly.[53] This conception of man - the doctrine of divinity of man - seems to have certain social and political

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50. A few instances are: the administering state, with a nation-wide bureaucracy as an integral part of it; the comprehensive economic activities of state, suggestive of Welfare State; the system of Panchayatiraj, dignity of the individual etc., see ibid., at pp.105-6.

51. D.Mackenzie Brown, op.cit., p.6.

52. See f.n.2, supra.

53. Each, individual is a spark of the Divine, 'deho devalayo nama', see Dr. Radhakrishnan, op.cit., p.286; see also K.M.Panikkar, Essential Features of Indian culture, p.11 See also Sri Aurobindo, op.cit., pp.98-99.

consequences which are of very great importance. As a matter of fact, the conception of state in Indian thought, as discussed earlier, can be appreciated better only with an understanding of this Hindu conception of man. The belief that every individual is a spark of the divine can be said to be the origin of the conception of the inalienable worth of the individual and its corollary of the limitation of the absolutism of external forces. The individual is not merely an insignificant unit in a larger whole, whether that larger unit is called community, the church or the state. The community or the church or the State exists for his benefit. If it is accepted that the individual, however lowly and insignificant in himself, has over-riding rights by virtue of his personality, then it is the denial of those rights if the State or the church or the community compels his obedience in matters affecting his conscience or his beliefs.[54] This conception of man and the highest respect given to the worth and dignity of the individual seems to be a profound and lasting contribution which the Indian thought has to offer to us.

Equally important is the concept of personal liberty which the Indian thought presents to us. Having considered 'personality' as unique, personal liberty was conceived as the freedom of the individual to pursue true

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54. K.M.Panikkar, ibid., at p.11.

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happiness. True happiness of man, according to Hindu view of life, lies in the finding and maintenance of a natural harmony of sprit, mind and body.[55] Personal liberty was thus regarded as the most comprehensive and compendious concept the essence of which seems to be the freedom of the individual from physical and social constraints and from the undue interference by any external force including the state in the pursuit of the legitimate goals or objectives of life - the 'Purusharthas'.[56] Thus the legal philosophy of India having its basis in metaphysics has attributed four dimensions to personal liberty in the form of four cherished objects of human life. Personal liberty was thus regarded as a composite concept consisiting of physical and material values (Artha); mental and emotional values (Kama) ethical values (Dharma); and spiritual values (Moksha). In fact, as opined by an eminent jurist,[57] if an objective and rational inquiry is made to ascertain the true nature of this complex concept of personal liberty a distinct sense and value of

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55. Sri Aurobindo, The Foundations of Indian Culture, p.2.

56. i.e. Artha, Kama, Dharma and Moksha. See, for a detailed analysis, Gopalan, Hindu Social Philosophy, op.cit.

57. G.S.Sharma, "The Concept of Personal Liberty in Ancient Indian Legal Theory: Its Relevance in Modern Times", 4. Kurukshetra Law Journal (1978) 95, at. p.97. See also Sri Aurobindo, op.cit., p.98 where he says: "The dignity given to human existance by the Vedantic thought and by the thought of classical sages of Indian Culture exceeded anything conceived by the Western idea of humanity".

the concept in question will be revealed which would still be foreign to the legal culture of the world. In Indian thought the socio-legal aspects were never dissociated from the ethico-spiritual aspects. The concept of personal liberty could never mean mere 'freedom from bodily restraint' as understood in Common Law'. Such a narrow concept of personal liberty, ignoring the ethico-spiritual aspects, would be not only non-Indian in nature but also incomplete and inadequate as it would not satisfy the aspirations of the people and would fail to give them guidance in making life worth living, distinct from crude animal existence. Spiritual liberation and perfection of individual personality have been the ultimate end of Indian culture of which the legal culture is only a department.[58]

Another fundamental aspect of Indian thought which is worthy of emphasis here is the Hindu conception of state which guarantees, though implicitly, personal liberty in the above broad sense.[59] As noted earlier, the very purpose and the justification of the Hindu state was to reinforce the

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58. See, G.S.Sharma, ibid., at p.98. The author also asserts in this context that the 'fateful' decision in Habeas Corpus Case would never have occurred had the judiciary in Gopalan's case kept in mind the true Indian ethico-spiritual traditions while dealing with the most sensitive concept of personal liberty.

59. The characteristic features of the Hindu conception of State and the implicit nature of the guarantee of liberty therein were discussed earlier in this section.

moral codes of society and to insure justice among men, ensuring thereby free opportunity for the individual to develop himself within the framework and recognised goals as set out by Dharma.[60] Of course, it is true that this ancient notion of State as such and the implicit and informal mode of guarantee of liberty therein may appear to be no longer relevant to us, for, those notions are totally different from what we have adopted in the Indian Constitution, following the western examples. Yet, one can derive from the Hindu conception of state two important values which are and will continue to be valid and relevant to us. They are: one, the subjection of the sovereign to the supremacy of law (Dharma), law being the king of kings. This, essentially, implies the value of Rule of Law and the negation of state absolutism. Second, perhaps more important than the first, the 'role-morality' of the ruler or the king. Indeed, the moral behaviour of the ruler may be taken as the cornerstone of Indian thought.[61] The Hindu Law codes always stressed the ultimate importance of individual political morality, and emphasised the prime necessity for the ruler and his ministers of conquering

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60. See, D.Mackenzie Brown, White Umbrella, p.21.

61. Ibid., at p.24. The author likens the individual political morality as insisted in Indian thought with the Confucian political ethic in China and with the Platonic in ancient Greece.

personal desires for pleasure or power and holding on to the duties imposed by office and law.[62]

These fundamental values of Indian political thought, which are given emphasis in the preceeding paragraphs, seem trancedental in nature and are as valid to-day as they were in the past. Those values do not cease to be relevant with the advent of the new constitution of Independent India. After all, the constitution of a country is not merely a documentation of political structures and institutional frame works, it is also a value document.[63] It is both valuational and institutional. When we look at the institutional aspects, it is true that the Constitution has adopted most of its political models and institutional structures from the West. But when the Constitution is looked upon as a value document, one can perceive that most of the value choices made in the Constitution are essentially indigenous in nature, having their deep roots in

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62. Kautilya summs up this aspect thus: "The whole of the science (of politics) consists in mastery (of the temptations) of the five senses", See Arthasastra I, 6: shyamasastry, Kautilya's Arthasastra, p.10.

63. See, Robert M.Hutchins, "The New Supreme Court", The Centre Magazine, Vol.V, No.5 (Sept.-Oct. 1972), p.12, as cited in Cases on Constitional Law - Political Roles of the Supreme Court, ed. by Rosenblum and Castberg (1973), p.V. The Constitution is viewed as "The Symbol of National Values".

the culture and ethos of the Indian people.[64] That might have happened so, perhaps, as a natural process of growth and evolution, for in politics and philosophy as well as in literature and arts, nothing that is not evolved from within and is not in harmony with inherited as well as individual traditions will be regarded as characteristic or essentially fit to live.[65] Therefore, while we shall do well, as we have done in our history, ever to be tolerant and hospitable

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64. Whether it be the principle of rule of law or supremacy of constitution; or the principle of democracy or of one man one vote; or the principle of equality, liberty or of social and economic justice - all this can be traced back and be explained in terms of the fundamental conceptions of 'man' and 'man in society' in Hindu thought. See Dr.S.Radhakrishnan, Occasional Speeches and Writings, Second series February 1956 - February 1957, pp.284-294. According to him ethical basis of democracy is the sacredness of human personality and respect for the individual (pp.284, 286). Democracy is a faith in the spiritual possibilities of man (p.285): "If we compromise with the essential freedom of spirit", he says, "all other liberties will disappear" (p.285). He quotes Apasthamba which declares: Atmalabhan na param vidyate, atmarthe prthivim tyajet (for the sake of soul even the whole world can be sacrificed) - Dharma Sutra, I, 72 (p.285). He also says that to realise freedom of spirit, liberty from physical, material and social constraints is essential (p.294); To him,whereas the fundamental rights are limitation on government for the protection of the citizens, the directive principles are our national dharma, all having a common goal of securing the full development of the peculiar and spiritual interest of the individuals - abhyudaya and nisreyata (pp.290-2). Regarding equality and adult suffrage, he says "we thus affirm the equality of all human beings. This principle is part of our heritage. Each individual is a spark of the divine (p.286).

65. C.P.Ramasamy Iyer, "Some Aspects of Social and Political Evolution in India", in The Cultural Heritage of India, Vol.II (1962), p.493.

to fresh views and receptive to modern ideas and institutions, we must also be alive to the need for assimilating them into our own culture and value systems. Such a process of assimilation and synthesis alone would enable an orderly and healthy growth from within; unlike any lifeless attempt on our part to imitate and reproduce with a servile fidelity the ideals and forms of the West'.[66]

In view of what has been discussed so far, we may develop a perception of the Constitution as a value document, an understanding of the nature and character of the values which the Constitution embodies, an awareness as to the fundamentals of Indian philosophy and political thoughts in which those constitutional values are deeply rooted. And finally we may make a conscious effort to assimilate what we have learned and accepted from outside into the values which we have inherited and are ingrained in us. They are all vital and essential prerequisites for developing a constitutional jurisprudence of our own, especially in an area like right to personal liberty. The fundamental values of Indian thought, which are given special emphasis here,[67] seem to offer profound and

66. Sri Aurobindo, "The spirit and Form of Indian Polity", D.M. Brown, White Umberlla, pp.137-8.

67. The Hindu conception of 'Man'; the concepts of 'Personal liberty'; the conception of 'State'; the role morality of the Ruler etc.

constructive help in expounding the proper meaning and scope of personal liberty and in evolving a just and flexible normative concept to regulate personal liberty - something which the system is still craving for. A proper perception of those values and a conscious effort to realise them seem to have tremendous potential for guiding mankind in their endeavour to establish a legal order in which the dignity of the individual and the sacredness of personality become the working principles.

As one of the industrious sons of modern India, Sri Aurobindo has prophesied: "India of the ages is not dead nor has she spoken her last creative word; She lives and has still something to do for herself and the human peoples..."[68]

The Freedom Struggle and The Urge For Personal Liberty - A Colonial Experience

Though the spirit of democracy and Rule of Law and an instinctive urge to respect, protect and preserve the dignity of human personality and its absolute worth are fundamental and not alien to Indian culture and tradition,[69]

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68. Sri Aurobindo, The Foundations of Indian Culture, p.401.

69. This aspect has been discussed earlier while dealing with Personal Liberty in Indian Thought.

it has to be conceded that the concept of fundamental rights in the sense of personal and civil liberties with their modern attributes and overtones are a development more or less parallel to the growth of constitutional government and parliamentry institutions from the time of British rule in India.[70] It is a truism that at every stage in the development of a people there are certain norms of living that fix the terms upon which men would be willing to associate and live together and endure a given order. As long as society meets these terms its members will go peaceably about their business, but if these norms are not met and the fundamental habits of living and acting of the people are interfered with, they rebel and demand their rights, which are fundamental in essence. What those fundamental rights are is determined by the interaction of human nature with the customs and expectations of the society the complex of which may be termed as its culture.[71] That is why in recent times, fundamental rights have been traced, not exclusively to natural law,[72] but to the age-old

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70. See Subhash C. Kashyap, Human Rights and Parliament (1978), p.20.

71. John Dewey, Freedom and Culture (1954), p.15.

72. The philosophers and jurists in Europe who developed the concept of a natural law were as much concerned with the supremacy of parliament against the arbitrarines of the executive as with the vindication of the rights of man against parliament itself. See H. Lauterpacht, International Law and Human Rights, London, (1950), p.135.

struggle of mankind through history.[73] The genesis of the right to personal liberty in the Constitution of India is, therefore, to be traced not only to its cultural values[74] but also to its national movements and independence struggle against the British rule.[75] Hence it seems appropriate to consider briefly the historical developments immediately preceding to the commencement of constitution - making by the Constitutent Assembly.

Pre-Independent Political Scenairio

The impetus for the demand for personal freedom and civil liberties in India came in the wake of the popular resistence to the British which resorted to oppressive and arbitrary acts such as brutal assaults on unarmed people, internments, deportations, arbitrary arrest and detention without trial. The immediate result of all this was the emergence of the nationalist movement and the formation of Indian National Congress. The freedom movement and the

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73. For a statement to this effect, see the Delhi Declaration adopted by the International Commission of Jurists in 1955, Journal of the International Commission of Jurists, Geneva, Vol.II, No.1, p.17.

74. This aspect is briefly discussed in the previous section.

75. See Granville Austin, Indian Constitution. Cornerstone of a Nation, (1972), p.50. Per Austin, 'Fundamental Rights and Directive Principles had their roots deep in the struggle for independence'

harsh repressive measures of the British encouraged the fight for liberty and the demand for constitutional guarantee of some fundamental rights. As early as 1885 the Indians demanded the same rights that their British rulers enjoyed in their own country.[76] As a matter of fact the declared objective of several movements, including the Indian National Congress, in the beginning was only to secure some civil liberties and human rights. The first concrete demand for fundamental rights appeared in the Constitution of India Bill, 1886 (known also as the Home Rule Bill). The Bill sought to guarantee to the people certain basic human rights such as freedom of speech, inviolability of one's house, freedom from arbitrary arrest and imprisonment, equality before law etc.[77] Between 1917 and 1919, the Indian National Congress (INC) passed a series of resolutions demanding civil rights and equality of status with Englishmen. Following the Montague-Chelmsford Report in 1918, the INC made a demand at its special session in August that year held in Bombay, for including in the the Government of India Bill then on the anvil "a declaration of the rights of the people of India as British citizens".[78] The demand included, among other things, protection in

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76. Ibid., at p.53.

77 Art 16, The Constitution of India Bill, 1985, in Shiva Rao, Select Documents, I.

78. See, Subhash C. Kashyap, op.cit., p.20 et. seq.

respect of liberty, life and property, freedom of speech and press, equality before law etc. In another significant resolution passed at its Delhi Session in December, 1918, the Congress claimed the right to self-determination and appealed to the British Government to repeal immediately oppressive laws, regulations and ordinances which empowered the executive to arrest, detain, intern, extern or imprison and which denied the basic civil liberties to the people.[79]

The experience of the World War I, the disappointment following the Montague-Chelmsford Report, the support of President Wilson to the principle of self-determination and Gandhiji's advent in India brought about "an agressive awareness of Indianness" which culminated in the Independence Movement.[80]

The next stride in the demand for fundamental rights was Mrs.Anne Besant's Commonwealth of India Bill, 1925, which embodied a specific "declaration of rights". The first among other 'fundamental rights' declared in the Bill was 'liberty of person and security of his dwelling and property.[81] The Bill also referred to freedom of

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79. Ibid., at p.21.

80. G. Austin, op.cit., p.53, also see, J.M.Shelat, The spirit of the Constitution, (1967) p.16.

81. Commonwealth of India Bill, clause 8 (g). The 'declaration of rights' in the Bill was really inspired by the Constitution of the Irish Free State of 1921, which included a list of fundamental rights. See Subhash C. Kashyap, op.cit., p.21.

conscience, freedom of speech, assembly and equality before law. Right to free elementary education and the right of all to use roads, courts of justice and other places of public resort were also declared.[82] Thus the Bill presaged an interesting combinations of the future Rights as well as Directive Principles.

Then came the Simon Commission which undertook a study of possible constitutional reforms in India. In response to this the Madras Session of Congress, 1927 resolved that the basis of any future constitution for the country must be a declaration of fundamental rights.[83] The Motilal Nehru Committee appointed in 1928 in pursuance of the 1927 Madras Congress Resolution, in its Report[84] (called as the Nehru Report, 1928) recommended a comprehensive list of fundamental rights, which was really a "close precursor of the Fundamental Rights of the Constitution".[85] The Report, besides other civil liberties and socio-economic rights,[86] contained the following rights pertaining to

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82. Ibid., Clause 8 (d)

83. Chakrabarty and Bhattacharya Congress in Evolution, (1940) p.27.

84. For a fuller details of the recommendations of the Nehru Report see B.Shiva Rao and others, The Framing of India's Constitution, Select Documents, Vol.I, New Delhi (1986), pp.59-75.

85. See G. Austin, op.cit., p.55.

86. Here also no distinction is made between justiciable and non-justiciable rights.

personal liberty and security: (i) personal liberty and inviolability of dwelling place and property, (ii) the right of every citizen to writ of habeas corpus, and (iii) protection in respect of punishment under ex-post facto laws.[87]

The attitude of the British rulers towards these consistent demands of the Indian people was negative and different, and was fully reflected by the statement of the Simon Commissions, 1930. The Commission said:

> "We are aware that such provisions have been inserted in many constitutions, notably in those of the European States formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exist the will and the means to make them effective".[88]

Thus the national leaders, by now, had come to realise that without achievement of national independence enjoyment of any of the other basic human rights and liberties would be impossible. Hence, the Lahore Session of Congress in 1931[89] declared the "inalienable rights of the

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87. See, Shiva Rao, op.cit., pp.59-75.

88. See, Report of the Indian Statutory Commission, Vol.II Cmd.3569, 1930; para 36.

89. See, Chakrabarty and Bhattacharya, op.cit., p.27.

Indian people as of any other people, to have freedom and to enjoy the fruits of their toil and have the necessities of life, so that they may have full opportunities of growth".

Another significant event in this evolutionary process was the famous Karachi Resolution of 1931 on "Fundamental Rights and Economic and Social change", which stated in unambiguous terms that 'in order to end the exploitation of the masses, political freedom must include (emphasis added) the real economic freedom of the starving millions'.[90] The fundamental rights in the Resolution were mostly derived from the Nehru Report. Some important additions were: the right to adult suffrage, abolition of capital punishment and right to freedom of movement throughout India.[91] Right to property was conspicous by its absence in the list. And the elaborate list of socio-economic rights of the Resolution did in fact become 'the spiritual antecedents of the Directive Principles'.[92] The

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90. Ibid., at p.28.

91. Ibid.

92. G. Austin, op.cit., p.56. The Resolution demanded social and economic rights like those of free primary education, a living wage and healthy conditions of work for labour, protection against old age, sickness and unemployment, protection of women workers, protection against childlabour etc. It also referred to state control of key industries. Virtually the Resolution was 'both a declaration of rights and a humanitarian socialist manifesto'.

Karachi Resolution, thus, manifested a growing realisation that the demand should no longer be confined to the negative rights (or State's negative obligations) but it should also emphasize the State's positive obligations to provide its people with the economic and social conditions in which their negative rights would have actual meaning.[93]

There was no change in the British attitude. The Joint Select Committee of the British Parliament on the Government of India Bill of 1934 also rejected the Indian demand to include a list of fundemental rights in the constitutional document. Though certain rights were included in the Government of India Act, 1935, they were only poor substitutes - both in form and in content - for what India had demanded.[94]

Another major document which contained a code of fundamental rights was the Sapru Committee Report, 1945. This Report conceived the rights which it declared as 'a standard of conduct for the legislatures, government and the courts'.[95]

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93. See, ibid.

94. See the Government of India Act, 1935, ss.275 and 297-300. While the Act was silent as to personal liberty and other civil liberties, it was anxious to secure the right to property.

95. See G. Anstin, op.cit., p.57.

During this period, another significant development was also taking place parallel to the growing demand for the inclusion of a list of fundamental rights in the constitutional documents made for India. Having realised the futility of these demands in the absence of political freedom, the Congress, as noted earlier, declared its resolve to achieve complete independence.[96] Quite in tune with the concept of 'Swaraj' as envisioned by Gandhiji in 1922, the Indian National Congress made the demand for a Constituent Assembly as part of its official policy in 1934. Pandit Nehru's proposal of a Constituent Assembly was for the first time formally accepted by the Congress in June 1934. Rejecting the British Government's White Paper,[97] for it did not express 'the will of the people of India, the Congress Working Committee resolved:

> "The only satisfactory alternative to the White Paper is a constitution drawn up by a Constituent Assembly elected on the basis of adult suffrage or as near it as possible, with the power, if necessary, to the important minorities to have

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96. Lohore Session of Congress, 1921, See, Chakrabarty and Bhattacharya, op.cit, p.27.

97. The proposal for Indian Constitutional Reform, 1933.

their representatives elected exclusively by the electors belonging to such minorities".[98]

The election manifesto of the Congress Party adopted at Bombay in July, 1934 reiterated the demand for a Constituent Assembly; and thenceforth that demand was repeated by the Congress more forcefully and frequently.[99]

Though the Cripps Mission, 1942 had failed for a variety of reasons, the British had accepted for the first time the idea that an elected body of Indians should frame the Indian Constitution.[100] Following the failure of Cripp's Mission, the historic 'Quit India' resolution was adopted by the All India Congress Committee at its Bombay Session in August, 1942. The resolutions, among other things, demanded the immediate end of British rule in India and said that the provisional government of free India would evolve a scheme of a Constituent Assembly which would prepare a Constitution acceptable to all sections of the people.[101] During the World War II the mood of the Indian

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98. See, B. Shiva Rao, V.K.N. Menon, Subhash C. Kashyap and Others (Ed.), The Framing of India's Constitution - Select Documents, Vol.I, pp.77-78.

99. See, Subhash C.Kashyap, Jawaharlal Nehru and the Constitution, (1982) p.17.

100. See G. Austin, op.cit., p.3.

101. For the text of the Resolution, See Shiva Rao and others, op.cit., pp.132-35.

people became increasingly one of self-assertion, of a readiness to take its destiny into its own hands. And by the end of the War India was ready for a Constituent Assembly and her leaders were demanding one.[102]

Eventually the British Government had sent to India, first, a parliamentary delegation (which reported that tide of independence was running high), and then a cabinet-level mission with the object of assisting 'the Viceroy in setting up in India the machinery by which Indians can devise their own constitution', and of mediating between the Congress and the Muslim League to create a constitutionally united India.[103] The Mission announced its Plan on 16th May 1946.[104] The announcement Cabinet Mission Plan, thus, marked the culmination (formal recognition by the British) of the two important demands that had been made consistently by the national leaders - one, the demand for a declaration of rights as a basis for any constitutional document; two, the demand for a Constituent Assembly to frame their own constitution. The Constituent Assembly was

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102. G.Austin, op.cit., pp.2-3.

103. Ibid., at p.3.

104. For the text of Cabinet Mission Plan, See M.Gwyer and A.Appadorai, Speeches and Documents on the Indian Constitution, pp.577-84.

elected under the terms of the Cabinet Mission Plan[105] and was convened in December, 1946. The Plan in para.19 (iv) envisaged a preliminary meeting of the Constituent Assembly at which an Advisory Committee would be set up to prepare fundamental and minority rights.[106] Thus for the first time, during the struggle for freedom, the British Government recognised the justification of the Indian plea for a declaration of fundamental rights as being an integral part of India's Constitution.

The demand for a declaration of rights was largely the result of the historical grievances and the suspicion against the uncontrolled powers of the State engendered by the colonial rule for nearly a century and a half. In that regard 'the Indian reaction, like the American reaction, is the product of British rule'.[107] And it is also true that to a certain extent the American Constitution and the political philosophy under-lying the Declarations of 1776 had inspired the national leaders and influenced the minds of the makers of the Indian Constitution. Besides, there

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105. Para.18 of the Plan. See, ibid. When the Indian Indepedence Act, 1947 came into force on 15, August 1947, the Constituent Assembly legally attained the status of a completely independent and sovereign body.

106. See, Gwyer and Appadorai, op.cit., pp. 577-84.

107. Ivor Jennings, Some Characteristics of the Indian Constitution, Oxford University Press, London (1953), p.85.

also existed a fundamental belief that independence meant liberty and the diverse freedoms which flowed from it and that those freedoms must, as a necessary sequence of independence, be expressly declared in the Constitutional Charter.[108] Such a belief was reinforced by the fall of Fascism and Nazism which had decried the human liberties and by the resurgence of interest in human rights reflected in the Atlantic Charter and the Declaration of Human Rights by the United Nations.[109]

It was against such a wide spectrum of historical setting the Constituent Assembly, which 'derived from the people... all power and authority,[110] set out to draft free India's Constitution.

Now, before we deal with the actual framing of Art 21 which guarantees the right to personal liberty in the Indian Constitution, let us also consider briefly the right to personal liberty as it existed under the British regime.

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108. See, J.M. Shelat, op.cit., p.18.

109. Kelson, The Law of the United Nations, (1950), pp.33-37 See also Dr.K.M. Munshi, Pilgrimage to Freedom, (1967), pp.293-94.

110. See, Objectives Resolution passed by the Assembly, C.A.Deb., Vol.I, p.5.

Right to Personal Liberty in India Under the British Regime

For any colonial government, the easiest way to repress dissent and resistence to their rule had been either to put to death or to shut up in jails those who dissent and resist. The British Government in India was in no way an exeception to this. The repressive measures which that government ruthlessly let loose against the Indian people during the freedom struggle make the British period the darkest in the history of personal liberty in India.

The British Government had resorted to three important strategies to curtail the personal liberty of the people and to put down the popular resistance to its rule: They were: 1) Preventive Detention 2) Special Courts; and 3) Martial Law.

Preventive Detention

The common law remedy of habeas corpus to test the legality of arrest and detentions was statutorily introduced in India through Section 491 of the Criminal Procedure Code.

Faced with intense political activities of the Independence Movement, the British Government sought to make the remedy of habeas corpus as provided under Sec.491 of Cr.P.C. inapplicable in cases of arrests and detentions for political reasons. The earliest instances of such laws

authorising detentions of persons without trial for political reasons can be found in the Bengal State Prisoners Regulation, 1818[111] and the similar Madras Regulations, 1819[112] and Bombay Regulations, 1827.[113] Subsequently, these Regulations were supplemented by the State Prisoner's Act, 1850 and similar Acts of 1858 and 1871. In all these cases what the courts could do was to determine whether the provision of these Regulations and Acts were applicable to a given case; and once it was found to be so, a writ in the nature of habeas corpus under the provisions of S.491 of the Cr.P.C. could not issue in favour of the detenue.[114] The provision in these Regulations and Acts were further reinforced by Ordinances[115] and Acts[116] in the early 1930's, strengthening the executive with more powers of preventive detention.

By the time the Government of India Act 1935 was passed, preventive detention had come to stay as a permanent feature of the British regime in India. The Government of

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111. Regulation 3 of 1818 (7th April, 1818).

112. Regulation 2 of 1819 (4th March, 1819).

113. Regulation 25 of 1827 (1st January 1827).

114. Ex-Rana Birpal Singh V. The King Emperor, 1946 9 F.L.J.1; see also Ameer Khan (RC) 1870, 6 B.L.R.392.

115. Ordinance X of 1932.

116. Act XXIII of 1932, passed by Indian Legislature.

India Act, 1935 empowered the Indian Legislature to pass such laws.[117] Thus when World War II started, the Central Legislature, at the instance of the Government of India, passed the Defence of India Act, 1939[118] - a comprehensive legislation, on the pattern of the Emergency Powers (Defence) Act, 1939 passed by the British Parliament.

The Defence of India Act authorised the Central Government to frame rules for the purpose of detaining any person reasonably suspected of being involved in any act prejudicial to the interest of the defence of British India and the successful prosecution of the war to do so.[119] And the Government of India framed comprehensive rules, _inter alia_, to provide for preventive detention.[120] Under Rule 26, it was enough that the Central or Provincial Government was satisfied with respect to any particular person that his detention was necessary to prevent him from acting in certain specified ways. To top it all, the orders passed under this Act would not be enquired into by any court of

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117. See, Government of India Act, 1935, Entry No.1, List I of the VII Schedule: Preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with the Indian States.

118. The Defence of India Act (Act XXV) of 1939.

119. See, para X of sub sec.2 of Sec 2 of the Defence of India Act, 1939.

120. See, Defence of India Rules 26 and 29.

law.[121] Though Rule 26 was held <u>ultra vires</u> the Act and so invalid by the Federal Court,[122] the Governor - General, through an Ordinance validated both Rule 26 as well as the detentions made under that rule with retrospective effect.[123] But Ordinance of the Governor -General was subsequently amended by another Ordinance of 1944.[124] This Ordinance of 1944 was intended to confer the power of detention by the Ordinance itself, instead of by rules framed under the Defence of India Act; and to enact a presumption in the Ordinance itself in favour of detention orders to perclude their being questioned in courts of law and to take away or limit the powers of the High Court to make orders under Sec.491 of the Cr.P.C in such cases.[125] Here, again even on the face of this Ordinance, the Federal Court ruled: 'The court is and will be still at liberty to investigate whether an order purporting to have been made under Rule 26 and now deemed to be made under Ordinance 3 was in fact validly made, in exactly the same way as immediately before the promulgation of the Ordiance'.

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121. See, Sec.16 of The Defence of India Act, 1939.

122. <u>Keshav Talpade</u> V. <u>Emperor</u>, 1943 6 F.L.J. 29, at p.46. In this case the court also held see.16 of the Act, which excluded the jurisdiction of courts as inoperative.

123. The Defence of India (Amendment) Ordinance, 1943.

124. Ordinance 3 of 1944.

125. <u>Ibid</u>., ss.6 and 10.

These preventive detention measures resulted in a serious impairment of the right to personal liberty of the people. Unbridled discretions of the executive to detain any person for political reasons was the order of the day during this period.

Special Courts

Another weapon in the quiver of the colonial government to further stifle the personal liberty to the individual was the mechanism of special courts, which greatly affected the jurisdictions of ordinary criminal courts.[126] In December, 1942, the Governor General passed an Ordinance,[127] authorising the constitution of special courts by the Provincial Governments as and when they would think it necessary to do so. Further, it was left to the discretion of the Provincial Government to direct the trial of such cases by these courts as they though fit to do.[128] Under the Ordinance, these courts could dispense with public and open trials[129] and even the presence of the accused person during the trial could be avoided.[130] The

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126. See, Ghosh V King Emperor, 1944, F.L.J.203, at p.214.

127. Ordinance No.2 of 1942.

128. Ibid., ss.5, 10 and 16.

129. Ibid., s.26.

130. Ibid., s.22.

general procedure and rules of evidence followed in criminal trials were made inapplicable or drastically altered to the serious disadvantage of the accused; and even the revisionary powers of the High Court and the power to issue the writ of _habeas corpus_ were abrogated.[131]

Though these draconian provisions in the Ordinance were held as _ultra vires_ the Government of India Act, 1935 by both the Calcutta High Court[132] and the Federal Court,[133] unfortunately these provisions were given the stamp of judicial approval by the Privy Council.[134] To the Privy Council, the questions whether the Ordinance was intra vires or ultra vires was 'a question of policy and not law'.[135]

Martial Law

The expression connotes the imposition of military government by which the ordinary laws of the land are suspended,[136] resulting in complete negation of peoples

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131. _Ibid_.

132. _Banoari Lal Sharma and Others_ V. _Emperor_, AIR.1943 Cal.285.

133. 1943 6 F.L.J. 79.

134. 1945 8 F.L.J. 7.

135. _Ibid_.

136. As a matter of fact innumerable persons were tried and convicted by these special courts, and in some cases the persons were even sentenced to death and executed - at the askance of the government.

liberty in all its facets. The British Government adopted this martial law as yet another effective means to deal with situations of emergencies - real and fancied - created as a result of growing demands for freedom and independence.

The earliest law during this period under which the government could proclaim martial law was the Bengal Regulation X of 1804.[137] The Government of India Act, 1915 contained express provisions[138] authorising proclamation of martial law. While martial was proclaimed by the government in Lahore and Amristar in 1919, the Governor General promulgated the Martial Law Ordinance. This Ordinance provided for the trial of martial law offences by a Commission to be appointed by the Local Government instead of Court-martial.[139] The Commission was authorised to exercise the powers of the Court-Martial under the Indian Army Act. The findings and the sentences of the Commissions were not subject to confirmation by the military authorities. And by another order passed by the G.G.-in - Council under the 1804 Regulation, the government suspended the functions of the ordinary criminal courts in those districts in so far as the offences arising out of the

137. The Regulation is known as Martial Law Regulation.

138. S.72. This section was retained in the Government of India Act 1919, also.

139. The Indian Army Act 1911 provided for only Court-Martial.

Ordinance of 1919. Though the procedures under martial law and the denial of the right of trial before the ordinary courts of law were challenged, the Privy Council held that the deprivation of such rights by the Ordinance was lawful.[140]

In 1921 martial law was proclaimed in Malabar to put down the 'Moplah Rebellion' under an Ordinance passed by the Governor-General.[141] Then in 1930, in the wake of the Civil Disobedience Movement, martial law was imposed in Sholpaur, through a Martial Law Ordinance of 1930.

Institution of Commissions, to be appointed by the local governments to try the martial law offences; the finality of the Commission's decisions without being subjected to any appeal; ousting of the jurisdiction of ordinary criminal courts; total exclusion of the procedures in the Criminal Procedures Code; and the abrogation of the writ of *habeas corpus* were the characteristic features of all these Martial Law Ordinances.[142] Still worse, was the indifferent and positivistic attitude of the judiciary towards this reign of terror and the total and arbitrary

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140. *Bugga* V. *The King Emperor*, 1920, 47 I.A.128; *Kali Nath Roy* V. *The Emperor*, 1920, 48 I.A. 96.

141. This Ordinance of 1921 was issued under s.72 of the Government of India Act, 1919.

142. See, for instance, Ss.6 and 16 of the Ordinance of 1921; and similar provisions in the Ordinance of 1930.

deprivation of the right to personal liberty of the individuals during the martial law. All these draconian provisions contained in these Ordinances were held lawful by the Court.[143] The judiciary refused to interfere even on the ground that the Commissions which tried the petitioners were not properly constitued. And the court maintained categorically that the sentences passed by the Commissions were not justiciable.[144]

From this brief account, one can see the grim picture of people's right to personal liberty that existed in the pre-Independence period. Under the preventive detention measures the government could detain any person for any period without trial. Through the special courts the government could secure the trial and conviction of any person at its own pleasure. And by invoking martial law in 'emergencies', the government could try, convict and even sentence to death any person on any ground through some Commission that could be set up by local governments. All these inhuman measures were marked by, certain common features such as unlimited and unguided executive discretion; exclusion of the jurisdiction of rules of

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143. See in re Kochuni Elaya Nair, 45 Mad.41; and In re Govindan Nair, 45 Mad.922 (FB) in which the Ordinance of 1921 was questioned. Also see Chanappa Shantirappa and other V. Emperor AIR 1931 Bom., 57 in which the Ordinance of 1930 was questioned.

144. In re Govindan Nair, AIR 1931 Bomb., 57, at p.60.

evidence; the ordinary courts and of the general rules of criminal procedure and barring of rights of appeal and revision; and the suspension of the remedy of habeas corpus. A deep distrust of the colonial government - for that matter any authroitarian regime - in the judiciary is strikingly manifest in all these measures which were adopted to curtail the personal liberty of the people. But unfortunately even the judicial attitude towards these serious invasions of personal liberty during this period had been, by and large passive and positivistic. Any rules framed by the executive under any law or ordinance could satisfy the courts as a justification for the deprivation of personal liberty of the individuals. All inconvenient questions were dubbed as questions of policy and not of law and so were outside the concern of courts.

There is another important aspect to be emphasised at this juncture, in the context of the political struggle for freedom and the repressive measures adopted by the British regime, as detailed above, the right to personal liberty, naturally, came to be understood, first and foremost, as the right to be free from being arrested or detained or imprisoned arbitrarily. Evidently, in this notion of personal liberty the (only) protection for the individual could be some standard or principle, inbuilt in the legal system, to ensure the absence of arbitrariness in

such cases of arrest or detention or imprisonment. - i.e. a just and reasonable protective norm. Unfortunately, a curious combination of the colonial attitude of the British regime and a matching judicial positivism had rendered the protective norm for personal liberty, in the pre-Independence era, bereft of fairness and justice. A semblence of procedure laid down by a semblence of law -- a 'procedure established by law'? -- is all what was required to deprive a person of his personal liberty.

It was against this background of harsh colonial experience of denial and deprivation of personal liberty that the people fought valiantly for their freedom and for a declaration of rights, including the right to personal liberty, as an integral part of their future constitution. Their demand for freedom was not a demand for mere change of rulers. The demand was for a new political and legal order; for a new system of values. It can, therefore, be reasonably assumed that their demand for right to personal liberty as a fundamental right was a demand for a new and broad concept of personal liberty; and for a new and just protective norm for personal liberty so that no future government under the new constitution would ever have recourse to those colonial measures to stifle the personal liberty of the individual in free India. The demand in substance, was for 'due process of law, as a guaranteed protection for their personal liberty.

Let us now consider the framing of Art.21 by the Constituent Assembly.

Personal Liberty And The Constituent Assembly - The Framing of Article 21

As envisaged in the Cabinet Misson Plan,[145] the Constituent Assembly on January 24, 1947 elected an Advisory Committee for reporting on minorities, fundamental rights and on the tribal and excluded areas.[146] Then on February 27, 1947 the Advisory Committee constituted a Sub-Committee on Fundamental Rights.[147] The Sub-Committee before formulating the list of fundamental rights, considered the various drafts submitted by its members.[148] In the draft list of fundamental rights, both K.M.Munshi and Dr.Ambedkar included the 'due process' clause as necessary protection to life, liberty and property.[149] Munishi's draft provided:

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145. See, Paragraphs 19 and 20 of the Cabinet Mission Plan 1946.

146. C.A. Deb., Vol.II pp.325-27.

147. See, B. Shiva Rao, The Framing of Indian Constitution - A study, Bombay, (1968), p.175.

148. The most prominent of such drafts were that of B.N.Rau, Alladi Krishnaswami Ayyar, K.M.Munshi and of Ambedkar See, B. Siva Rao, op.cit., p.176.

149. B.Shiva Rao, Framing of Indian Constitution: Select Documents, II, pp.67-114.

"No person shall be deprived of his life, liberty or property without due process of law".

The other provisions in the draft, which in effect elucidated the 'due process' clause, had guaranteed to every person the right to be informed, within twenty four hours of his deprivation of liberty, by what authority and on what grounds the action was being taken. Further, they provided that no person would be subjected to prolonged detention preceding trial, to excessive bail or unreasonable refusal of bail, to inhuman or cruel punishment or to denial of adequate safeguards and proper procedure.[150] Munshi attached great importance to the 'due process' clause, for, its basic concept, according to him, was: 'every citizen is entitled to fair treatment at the hand of the Executive and the Legislature, and the Judiciary should have the power to see that it is given'. To him this is at the heart of democracy.[151] Ambedkar's draft also provided that the State should not deprive any person of life, liberty or property without the 'due process of law'.[152]

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150. Munshi's draft, Articles V (1) (e) and V (4) and Article XII(3), Select Documents II, 4 (ii), pp.75, 79.

151. K.M. Munshi, Prilgrimage to Freedom, (1967), p.298.

152. Ambedkar's draft, Article II (1) (2), Select Documents II, 4 (ii) (d), p.86.

The Sub-Committee on Fundamental Rights discussed the subject on March 25, 26 and 29 1947, and included in its draft Report two clauses, 11 and 29:

11. No person shall be deprived of life, liberty or property without due process of law.

29. No person shall be subjected to prolonged detention preceding trial, to excessive bail, or unreasonable refusal thereof, or to inhuman or cruel punishment.[153]

In clause 29, it may be noticed, the provision regarding the right to be informed of the authority and ground of deprivation of one's liberty within twenty four hours, as originally proposed by Munshi, was omitted in view of the 'due process of law' provisions in cl.11.[154]

B.N. Rau -- whose influence was the single largest cause for the eventual exit of the 'due process' clause from the Constitution[155] -- in his comments on the draft Report pointed out how a substantive interpretation of 'due

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153. Minutes and Draft Report of the Sub-Committee, Annexure, Clauses 11 and 29. Select Documents II 4 (iii) and (iv), PP 119-20, 122, 132, 139, 141. See B. Shiva Rao, A study, op.cit., p.232.

154. B. Shiva Rao, ibid.

155. See. G. Austin, op.cit., p.102.

process' might interfere with legislation for social purposes and might result in a vast flood of litigation.[156]

The Sub-Committee again met on April 14 and 15, 1947 to consider the draft Report in the light of the comments received. But it reaffirmed its proposal for incorporating both clauses 11 and 29 in the Constitution, and thus reproduced them as clauses 12 and 28 in the final Report.

The clauses, then, came up before the Advisory Committee for consideration on April 21 and 22, 1947. Here, again, clause 28 was deleted by the Advisory Committee without any discussion,[157] 'presumbly because the Committee felt that the expression "due process of law" was wide enough to cover within its scope the contents of clause 28.[158]

Commenting on clause 12, A.K. Ayyar explained the uncertainties of the judicial interpretations of the phrase 'due process of law', referring to the American experience. He also pointed out that the aim of 'due process' was to limit legislative power; and the clause might endanger

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156. B. Shiva Rao, A study, pp.232-33.

157. Advisory Committee Proceedings, April 21 and 22 1947. Select Documents II, 6 (iv), p.276.

158. B. Shiva Rao, A study, p.233.

property, tenancy and other legislations. But he concluded his comments by saying 'personally, I am for the retention of the clause'.[159]

The most forceful criticism of the 'due process' clause in the Advisory Committee came from G.B.Pant. He argued that to fetter the discretion of the legislature would lead to anarchy. He maintained that legislatures should retain the power to pass laws for empowering the executive to detain persons for short periods, and for the acquisitions of private property for public purposes without being obliged to pay compensation at market rates.[160]

Ambedkar and Munshi defended the 'due process' clause. According to Ambedkar there is no need to give carte blanche to the government to detain with a 'facile provision'[161] Munshi replied to Pant that no provision prohibiting detention had been put in the clause so as not to fetter government action. But, he said, 'due process' prevented legislative extravagance, and there should be no fear that judges would replace the legislatures.[162]

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159. See, ibid., at pp.233-34; also G.Austin op.cit., p.85.

160. Ibid.

161. G.Austin, ibid., at p.85.

162. Ibid.

As B. Shiva Rao observed, Pant's view in regard to limiting the right to liberty did not find many sympathisers; but there was considerable support for his arguments regarding legislation dealing with property and tenancy.[163]

At this stage, as a possible way out of the practical difficulties created by coupling property along with 'life and liberty', K.M. Panikkar suggested that life and liberty should be separated from property. In his view, the courts should guard our life and liberty and there should be no detention; but property must be subjected to legislation.[164] Patel also agreed that 'property' should be separately dealt with. The Committee adopted this course; and the 'due process' provision was incorporated in clause 9 of the Report submitted to the Constitutent Assembly which read: "No person shall be deprived of life or liberty without due process of law.[165]

When this clause came up before the Constituent Assembly for consideration on April 30, 1947, the provision was adopted without any amendment being moved.[166] Thus the

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163. Shiva Rao, A study, p.234.

164. G. Austin, op.cit., p.86.

165. Interim Report of the Advisory Committee, Annexure, Select Documents II, 7 (i) pp.245-7, 247.

166. C.A. Deb., Vol.III, p.457.

'due process' clause was supported by the entire Constituent Assembly as a protective norm for the liberty of the individual.

And the Constitutional Advisor, B.N.Rau reproduced this provision in clause 16 of his Draft Constitution published in October 1947. But in doing so, by another stroke, he restricted the scope of the expression "liberty" by adding the word "personal" before it.[167] His justification for the change was that the word "liberty" by itself might be construed widely so as to include even freedom of contract unless it was qualified by the word "personal".[168] And this change was also approved by the Drafting Committee at its meeting on October 31, 1947.[169]

Yet another stroke to this clause was in the offing when B.N.Rau under-took his trip to the United States, and other countries for consultations and study about the framing of the Constitution. During that visit Rau had discussions with Justice Frankfurter of the United States Supreme Court who was of the opinion that the power

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167. Rau, Draft Constitution, Cl.6. This change narrowed the scope and meaning of liberty considerably. See, Alexendrowicz, Constitutional Developments in India, (1957), pp.11-13.

168. Select Documents III, 1(ii), p.199.

169. See, Draft Constitution, February 1948, f.n. to Article 15; also see Rau, Indian Constitution, (Ed) by B.Shiva Rao, p.303.

of judicial review implied in the 'due process' clause was both undemocratic -- because a few judges could veto legislation enacted by the representatives of the people -- and burdensome to the Judiciary. This view was communicated by B.N.Rau to the Drafting Committee;[170] and later he suggested specifically that the 'due process' clause be eliminated in favour of the phrase 'according to the procedure established by law', a phrase borrowed from Article 31 of the Japanese Constitution.

The Drafting Committee took up the matter again during its meetings in January 1948; and on 19th January the members decided to omit 'due process', after giving a deceptively simple reason that the expression 'procedure established by law' was "more specific" -- a fatal blow, indeed, to personal liberty in free India. The text of the provision, thus recast by the Drafting Committee, was incorporated in Article 15 of the Draft Constitution:

> "No person shall be deprived of his life or personal liberty except according to the procedure established by law..."[171]

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170. Rau's letter to Prasad, dated 11 November 1947, <u>Prasad Papers</u>, File 2-N/47. See, G.Austin, <u>op.cit</u>., p.103.

171. Draft Constitution, February 1948, Article 15, see f.n. to the article. <u>Select Documents</u>, III 6, p.523.

Commenting on the decision of the Drafting Committee, Granville Austin observed: "It was Rau's enthusiastic espousal of Frankfurter's views that originally caused the Drafting Committee to reconsider the issue".[172] But it is still unbelievable - and mysterious too -- how the Drafting Committee could have surrendered abjectly to the will of B.N. Rau, ignoring the will and collective wisdom of the entire Constituent Assembly, as expressed on April 30 1947 by voluntary and unanimous adoption of the 'due process' clause as a protection for liberty -- a cause for which the people of India had fought valiantly and rallied behind the national leaders during the freedom struggle. After making a painstaking study, Austin himself conceded that 'it was not clear precisely what happened'[173] in the Drafting Committee. As regards B.N. Rau's influence as a causative factor for the elimination of "due process" clause, one may agree with the remarks made by

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172. G.Austin, op.cit., p.104.

173. Austin, who attempted to reconstruct the events, indicates that of the seven members of the Drafting Committee at least four - Munshi, Ambedkar, Ayyar and M.Saadulla - were known supporters of the 'due process' clause; and of these four, except Munshi, all others might have changed sides; Ayyar more openly than Ambedkar or Saadulla. He also refers to Rau's influence on Ayyar; and to the increasing conviction of others as to the indispensability of preventive detention to meet the political turbulance created by the communal violence during that period. See Austin, ibid., at p.104.

K.M.Munshi -- an uncompromising champion of that clause.[174] He says: "If Justice Black of the Supreme Court of the U.S.A., had been consulted, possibly he would have given an opinion contrary to Justice Frankfurter's".[175] Perhaps, could then the "due process" clause have been retained in the Draft Constitution?

The draft Article 15 was debated in the Constituent Assembly on 6 and 13 December, 1948. By that time the disapproval of the Drafting Committee's action became evident in the amendments to the draft submitted by Assembly members. There were not less than twenty amendments sponsored by the members.[176] Of them, twelve would have reintroduced 'due process', and the remaining eight would have replaced 'procedure established by law' by 'save in accordance with law',[177] an expression which would have made the right to personal liberty justiciable.[178] The entire debate centred on the controversy about 'due process'; and in the debates all the members who spoke,

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174. Ibid.

175. K.M. Munshi. Pilgrimage to Freedom, p.298. However, Justice Frankfurther's opinion carried weight with Alladi and B.B. Rau.

176. See, B. Shiva Rao, A study, p.236; also G. Austin, op.cit., p.104.

177. Ibid.

178. See, speeches of M.A. Baig and T.D. Bhargava C.A.Deb., Vol. VII, pp.845-46.

except an ambivalent Ayyar and an apologetic Ambedkar, favoured the restoration of 'due process of law' as a protection for personal liberty. Besides, each one of those speeches in support of 'due process' was marked by wisdom, reason and feeling.

On December 6, 1948 Kazi Syed Karimuddin moved an amendment to the draft Article 15: "No person shall be deprived of his life or liberty without due process of law".[179] Speaking on the amendment, both Karimuddin and Mahboob Ali Baig pointed out that the use of the phrase "procedure established by law" stripped a court of the power to go into the merits and demerits of the grounds on which a person was deprived of his life or liberty; a court could not look into the injustice of any law or of a capricious provision in any law since its function would come to end the moment it was statisfied that the "procedure established by law" had been complied with.[180] Further M.A. Baig exposed the unsoundness of the Drafting Committee's claim about the Japanese Constitution as its precedent for using the phrase "procedure established by law".[181] Referring to Articles 32,34 and 35 of the Japanese Constitution, Baig

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179. Admendment No.528, see C.A. Deb., Vol.VII, p.843.

180. C.A. Deb., Vol.VII, pp.843-44.

181. See, Draft Constitution, Article 15 f.n. This clause is taken from Article 31 of the Japanese Constitution, 1946.

pointed out that in that Constitution several fundamental rights endangered by the omission of due process had been separately guaranteed. For instance, the right of a person not to be detained except on adequate cause, and unless at once informed of the charges against him, the right to counsel and to an immediate hearing in open court, and the right of a person to be secured against entry, search etc., except on a warrant,[182] were found expression in that constitution. And, he said, if those rights were also incorporated along with the 'procedure established by law' of Art.31 of the Japanese Constitution in the draft that would have been a complete safeguard of the personal liberty; but 'Article 15 of the Draft Constitution was devoid of all this'.[183]

Pandit Thakur Dass Bhargava, supporting Karimuddin's Ammendment, explained that if the phrase 'due process of law' was used, the courts could go into the question of substantive as well as procedural law; i.e., the courts would have the right to go into the question whether a particular law enacted by Parliament was just or unjust, and whether or not, as a matter of fact, it protected the liberties of the people; and if the Supreme Court came to

182. C.A. Deb Vol.VII, pp.844-45.

183. Ibid.

the conclusion that any law was unreasonable or unjust such a law would be held to be unconstitutional.[184] To allay the misgivings about the power of courts implicit in 'due process', he reminded the members that the House had already accepted the word "reasonable"[185] in Article 13, an expression which essentially conferred the same kind of powers on the courts as the 'due process', and that 'in a democracy the courts were the ultimate refuge of the citizens for the vindication of their rights and liberties'. Regarding the argument that the 'due process' clause would weaken the administration due to uncertainties, he said: "But our liberties will be certain, though the particular law which may be reviewed by the Court may become uncertain. Administration will not be weakened; but, of course, administration will not have its way". Expressing the mood of most of the members, he added: "But we want to have a government which will respect the liberties of the citizens of India".[186]

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184. Ibid., at p.846; C.C. Shah also expressed the same view, see ibid., at p.848.

185. Ibid., at p.847. When the draft Article 13 was taken up for debate on December 1, 1948. T.D. Bhargava moved an amendment to insert the word 'reasonable' before the word 'restriction' as used in the sub-clauses of that article. The House accepted the amendment. See, C.A. Deb., Vol.III, pp.736-39.

186. C.A. Deb., Vol.VII, p.848.

K.C. Sharma, in his speech, supporting the 'due process' clause maintained that this clause did not laydown a specific rule of law, but it implied a fundamental principle of justice, as 'a necessary limitation on the powers of the State, both excecutive and legislative'.[187]

C.C. Shah, speaking on the Amendment No.528, favoured the "due process" clause as a protection for personal liberty, which according to him, was 'the most fundamental of the Fundamental Rights without which all other rights would be meaningless'.[188] To dispel the apprehension entertained in some quarters as to the substantive interpretations of 'due process' and the consequent controversies and uncertainties as they occurred in the American context,[189] C.C. Shah said:

> "But the article in our Constitution is in two respects entirely different from the article in the United States Constitution. There the words (due process of law) were used in connection with life, liberty and property. Here we have omitted

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187. Ibid., at p.850.

188. Ibid., at p.848.

189. As we have noted earlier, this aspect was the main thrust in the arguments of B.N. Rau and Alladi for the removal of 'due process' from Article 15.

the word "property", because it is in connection with this word, there has been a good deal of litigation and uncertainty. There has been practically no uncertainty as regards the interpretation of the 'due process' clause as applied to life and liberty. Secondly, 'liberty' has been qualified by adding the word "personal" to make it clear that this article did not refer to any kind of liberty of contract or similar rights".[190]

K.M. Munshi, in support of the Amendment, pleaded that in a democracy there must be some independent agency to strike a balance between social control and individual liberty, and that the 'due process' clause was the only deterrent to irresponsible legislation.[191] He also emphasised that with the omission of the word "property" and the addition of the word "personal" before "liberty", the 'due process of law' provison had become unexceptional and no longer vulnerable to the difficulties of interpretation to which the 'due process' clause in the U.S. Constitution was subject.[192] He explained that the 'due process' clause

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190. C.A. Deb. Vol.VII. p.849.

191. Ibid., at p.852.

192. Ibid., On this point K.M. Munshi agreed with the views of C.C. Shah.

would enable the courts to examine not only the procedural but also the substantive law. In other words, the courts would examine whether the law, authorising the deprivation of personal liberty was required by the exigencies of the case and that will strike a balance between individual liberty and social control.[193] Expressing his anxiety over possible legislative vagaries, he said:

> "We have, unfortunately in this country legislatures with large majorities, facing very severe problems, and naturally, there is a tendency to pass legislation in hurry which may give sweeping powers to the executive and the police. Now there will be no deterrent if these legislations are not examined by court of law".[194]

Referring to the conditions prevailing at that time, Munshi said:

> "Our emergency at the moment has perhaps led us to forget that if we do not give... it (the individual liberty) the protection of the courts, we will create a tradition which will ultimately destroy

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193. Ibid.

194. Ibid.

even whatever little of personal liberty which exists in this country. I, therefore, submit, Sir, that this amendment should be accepted".[195]

L.H. Lari, strongly supporting the "due process" clause, stressed the importance of the right which that clause intended to protect. He said: "We all know that the state, these days, is all powerful. Its coercive processes extend to the utmost limits, but still there is a phase of life which must be above the processes of Executive Government, and that is individual liberty".[196] He opined that the essence of the "due process of law" provision was two-fold. First, there would be an enquiry before a man was condemned, and then there would be a judgement after trial. On the other hand, if the words "procedure established by law" were adopted, it would mean that the legislature was all-powerful.[197] According to him, the risk is much more in the context of a Parliamentary Government in which the legislature is controlled by a cabinet, which means by the executive.[198] Referring to the instances of legislation in

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195. Ibid., p.853.

196. Ibid., p.855.

197. Ibid. He referred to the Human Rights Documents and to the clause therein which states that nobody should be subjected to arbitrary detention.

198. Ibid., at p.856 H.V. Pataskar, who favoured the 'due process' clause, also shared these views. See, ibid., at p.851.

the British period, of rights which were curtailed, and of innocent persons jailed, he cautioned the House thus: "... every legislature and every government is liable to do such things which the British Government did. You can not excuse the excesses of law simply because those excesses are committed by a popularly elected legislature".[199] As to the stability and security of the State, he said that there were sufficient provisions in the Constitution enabling the government to deal with them.[200] He also explained, referring to the experience of others, that the words "due process of law" could exist without jeopardising the existence of the State; and that, not only here, but throughout the world, every assembly was likely to misuse its power.[201] He appealed to the House not to be carried away by the argument that there seems to be some germ of disruption in the 'due process' clause. Expressing his anguish, he said:

> "If this clause is not accepted then the whole Constitution becomes lifeless. The Article (15), as it sands, is lifeless and it makes also the whole Constitution lifeless. Unless you accept

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199. Ibid.

200. Ibid.

201. Ibid., at p.857.

this Amendment, you would not earn the gratitude of future generations".[202]

Alladi Krishnaswami Ayyar, raising his 'lone voice'[203] in support of the retention of the expression "procedure established by law" as against the "due process" provision, argued that the verdict of three or five judges on what exactly was the "due process" according to them in a particular case could not be treated as more democratic than the expressed wishes of the legislature or the action of an executive responsible to the legislature. He also referred to the lack of uniformity in the judicial interpretation of the phrase in the United States.[204] Referring to the procedural importance of "due process" he said:

"The expression 'due process' itself as interpreted by the English Judges connoted merely the due course of legal proceeding according to the rules and forms established for the protection of rights, and a fair trial in a court of justice according to the modes of proceeding applicable to the case. Possibly, if the expression has been understood

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202. Ibid.

203. B.Shiva Rao, A study, p.237.

204. C.A. Deb. Vol.VII, p.853.

according to its original content and according to the interpretations of English Judges, there might be no difficulty at all".[205]

But he could not accept that clause in the Indian Constitution because 'the expression as developed in the United States Supreme Court had acquired a different meaning and import'. And he justified the Drafting Committee's decision to exclude the 'due process' clause on the ground that its substantive interpretation might impede social legislation.[206]

The stand taken by A.K. Ayyar in the Assembly seems to be very strange for more than one reason. First of all, only on the face of these identical arguments he supported the 'due process' clause in the Advisory Committee in its meeting on April 21, 1947.[207] In spite of the possibility of substantive interpretations, he was willing to accept the 'due process' clause because of its procedural importance in the context of personal liberty. But now in the Assembly he took just the opposite view. Secondly, he could not put forward any new argument in support of his

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205. Ibid.

206. Ibid.

207. See, the proceedings of the Advisory Committee meeting 21 April 1947.

changed position. And finally, he never explained in his speech why he had changed his position. All this boils down to this fallacy: To Ayyar the grounds and arguments were the same both for accepting as well as for rejecting the 'due process' clause. It was really one of the "sorriest performances ever put on by the Assembly leadership".[208]

Despite the fact that A.K. Ayyar had upheld the Drafting Committee's decision to drop the 'due process' clause, his ambivalence on the issue was still manifest in his speech in the Assembly. He said:

> "The support which the Amendment (No.528) has received reveals the great faith which the Legislature and the Constitution makers have in the Judiciary. The Drafting Committee in suggesting "procedure" for "due process of law" was possibly guilty of being apprehensive of judicial vagaries in the moulding of law. The Drafting Committee has made the suggestion and it is ultimately for the House to come to the conclusion whether that is correct, taking into consideration the security of the State, the need for liberty of the individual and the harmony between the two. I am still open

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208. G. Austin, op.cit., p.106.

to conviction and if any other arguments are forthcoming I might be influenced to come to a different conclusion".[209]

In view of the trend of opinion in the Assembly, further consideration of the draft Article was postponed, as suggested by Ambedkar.[210]

After a week, the Article was again taken up for debate on December 13, 1948. Dr. Ambedkar was called up to reply. Ambedkar opened his reply in an apologetic tone thus: "I must confess that I am somewhat in a difficult position with regard to Article 15 and the amendment moved by my friend Pandit Bhargava for the deletion of the words "procedure established by law" and the substitution of the words 'due process'".[211] He then proceeded to explain the implications of "due process". According to him 'the question of 'due process' raised the question of the relationship between the legislature and the judiciary'. Under the 'due process' clause, the judiciary would be endowed with authority to question the law passed by legislature not merely on the ground whether it was in excess of the authority of the legislature, but also on the

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209. C.A. Deb. Vol. VII, p.854.

210. See, ibid., at p.859.

211. Ibid., at p.999.

ground whether that law violated certain fundamental principles relating to the rights of the individual.[212] And the question would be whether the judiciary should be given this additional power of review. On this question he succinctly placed before the Assembly the two sharply divergent points of view and the difficulties implicit in each of them: one view was that the legislature could be trusted not to make any law which would abrogate the fundamental rights applicable to every individual. The other view was that it was not possible to trust the legislature; the legislature was likely to err, to be led away by passion, by party prejudice, and might make a law abrogating the fundamental rights of a citizen.[213] Admitting that it was difficult to take any definite conclusion, for, there were dangers on both sides, Ambedkar said:

> "For myself I can not altogether omit the possibility of a Legislature packed by partymen making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining

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212. Ibid., at p.1000.

213. Ibid.

laws made by the Legislature and by dint of their own individual conscience, or their bias or their prejudices be trusted to determine which law is good and which law is bad. It is rather a case where a man has to sail between Charybdis and Scylla and I therefore would not say anything. I would leave it to the House to decide in anyway it likes".[214]

Thus, Ambedkar' torn between his belief in 'due process' and his official duty to uphold his Committee's decision, remained on the fence'.[215]

All the amendments for replacing the words "procedure established by law" by the words "due process of law" or other similar expressions were defeated, and on 13 December, 1948 Article 15, without the 'due process' clause was adopted.[216] This Article 15 was reproduced in the Constitution of India as Article 21 in its present form:

> "No person shall be deprived of his life or personal liberty except according to the procedure established by law".[217]

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214. Ibid., at pp.1000-01.
215. G. Austin, op.cit., p.106.
216. C.A. Deb. Vol.VII, p.1000-1.
217. The Constitution of India, Art.21.

From this brief history of the framing of Article 21, which makes the right to personal liberty as a constitutional guarantee in India, one can legitimately draw certain inferences which may have far-reaching consequences.

Though the draft Article 15, in the present form was adopted by the members of the Constituent Assembly on that day, it appears that in so doing the members had obeyed the whip;[218] and not the dictates of their conscience and reason or their conviction. The wording of Article 21 (the draft Art.15) miserably failed to reflect the will and intention of the members of the Constituent Assembly[219] as well as the aspirations of the people.[220] The intense feeling of dissatisfaction as to the wording of the article was acknowledged by none other than Dr.Ambedkar himself. Ambedkar noted that Article 15 had been violently criticized by the Indian public; and he said: 'a large part of the House, including myself, were greatly dissatisfied with the wording of the Article'.[221] The controversy and discontent over the exclusion of 'due process' in the Article had been widespread. Even A.K. Ayyar recognised that 'a good number

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218. See, G. Austin, op.cit., pp.106 and 109.

219. See, the sequence of events in the Constituent Assembly and the views expressed by the Members.

220. See, the brief history of the peoples' demands for freedom and liberty as discussed earlier.

221. See C.A.Deb., Vol.IX, pp.1496-7.

of members in this House' favoured the retention of 'due process'.[222] And public reaction to the omission of 'due process' during 1949 was most unfavourable. In Ambedkar's own words: "No part of our Draft Constitution... has been so violently criticized by the public outside as Article 15".[223] Thus it appears that the intention of the members of the Constituent Assembly was to guarantee the 'due process of law' and not the 'procedure established by law' as a protection to personal liberty and that Article 21 as it was framed had failed to give effect to that intention. This point can further be substantiated by a brief reference to the subsequent conduct of members in the Constituent Assembly during the debate on the newly introduced Article 15 A, dealing with safeguards for persons under arrest and detention.

Though Article 15 was adopted in December 1948, the vote of the Assembly did not finally set the controversy at rest. In the absence of 'due process' people, both within and outside the Constituent Assembly were apprehensive of executive excesses and legislative vagaries as a potential threat to personal liberty. It was widely felt that draft Article 15 gave to Parliament a _carte blanche_ to provide for the arrest of any person under any

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222. _C.A._ _Deb_., Vol.VII, p.853.

223. _C.A._ _Deb_., Vol.IX, p.1497.

circumstance it deemed fit.[224] In May 1949 the Assembly members, with a determination to restore at least some safeguards for personal freedom, had moved certain significant amendments in order to curtail the executive's power to detain.[225] It was as a tangible result of the mounting pressure of the Assembly members on its leaders, Dr. Ambedkar introduced a new Article 15 A in the Constituent Assembly on 15 September 1949. So the introduction of this new article itself is suggestive of the conviction of the members as to the 'due process' protection.

Article 15 A,[226] provided that any arrested person must be produced before a magistrate with in twentyfour hours of his arrest, informed of the grounds of arrest, and detained further only on the authority of the magistrate. The arrested person should not be denied counsel. But these provisions were not to apply to persons held under preventive detention laws. An individual so held could not be detained longer than three months unless an Advisory

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224. Dr. Ambedkar also shared this view in his speech while introducing Article 15A. C.A Deb., Vol.IX, p.1497; also see, G.Austin, op.cit., p.109; B.Shiva Rao, A study, p.238.

225. For instance, Amendments 52, 53 and 54 of consolidated list of 5 May, 1949 - See, G. Austin, op.cit., p.109.

226. For the text of Article 15A, see, C.A. Deb., Vol.IX, pp.1496-7.

Board supported further detention, and unless laws permitting greater periods of detention were in existence. Parliament could by law prescribe: "The circumstances under which and the class or classes of cases in which a person who is arrested under any law providing for preventive detention may be detained for a period longer than three months and also the maximum period for which any such person may be detained".[227]

Introducing this Article in the Assembly, Ambedkar observed that they were "making, if I may say so, compensation for what was done then in passing Article 15". "In other words", he said, "we are providing for the substance of the law of "due process" by the introduction of Article 15 A".[228] What is important to us, for the moment, is not whether this new Article really amounted to a 'compensation' for the loss of 'due process' in Article 15, as Ambedkar claimed; but the fact that this statement of Ambedkar further fortifies our conclusion that it was not the intention of the Constituent Assembly to do away with "due process" as a protection to personal liberty; and still the intention was to restore the "substance of the law of

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227. The provisions as summed up above is taken from G.Austin, op.cit., pp.109-10.

228. C.A.Deb., Vol.IX, p.1497. Commenting on this claim of Ambedkar, K.M.Munshi quipped: "A strange claims from such a constitutional expert". See Munshi, Pilgrimage to Freedom, p.301.

due process". This new Article as well as its projection as a 'compensation for 'due process', however, did not allay the apprehensions of the members.[229] It was followed by a long and spirited debate, which once again brought to light the anguish and disappointment of the members over the omission of 'due process' in Article 15. And most of the members were of the view that the new Article 15 A could never be a 'compensation' for the 'due process clause'; and that the safeguards against arbitrary arrest and detentions provided in the Article were highly inadequate or even illusory. Many amendments were also moved in this regard.

Pandit Thakur Das Bhargava, in his Amendment, pleaded for certain very important safeguards such as right to access to courts and to be defended by counsel in all proceedings and trials; right not be a subjected to unreasonable restraints and searches of person and property; right to speedy and public trial, to cross - examine and to produce his defence, to at least one appeal; right of the detained persons not to be subjected to hard labour or unnecessary restrictions; freedom from torture etc.[230] Here also, he maintained that the "due process" clause should be there in Article 15, and that Article 15 A could not be a

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229. B. Shiva Rao, A Study, p.239.

230. C.A. Deb., Vol. IX, pp.1498-99.

compensation for that clause.[231] Reflecting the feelings of most of the members in the Assembly, he said:

> ".... it is most unfortunate to this country that we have not been able to pass this 'due process' clause .... The first casualty in this Constitution is justice. After all what is a fundamental right? A fundamental right is a limitation of the powers of the executive and legislature..... Article 15 is the crown of our failures, because by virtue of article 15 we have given the executive and the legislature power to do as they like with the people of this country so far as procedure is concerned".[232]

In this context he had also accused the Drafting Committee for its 'failure to carry out the will of this House' and he said: "It has succumbed to extraneous influences from other authorities".[233] This is another

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231. Ibid., at p.1501.

232. Ibid.

233. Apart from the Drafting Committee's omission of 'due process' in Art.15, Bhargava referred to the way in which an amendment moved by Karimuddin, seeking 'the right of the people to be secure in the persons, houses, papers and effects against unreasonable search and seizures, was treated. The amendment was accepted by Ambedkar; the Vice-President said twice that the amendment was accepted. Then the question was again raised and ultimately it was negatived. See ibid., at p.1506.

significant aspect which came to surface during the debates on Article 15 A. Many others in the Assembly also referred to this aspect.

Dr.P.S. Deshmukh, in his speech, said that Article 15 A was not a real and adequate remedy and it was better to omit it, leaving personal liberty to Article 15. Expressing his anguish, he further said:

> "The situation is grave. Our respect for law is certainly decreasing. We are ruling our people in a manner much less generous than the aliens did... If you want to safeguard the freedom of the people and their liberty, there should be a more radical provision in the constitution than what has been proposed".[234]

H.V. Kamath suggested that it should be clarified that the jurisdiction of the Supreme Court and the High Courts, especially in regard to their power to issue writ of habeas corpus, was not sought to be barred in cases of preventive detentions;[235] and that the constitution should specifically guarantee that no detinue will be subjected to physical and mental ill-treatment.[236] In view of

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234. C.A. Deb., Vol.IX, p.1514.

235. Ibid., at pp.1517-18.

236. Ibid., at p.1517.

Parliament's power to prescribe the maximum period of detention, as proposed in cl.(4) of Article 15 A, Kamath argued: "... there must be the courts of justice to go into every case and decide as to whether every person detained under that law has been justly detained, has been fairly detained and has been detained for longer than is absolutely necessary".[237]

H.V. Pataskar also lamented the failure of the Assembly to retain the 'due process' clause; and maintained that Article 15 A was not a compensation for that clause.[238]

Dr. Bakshi Tek Chand, in his cogent and powerful speech, pointed out that the provisions contained in Article 15 A were no better than those contained in the various Public safety Acts, Rules under the Defence of India Act, and the notorious Rowlatt Act (1919);[239] and said: 'I consider article 15 A as the most reactionary article that has been placed by the Drafting Committee before the House, and therefore I would ask the House to reject it altogether and not allow it to form part of the Constitution'.[240] No written constitution in the world provided for detention

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237. Ibid., at p.1519.

238. Ibid., at pp.1527-8.

239. Ibid., at p.1527.

240. Ibid., at p.1529.

without trial in this manner in normal times. 'It is not to be found even in the Japanese Constitution, which the Drafting Committee purports to follow. Article 15 A does not give any fundamental right to the people. In fact it is a charter for denial of liberties'.[241] Referring succinctly to the entire history[242] of Articles 15 and 15 A, he remarked: "It is strange, indeed, how the members of the Drafting Committee have drifted from the position which they had originally taken to the submission of the present article 15 A".[243]

A.K. Ayyar defended both Article 15 with out the 'due process' clause and Article 15 A as introduced by Ambedkar.[244]

Jaspath Roy Kapoor described Article 15 A as 'one more illustration of the conservatism which characterises the Chapter on Fundamental rights', and called that Chapter as 'Limitation on Fundamental Rights'. He also pointed out, as a defect, that under clause (4) of Article 15 A, it was not obligatory on Parliament to prescribe the maximum period.[245]

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241. Ibid.

242. See ibid., at pp.1529-32.

243. Ibid., at p.1529.

244. Ibid., at p.1536.

245. Ibid., at p.1541.

Ananthasayanam Ayyangar 'would have very much liked to retain the words "due process of law" in the original Article itself'.[246] And Mahavir Tyagi said that Article 15 A would only 'enable the future governments to detain people and deprive their liberty rather than guarantee it'.[247]

Dr. P.K. Sen supported the views expressed by Bhargava and Tek Chand on the 'due process' clause. He also referred to "extraneous forces", influencing the decisions of the Chairman, Dr. Ambedkar.[248] Pandit H.N. Kunzru also expressed dissatisfaction over the adequacy of safeguards provided by Article 15 A.[249]

B.P. Gupta described Article 15 A as 'an attempt to rescue something out of fire that eliminated that phrase "due process of law". He said:

> "Article 15 concerns the most vital of all the Fundamental Rights, viz., the right to life and personal liberty. Those of us who advocated the

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246. Ibid., at p.1544.

247. Ibid., at p.1547.

248. Ibid., at p.1550 Shri B.p.Gupta also alleged such influence of 'those who occupied seats of authority and responsibility', at p.1554.

249. Ibid., at p.1551.

adoption of that phrase wanted to give that right the essence of Fundamental Right. And what is the essence of Fundamental Right? In the small field of basic needs of the civilized man, the limitation on the sovereignty of the legislature and to that extent the supremacy of the judiciary, are the essence of the Fundamental Rights. Unfortunately we were defeated".[250]

He pointed out that Article 15 A did not in any way seek to restore that supremacy, for, the 'carte blanche' given by Article 15 to the Parliament for the arrest of any person under circumstances that Parliament might think fit' was very much there; and that power of Parliament was not substantially restricted by the propôsed Article 15 A.[251]

Sensing the mood of the Assembly from the spirited arguments and expositions presented by the members regarding the protection of personal liberty, Dr. Ambedkar, said, in his reply to the debate:

"As I said, I myself and a large majority of the Drafting Committee as well as the public feel that

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250. Ibid., at p.1553.

251. Ibid.

in view of the language of article 15, viz., that arrest may be made in accordance with a procedure laid down by the law, we had not given sufficient attention to the safety and security of individual freedom. Ever since that article was adopted I and my friends had been trying in some way to restore the content of due procedure in its fundamentals without us the words 'due process'"[252]

Then he explained the implication of each clause in Article 15 A, and appealed to the members to accept Article 15 A in good spirit.[253] And that Article was, finally, passed by the Assembly on 16 September, 1949[254] and was reproduced as Article 22 of the constitution.

But the issue was not yet settled. The executive, at the instance of the Home Ministry, was determined to have its way. As a matter of fact, even prior to the introduction of Article 15A in the Assembly, the Home Affairs Ministry took 'very strong objections' to the powers provided for Advisory Boards.[255] The Government

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252. C.A. Deb., Vol.IX p.1556.

253. Ibid., at pp.1557-59.

254. Ibid., at p.1559.

255. See, Letter from S.N. Mukerji (Assembly Secretary) to H.V.R. Iyengar, Home Secretary, dated 16 August, 1949, and the reply to it. Letter from H.V.R. Iyengar to S.N. Mukerji, dated 19-20 August, 1949, Law Ministry Archives. See G. Austin, op.cit., p.110.

categorically stated in its letter to the Assembly Secretariate that 'it would not be possible for the executive to surrender their judgement to an Advisory Board as a matter of constitutional compulsion';[256] and the Ministry wanted the details of detention to be left to the legislatures. It was on the face of this objection of the Home Ministry, Ambedkar introduced in the Assembly Article 15 A,[257] which was eventually passed by the members with all the reservations they had.

Soon after that, on 15 November 1949, T.T. Krishnamachari moved an Amendment in the Assembly, apparently embodying the avowed view of the Home Ministry that 'there was to be no interference with executive actions in detention cases'.[258] The Amendment conferred on Parliament the power to prescribe the maximum period of detention, the power to prescribe the categories of cases in which a person could be detained for longer periods than three months 'without obtaining the opinion of an Advisory Board', and the power to lay down the procedure to be followed by Advisory Boards. Pushing through the Amendment Krishnamachari said that a number of members had seen it and

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256. Ibid.

257. Ibid.

258. G. Austin, ibid., at p.111.

agreed with its terms', and also tried to convince the members by pointing out that by this Amendment 'indefinite detentions had been made impossible'.[259] But, as remarked by Granville Austin, he failed to point out that this Amendment made it possible for Parliament to make laws providing for detention unscrutinized by Advisory Boards and could so circumscribe Advisory Board's procedure as to make it useless as protections of personal liberty.[260] A helpless Ambedkar had to defend it by saying, perhaps with great inner struggle, that the amendment lessened the 'harshness' of Article 15 A.[261] And the Assembly had to accept (or acquisece in?) the Amendment, which subsequently became part of clause (7) of Article 22 of the Constitution.

Thus whatever little safeguard was there in Ambedkar's Article 15 A had found its exit through Krishnamachari's Amendment, which in fact made the 'compensation' for the 'due process' clause in Article 15 A not only inadequate but illussory. Parliament still continued to have the '*carte blanche*' to provide for the arrest of any person under any circumstance it deemed fit'.

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259. For the text of the Amendment and Krishnamachari's defence of it see, *C.A. Deb.*, Vol.XI, p.531.

260. G. Austin, *op.cit.*, p.112.

261. *C.A. Deb.*, Vol. IX, p.576.

Ambedkar's effort 'to restore the substance of the law of due process' as a protection to personal liberty fell to ground.

This brief resume of the proceedings and debates on Article 15 A in the Assembly, subsequent to the adoption of Article 15, further strengthens our inference, as has already been drawn, that the intention of the Constituent Assembly was to guarantee the protection of "the due process of law" to personal liberty, and that the language of Article 21 (Draft Article 15) did not give effect to that intention. Ambedkar himself acknowledged, in his reply, this aberration that occurred in the framing of Article 21. Precisely for that reason, 'ever since that Article was adopted, he 'had been trying in some way to restore the contents of the 'due process of law'. But, his attempts to restore the substance of the law of 'due process' without using that word 'due process' did not appear to have ever succeeded.

Thus the Constituent Assembly could not secure a just protective norm for personal liberty. It could not succeed in its attempts to restore even the contents of 'due process' and thereby to 'compensate' the omission of 'due process' in Article 21, much to the dissatisfaction of the people and quite contrary to the intentions of the substantial majority of the members of the Assembly. The

right to personal liberty in Art.21 of the Indian Constitution was thus left with the protection only of 'a procedure established by law' - the same old colonial standard.

Though the members of the Assembly fought althrough, first, for the retention of 'due process' in Article 21, and then for the restoration of the substance of 'due process' through Article 22, in the end they seemed to have "pinned their faith upon the mercy of the legislature and the good character of their leaders" and perhaps more possibly upon the wisdom of the judiciary and the dynamics of its interpretative process for the protection of the right to personal liberty of the people.

Let us, therefore, turn to the Supreme Court of India, which, the Constitution, recognises as the protector and guarantor of the liberty of the individual and as the ultimate authority to interpret the Constitution.

PART II

PERSONAL LIBERTY AND JUDICIAL PROCESS: THE GOPALAN ERA

CHAPTER III

THE CONCEPT OF PERSONAL LIBERTY IN ARTICLE 21 - MEANING AND CONTENT

Personal Liberty and Judicial Process - General:

The Constituent Assembly has secured to the people of India the guarantee that "No person shall be deprived of his... personal liberty except according to the procedure established by law".[1] The issues such as the meaning and content of personal liberty, and the nature and scope of the protection of 'the procedure established by law' were destined to be expounded by the Supreme Court through judicial process. The Supreme Court has been envisaged as the ultimate authority to interpret the Constitution, as the guardian of the Constitution, and as the protector and guarantor of the the fundamental rights.[2] Having realised that if the fundamental rights are placed at the mercy of

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1. The Constitution of India, 1950, Art.21.

2. See Granville Austine, The Indian Constitution - Cornerstone of a Nation, (1972), p.165 et. seq. For the judicial confirmation of this view in the year 1950 itself, see Romesh Thapper V. State of Madras, A.I.R. 1950 S.C.124 (where the Court declared: "... the Supreme Court is constituted as the protector and guarantor of Fundamental Rights").

Parliament, they would cease to be fundamental, it has been provided that any law, made by the State, which takes away or abridges the fundamental rights shall be void;[3] and that any person who is deprived of his fundamental rights shall be entitled directly to approach the Supreme Court for the enforcement of such rights.[4] The Supreme Court is armed with the power of judicial review, in exercise of which it can issue any appropriate writ or order or direction for the enforcement of the fundamental rights[5] - a process entailing constitutional interpretation and, if need be, invalidation of state action, including legislation. Thus the Constitution has made judicial process as the bulwark of personal liberties. The role and significance of the Supreme Court endowed with the power of judicial review, as perceived by the Constituent Assembly, may be gathered from the words of Dr. Ambedkar; He said:

> "... If I was asked to name any particular article in this Constitution as the most important - an article without which this Constitution would be a nullity - I could not refer to any other article except this one (the present Art.32). It

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3. The Constitution of India, Art.13.
4. Ibid., Art.32.
5. Ibid.

is the very soul of the Constitution and the very heart of it and I am glad that the House realised its importance".[6]

The Supreme Court, as the apex of an integrated judicial system has emerged as a powerful instrument for upholding the supremacy of the Constitution and for unifying the legal processes all over the country, for, it would be the final authority on the interpretation of the Constitution.[7]

The inner vitality and creative potential of an apex court having the ultimate authority to interpret a written constitution has been brought to light vividly by

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6. See. C.A.Deb., Vol.VII, p.953. Also the First Chief Justice of India, Justice Kania, remarked on the occasion of the inauguration of the Supreme Court thus: "... it (the Supreme Court) will play a great part in the building up of the nation, and in stabilizing the roots of civilization ... and maintain the fundamental principles of justice which are the emblem of God...." as quoted by K.M. Munshi, The Pilgrimage to Freedom, op.cit., p.319.

7. K.M. Munshi, ibid., at p.320. The Supreme Court was conceived as a great unifying force by many leading members in the Constituent Assembly. K.M.Munshi held so because 'the unconcious process of consolidation which a uniformity of laws and interpretation involves makes the unifying unconcious and therefore more stable'. See, G.Austin, op.cit., p.184. To Dr.Ambedkar, 'one single integrated Judiciary having jurisdiction and providing remedies in all cases arising under the constitutional law' was 'essential to maintain the unity of the country' See C.A.Deb., Vol.VII, pp.1, 37.

the experience of the United States - an experience that has been a great source of inspiration and guidance for India, both during the making of the Constitution and there-after.[8] The Constitution of India, like that of the United States, is both, "the symbol of national values"[9] and the charter of allocation of political power. In delineating our national values through the interpretation of that 'symbol', and in determining the limits of the allocated powers of political authorities through the construction of that 'charter', the apex court inevitably makes policy choices, creates new legal and constitutional norms and thus performs a distinctive political role.[10] Delineating the contents of 'personal liberty' and evolving a 'standard' for its protection through constitutional interpretation has been an exhilarating facet of judicial process in India eversince

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8. The Report of the Advisory Committee on Fundamental Rights bears ample evidence to show the Committee's reliance on the American example of justiciable fundamental rights. See, G.Austin, op. cit., p.169. The examples of Judicial reliance on American authorities, in interpreting the Indian Constitution, are inumerable. To cite a few, see Kharak Singh V. State of U.P., A.I.R., 1963 S.C.1295; Satwant Singh V. A.P.O., A.I.R. 1967 S.C. 1836; Gobind V. M.P., A.I.R. 1975 SC 1378 etc.

9. Robert M. Hutchins, "The New Supreme Court", The Centre Magazine, Vol.V, No.5 (Sept. - Oct.1972) p.12, as cited in Cases on Constitutional Law - Political Roles of the Supreme Court, by Rosenblum and Castberg (1973), p.V.

10. For a detailed analysis of the political nature of judicial process, see Upendra Baxi, Indian Supreme Court and Politics, (1980).

the inauguration of the Supreme Court. What is proposed to be discussed in this part is this facet of judicial process and the interpretative development of Art.21 during the period from Gopalan[11] to Shivakant Shukla.[12]

The Concept of Personal Liberty:

The genesis and development of right to personal liberty from Magna Carta to modern times, as we have traced out in part one, shows that by virtue of the peculiar historical process the concept of personal liberty has come to acquire as its 'core'[13] the freedom from arbitrary arrest, detention, imprisonment or other forms of physical incarceration.[14] This core meaning, later on, appears to have been treated as the exclusive meaning of personal liberty in English Common Law.

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11. A.K. Gopalan V. State of Madras, A.I.R. 1950 S.C.27

12. A.D.M. Jabalpur V. Shivakant Shukla, A.I.R. 1976 S.C.1207

13. For a detailed discussion of this aspect, see Chapter I, supra.

14. For, right from Magna Carta onwards people have fought and demanded for their personal liberty in response to arbitrary arrest, detention and imprisonment, resorted to by the King. And it is was in response to such demand, the Magna Carta, the Petition of Rights, the Bill of Rights and other innumerable number of constitutional documents conceded and then guaranteed the right to personal liberty as protected by due process of law. See, ibid.

Thus, according to A.V.Dicey, "personal liberty, as understood in English law, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification".[15] And to Blackstone, "Personal liberty" consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by "due process of law".[16]

It may be noted from the above definitions that while to Blackstone the freedom of movement as a positive aspect is the basic element of personal liberty, to Dicey "personal liberty" connotes only the negative aspect of freedom from imprisonment or other physical coercion. But this apparent contrast between the 'positive' and 'negative' aspects seems to be only in form and not in substance. For, one may possess the freedom of movement only in so for as he is free from imprisonment or other forms of physical restraint, or in other words, so long as a person is free from arrest, imprisonment or other physical coercion, he may continue to retain his 'power of locomotion'. Therefore, it is submitted, the difference between Dicey and Blackstone in

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15. A.V. Dicey, Law of Constitution, 10th ed., (1962), pp.207-8.

16. Blackstone, Commentaries on the Laws of England, Vol.I (8th ed.) p.134.

their approach to the meaning of the expression 'personal liberty' need not be overemphasised.[17] Further, it may be noted that even Blackstone does not seem to have included in his definition of 'personal liberty' any other positive rights or freedoms than the freedom of movement, which essentially consists in the freedom from any physical restraint or coercion.[18] Thus the meaning of 'personal liberty' as it obtains in English Common Law still continues to be confined to the 'core' of that concept as reflected in the Dicean definition.[19]

Despite this restrictive meaning and 'minimal' protection,[20] right to 'personal liberty' occupies a dominant position in the English system by virtue of the constitutional principles of rule of law and the 'principle

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17. See, B. Errabi, "Right to personal Liberty in India: Gopalan Revisited with a Difference", Comparative Constitutional Law, ed. by M.P. Singh, Eastern Book Co., (1989), pp.295-96.

18. A similar view can be inferred from the observation of Das, J. in Gopalan, A.I.R. 1950 SC.27, at pp.110-111.

19. See Lord Hewart, The New Despotism, (1945) at p.27 (where he says: "The right of personal liberty is the right not to be arrested or detained or otherwise subjected to physical restraint except in accordance with law"); see also Wade and Phillips, Constitutional Law, (4th ed.), p.337.

20. The protection is 'minimal' in the sense that the rights are effective only against the executive and are totally ineffective against legislative encroachments.

of legality'.[21] Accordingly, in England, a subject 'may say or do what he pleases provided he does not transgress any substantive law or infringe the legal rights of others'.[22] Also the Common Law does not make any distinction between different rights in respect of the extent of their protection. And yet the right to personal liberty derives its pivotal position from the fact that the possession of one's 'personal liberty' in the sense of 'freedom of the person' was a condition precedent for the exercise and enjoyment of all his other common law rights.[23] Therefore, in England, as one Scholar pointed out, 'it would have made no difference even if all the positive rights like the right to freedom of movement, the right to assembly.... etc., were read into the concept of personal liberty, for their exercise and enjoyment were coterminous with the loss of

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21. See, Ivor Jennings, The Law and the Constitution, 5th ed., (1967), p.263 (where he says: "The right to personal freedom is a liberty to so much personal freedom as is not taken away by law. It asserts the principle of legality that everything is legal that is not illegal....).

22. See, Halsbury's Laws of England, Vol.7, Butterworths, (1954), pp.195-97.

23. Ivor Jennings, op.cit. He aptly describes the right to personal liberty as the genus and all the other positive rights as the species. Lord Denning has given another view of 'personal liberty' when he said: "By personal freedom I mean the freedom of every law abiding citizen to think what he will, to say what he will and to go where he will on his lawful occasion without hinderance from any person..." To him personal liberty is the key to the development of human personality. Denning, Freddom under Law, op.cit., p.5.

personal liberty. Similarly, it would have made equally no difference even if the meaning of that expression was restricted to the negative aspect of freedom from imprisonment for so long as the individual was in possession of his personal liberty he could also exercise and enjoy all his positive rights subject only to the condition that he did not transgress the substantive law or infringe the legal rights of others'.[24]

In the United States, on the other hand, where 'personal liberty' has emerged as a constitutional guarantee,[25] the meaning of that expression could not be restricted to mere freedom from bodily restraint or coercion. Though the term 'liberty' in the Fifth Amendment was intended to be used in the sense of 'liberty of person' or 'personal freedom' only,[26] that expression has acquired, through judicial process, a more liberal and comprehensive meaning in the context of Fourteenth Amendment, which extended the liberty guaranteed by the 'due process' clause of the Fifth Amendment to the states as well. Thus the U.S.

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24. Errabi, op.cit., p.296.

25. For the meaning and implications of 'liberty' as a constitutional guarantee, see the earlier discussion in Part I, supra.

26. Because the other specific attributes of liberty are separately guaranteed by different Amendments while the Fifth Amendment secured life, liberty and property to the people. For the details, see ibid.

Supreme Court, armed with the power of judicial review conferred by the 'due process' clause, has enlarged the concept of liberty of the person in the Fourteenth Amendment so as to include in it freedom of speech and of the press, religious liberty, protection against ex-post facto laws, self-incrimination, double jeopardy and a variety of other subjects impinging on the physical or intellectual freedom of the citizen.[27] Besides, the concept of liberty as guaranteed by the Fifth and the Fourteenth Amendments has also been used by the Supreme Court in order to give constitutional recognition and protection to such other forms of rights and liberties which are not specifically or explicitly guaranteed in the Constitution.[28] Thus the concept of personal liberty as a constitutional guarantee, in the United States, has acquired through judicial process, the most liberal and comprehensive meaning, capable not only

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27. Willis, Constitutional Law, pp.487,514 See, also Warren, "The New 'Liberty' under the Fourteenth Amendment", 39 Harv.L. Rev., 431.

28. See Allegeyer V. Lousianna, 165 U.S. 578 (1897) where the Court held freedom of contract as part of 'liberty' in the Foruteeth Amendment and said "... The liberty ... means not only the right of the citizen to be free from the mere physical restraint of his person, ... but the term is deemed to embrance the right of the citizen to be free in the enjoyment of all his faculties...." Similarly in Meyer V. Nebraska, 198 US.45 (1905) the Court held freedom of conscience as part of 'liberty'; and in Griswold V. Connecticut, 381 U.S. 479 (1965) and Roe V. Wade, 410 U.S. 113 (1973) right to privacy was recognized as part of 'liberty'.

of absorbing the already 'enumerated'[29] rights in the Constitution but also of accommodating the newly emerging rights in society that are competing for constitutional recognition.

This theory of personal liberty as a compendious concept having an inner vitality to expand and grow from within in response to the community claims seems to be relevant and applicable to the field of international human rights as well. As Paul Gormley has points out, the legal and moral force of the Universal Declaration of Human Rights continues to expand; the rights, including the right to personal liberty, contained in the U.D.H.R are expanding in scope beyond their original definition; and from those fundamental rights newer rights continue to emerge.[30]

It is worthwhile to recall here the conception of 'personal liberty' that existed in the ancient Indian thought, as we have sketched out earlier.[31] From that

29. i.e. the rights which are specifically and distinctly enumerated in the Bill of Rights in the Constitution.

30. W. Paul Gormley, "The Emerging Dimensions of Human Rights: Protection at the International and Regional Levels the Common Standard of Mankind, "The Banaras law Journal, Vol.17 (1981) pp.1,3. He refers to right to health, right to food, right to pure and clean environment etc. as illustrations of such new rights emerging out of the original rights declared in the U.D.H.R. and other U.N. Covenants.

31. For detailed discussion of this aspect, see Ch.II, *supra*.

discussion we have seen that the worth and dignity of individual had been at the heart of the concept of 'personal liberty'; that 'personal liberty' was conceived as an integral concept, consisting of physical, emotional, ethical and spiritual values; and that the right to personal liberty essentially consisted in the freedom of the individual to pursue the physical, mental, ethical and spiritual goals of life without being unduly interfered with by any outside agency, including the State.[32]

Now it may be appropriate to consider, in the above backdrop, how the Indian Supreme Court has interpreted the expression "personal liberty" in Art.21.

The Meaning and Content of Personal Liberty and The Supreme Court of India

Gopalan's Case:

In A.K.Gopalan V. State of Madras,[33] the first case in which the Supreme Court was called upon to interpret the Constitution, all aspects of the right to personal liberty as guaranteed in Art.21 were very comprehensively dealt with. However, for the moment, it is proposed to consider only those aspects of the decision which pertain to

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32. Ibid.

33. A.I.R. 1950 S.C.27.

the definition and meaning of the expression 'personal liberty'.

A.K. Gopalan, a prominent communist leader, was detained under the Preventive Detention Act, 1950 on grounds which he could not disclose to the Court because of Sec.14 of the Act, which forbade him from disclosing those grounds to any court on pain of prosecution and punishment. The petitioner, under Art.32 of the Constitution, challenged the legality of his detention on the ground, _inter alia_, (i) that since the freedom of movement was the essence of the right to personal liberty secured by Art.21, deprivation of his personal liberty amounted to an unreasonable restriction on his right to freedom of movement guaranteed under Art.19(1)(d)[34] read with Art.19 (5)[35]; (ii) that since 'personal liberty' was synonymous with freedom of movement, any restraint on the petitioner's freedom of movement was a deprivation of his 'personal liberty' protected by Art.21; (iii) that while Art.19 (1) conferred on the individual the substantive right to personal liberty, Art.21 secured

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34. Art.19 (1)(d) provides: "All citizens shall have the right ... to move freely throughout the territory of India".

35. According to Art. 19(5) the State shall have power to impose any reasonable restriction, by law, on the exercise of the right conferred by Art.19 (1) (d) either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. For the text of Art.19 and other relevant provisions, see, Annexure VIII, _infra_.

procedural guarantee of that right; and (iv) that since his detention infringed on his rights guaranteed under Art.19(1), the Act under which he was detained imposed unreasonable restriction on the exercise of those rights.[36]

It is apparent from the above contentions of the petitioner that his attempt was to persuade the Court to accept that his detention had constitutional impact on his rights secured under Art.19(1) and consequentially the law which authorised his detention was liable to be tested on the touchstone of reasonableness as provided by clauses (2) to (6) of Art.19. Interestingly, it was precisely this analysis which the majority of the Court seems to have been determined to avoid.[37] It was in this context[38] that the Supreme Court set out to ascertain the meaning of the expression 'personal liberty' in Art.21.

Since the petitioner argued that the detention was a restraint on his freedom of movement and that it was in

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36. See the issues as formulated by the judges in their separate judgements in this case.

37. The Court has adopted various theories and reasonings in order to avoid the applicability of Art 19 to test the validity of the 'law' in Art.21, notwithstanding the factual infringement of rights in Art.19 by such 'law'. This aspect will be discussed in Chapter V. infra.

38. This context is very significant, for, it has influenced considerably the kind of interpretation which the court has given to Art.21 in general, and to 'personal liberty' in particular.

Art.19(1) (d) (and not in Art.21) that the Constitution had guaranteed the freedom from arrest and detention, the Court had to determine, first, whether the freedom from arrest and detention did fall within the expression 'personal liberty' in Art.21 or not. Thus, the majority of the Court held that the phrase 'personal liberty' in Art.21 primarily meant freedom from any kind of physical restraint or coercion, including arrest and detention.

Mukherjea, J. observed: "In ordinary language 'personal liberty' mean liberty relating to or concerning the person or body of the individual and 'personal liberty' in this sense is the antithesis of physical restraint or coercions".[39] Referring to Dicey's definition of personal liberty, he said ".... It is in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the <u>essence</u> (emphasis added) of personal liberty and not mere freedom to move to any part of the Indian territory".[40]

According to Kania, C.J. 'personal liberty' would <u>primarily</u> (emphasis added) mean liberty of the physical body.[41] Patanjali Sastri. J. also was of the view of that

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39. A.I.R. 1950 S.C.27, at p.96.

40. <u>Ibid</u>., at p.97.

41. <u>Ibid</u>., at p.37.

the expression 'personal liberty' meant 'freedom from bodily restraint".[42] And to Das, J. personal liberty connoted "freedom of the person" which meant that "one's body may not be touched, violated, arrested or imprisoned and one's limbs shall not be injured or maimed except under authority of law".[43]

Then, with reference to the argument that the detention of the petitioner infringed his right to move freely throughout the territory of India (Art.19 (1) (d)) because the freedom of movement was of the essence of 'personal liberty', Kania, C.J., Sastri, Mukherjea and Das JJ. (Fazl Ali.J. dissenting) held that the concept of the right "to move freely throughout the territory of India" in Art.19(1) (d) was entirely different from the concept of the "right to personal liberty" in Art.21. According to the majority in the right "to move freely throughout the territory of India", the emphasis is not on "free movement" simpliciter; but on the right to move freely throughout the territory of India;[44] and its purpose is not to provide protection for the general right of free movement but to secure a specific and special right of the Indian citizen to move freely throughout the territories of India. In short,

42. Ibid., at p.69.

43. Ibid., at p.108.

44. Per Kania, C.J., Ibid., at p.35.

it is a protection against provincialism.[45] Assuming that the right of locomotion or freedom of movement was of the essence of personal liberty, the majority held that it did not fall under Art.19(1) (d) which conferred a different right, but it fell under Art.21 which secured the freedom of the person.[46] Das.J. opined that the general right of locomotion or freedom of movement emanated from and so was implicit in the freedom of the person which in the sense of immunity from arrest and detention, was secured by Art.21.[47] Here it may be interesting to note that the majority appears to have interpreted, it is submitted, rightly 'personal liberty' in Art.21 so as to encompass in that concept both the negative aspect of 'freedom from physical restraint or coercion' as emphasised by Dicey as well as the positive aspect of 'freedom of movement' as stressed by Blackstone. On this point even Fazl Ali, J. can be said to have been in agreement with the majority for he said: "... The juristic conception of 'personal liberty', when these words are used in the sense of immunity from arrest, is that it consists in freedom of movement and locomotion".[48] But, of course, to

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45. Ibid. For similar views, see, Sastri, J. at p.69; Mukherjea.J at p.95; and Das, J. at p.111.

46. See, H.M. Seervai, Constitutional Law of India, 3rd ed. Vol.I, p.700.

47. Das, J. AIR 1950 S.C.27, at p.111.

48. Ibid., at p.53.

Fazl Ali, J., unlike the majority, 'personal liberty' in this sense is to be found in Art.19(1) (d), and not in Art.21.[49]

As it has been suggested earlier, the positive aspect of "personal liberty" in the Blackstonian sense is only a limited one, for the freedom of movement emphasised therein is nothing more than the Dicean conception of personal freedom in the sense of immunity from arrest and detention. Therefore, the question still remains whether the expression 'personal liberty' in Art.21 is capable of comprehending any further positive rights. Some of the judges dealt with this particular aspect in the context of their effort to meet the petitioner's argument that Art.19(1) and Art.21 should be read together because Art.19(1) dealt with substantive rights and Art.21 dealt with procedural rights.[50]

The majority of the Court, rejecting the above argument of the petitioner, pointed out the serious implications of that argument. According to the Court, the acceptance of that argument would mean that the most fundamental right of all, the right to life, was nowhere provided in our Constitution, rendering the procedural right in Art.21 meaningless in the absence of a substantive right

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49. Ibid., at p.54.

50. See, A.I.R. 1950 S.C.27, at p.36.

to be protected;[51] that the non-citizens had no substantive right to personal liberty, rendering, again, the procedural right in Art.21 irrelavant, for the non-citizens could not claim any right under Art.19;[52] and that the citizens as well as non-citizens would have no other substantive aspect of their personal liberty protected in the Constitution, rendering Art.19 as exhaustive of all aspects and contents of personal liberty.[53] Thus, it was held that Art.21 guaranteed substantive as well as procedural right to personal liberty.[54] Elaborating further the substantive aspects of personal liberty in Art.21, it was held that the expression 'personal liberty' in its positive aspect would cover many unenumerated positive rights. Thus according to Kania, C.J. personal liberty in Art.21 is wide enough to include "the right to eat, or sleep when one likes or to work or not to work as and when one pleases and several such rights".[55] And Das, J. gave the most comprehensive meaning to the expression 'personal liberty' when he said:

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51. Ibid., at p.36 (Kania, C.J); at p.71 (Sastri.J); at pp.94-95. (Mukherjea, J); at pp.110-111 (Das,J).

52. Ibid.

53. Ibid., per Kania, C.J., "Art.19(1) does not purport to cover all aspects of liberty..."

54. Ibid., per Sastri, at p.71: "The truth is that Art.21, like its American prototype in the Fifth and Fourteenth Amendments of the Constitution of the United States, presents an example of the fusion of procedural and substantive rights in the same provision".

55. Ibid., at p.36.

> "I cannot accept that our Constitution intended to give no protection to the bundle of rights which, together with the rights mentioned in sub-cls.(a) to (e) and (g) of Art.19 (1) make up personal liberty. Indeed, I regard it as a merit of our Constitution that it does not attempt to enumerate exhaustively all the personal rights but uses the compendious expression "personal liberty" in Art.21, and protects all of them".[56]

Finally, in response to the argument of the petitioner that 'personal liberty' included the freedoms conferred by Art.19(1) (a) to (e) and (g) and the impugned law did not satisfy the test of Art.19(2) to (6),[57] the Court had to determine the question whether the phrase 'personal liberty' in its positive aspect included the rights guaranteed under Art.19(1). On this issue, some of the judges appear to have made a subtle distinction between 'personal liberty' in its general sense, and 'personal liberty' as contemplated in Art.21.[58] Thus according to Kania, C.J., the concept of 'personal liberty' in its wider

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56. Ibid., at p.110.

57. Ibid., at p.34.

58. Per Kania, C.J., "Personal liberty covers many more rights in one sense and has a restricted meaning in another sense". ibid., at. p.36; see also Fazl Ali, J., at p.53.

sense would include even some of the positive rights dealt with by Art.19(1) such as the rights to movement and residence.[59] Das, J. too sought to give a wide scope to the concept of 'personal liberty' and said:

> "In my judgement Art.19 protects some of the important attributes of personal liberty as independent rights and the expression "personal liberty" has been used in Art.21 as a compendious term including within its meaning all the varieties of rights which go to make up the personal liberties of man".[60]

Fazl Ali, J., in his dissenting judgement, held that the expression "personal liberty" in its wider sense included "not only immunity from arrest and detention but also freedom of speech and freedom of association etc."[61]

As regards the import of 'personal liberty' as contemplated in Art.21, the majority held that the expression 'personal liberty' in the sense in which it was used in Art.21 did not include the specific rights that were separately dealt with under Art.19(1). As per Kania, C.J., the contents and subject-matters of Arts.19 and 21 were not

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59. Ibid., at p.36.

60. Ibid., at p.111.

61. Ibid., at p.53.

the same and they proceeded to deal with the rights covered by their respective words from totally different angles.[62] And he said: "It seems to me improper to read Art.19 as dealing with the same subject as Art.21. Art.19 gives the rights specified therein only to the citizens of India while Art.21 is applicable to all persons".[63] Similar views were held by Sastri, Mukherjea and Das, JJ.[64]

In support of the above conclusion some of the judges among the majority referred to the Drafting Committee's Report[65] on draft Art.15 (the present Art.21) which inserted the word 'personal' before the word 'liberty'. The Report stated that the word 'liberty' should be qualified by the word 'personal' before it, for otherwise it might be construed very widely so as to include even the freedoms already dealt with in Art.13 (now Art.19) (emphasis added). Thus Sastri, J.held: "...the acceptance of this suggestion shows that whatever may be the generally accepted connotation of the expression 'personal liberty' it was used

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62. Ibid., at p.37.

63. Ibid.

64. Ibid., at p.71 (Sastri, J.); at pp.109, 113 (Das,J.); at pp.94-95 (Mukherjea,J.) Mahajan, J. did not deal with the issue of interpretation of 'personal liberty' as such See at p.90.

65. For the details of this aspect, See the earlier discussion about the drafting of Art.21 in Ch. II, supra.

in Art.21 in a sense which excludes the freedom in Art.19...."[66] Similarly Mukherjea, J. observed: "If the views of the Drafting Committee were accepted by the Constituent Assembly, the intention obviously was to exclude the content of Art.19 from the concept of 'personal liberty' as used in Art.21".[67]

Thus, the ratio of Gopalan on the interpretation of 'personal liberty' in Art.21 comes to this: 'personal liberty' in Art.21 primarily means the freedom from any kind of physical restraint or coercion, including arrest and detention, which essentially consists in the freedom of movement and locomotion. The concept of 'personal liberty' also includes a bundle of several other unenumerated positive rights, such as the rights to eat, drink, sleep, work etc., which would go to make up a man's personal liberty; but it does not include the freedoms that are specifically and separately conferred by sub-cls. (a) to (e) and (g) of cl.(1) of Art.19.

The above liberal conceptualisation of 'personal liberty', it is submitted, is a positive aspect of Gopalan, which, unfortunately, did not seem to have received the attention and appreciation which it deserves from Gopalan's

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66. Ibid., at.71.

67. Ibid., at p.97; Das J. also referred to this aspect, at p.110.

critics, who often allege that in Gopalan 'personal liberty' was narrowly interpreted to mean mere freedom from physical restraint or detention.[68] Perhaps, this positive aspect of Gopalan may have been clouded by the passive and positivist approach of the Court towards the protection of 'personal liberty'.

Further, in evaluating the interpretation of 'personal liberty' in Gopalan it is worthwhile to remember two other important aspects. First, the case was concerned with the constitutionality of the preventive detention of the petitioner which in any case was an infringement of the 'personal liberty' even in the narrowest sense of that term. Second, the issues and arguments raised before the Court were not so much about the interpretation of the words 'personal liberty' as the inter-relation between Arts.19 and 21. For these reasons one may feel that the context of Gopalan might not have offered to the Court an appropriate

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68. See, U.N. Gupta, Constitutional Protection of Personal Liberty in India, (1970), at. pp.27-28; D.N.Saraf, "Limits of Personal Liberty Under the Indian Constitution", 4, K.L.J., (1978) 10; Mohammed Ghouse, Annual Survey of Indian Law, Vol.XIV, 1978 pp.393-395; H.M. Seervai, a staunch supporter of Gopalan, too, claims that as per Gopalan 'personal liberty' in Art.21 means only freedom from arrest and detention, see H.M.Seeravai, op.cit., pp.696 et. Seq. For the view that Gopalan gives a liberal meaning to 'personal liberty' in Art.21, see, P.K.Tripathi, "The Fiasco of Overruling A.K.Gopalan", AIR 1990, Jnl.Section, p.1; B.Errabi, op.cit.

opportunity to pronounce on the true meaning and scope of 'personal liberty' in Art.21.

But there are many subsequent cases the factual situations of which presented to the Court more appropriate contexts for expounding the meaning and import of the concept of 'personal liberty' in Art.21.

Subsequent Cases

Kharak Singh V. State of U.P.:[69] This case involved the constitutional validity of Ch.XX of the U.P. Police Regulations. The petitioner, who was acquitted of a charge of dacoity, was placed under 'surveillance', and a 'history sheet'[71] was also opened against him as authorised by the said Regulations. According to Reg.236 the 'surveillance' consisted of one or more of the following measures:

"a) secret picketing of the house or approaches to the house of suspects;

b) domiciliary vists at night;

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69. A.I.R. 1963 S.C. 1295.

70. Per Reg.228 in Ch.XX of the Police Regulations, (history sheet) means the personal records of criminals under Police surveiveillance; and such history sheets should be opened for persons who are or are likely to become habitual criminals.

c) periodical inquiries by Police Officers into the repute, habits, associations, income, expenses, and occupation;

d) the reporting by constables and chaukidars of movements and absences from home;

e) the verification of the movements and absences by means of verification slips;

f) the collection and recording on a history sheet of all information bearing on conduct".

Since the petitioner was treated as a Class A 'history sheet man' all the above measures were made applicable to him.[71] Under these circumstances the petitioner urged the Court to declare all the above-mentioned cls. of Reg.236 as unconstitutional on the ground that they violated his fundamental rights conferred by Arts.19 (1) (d)[72] and 21.[73]

Admittedly, the U.P. Police Regulations had no statutory basis and so were held to be no 'law' within the meaning of Art.13.[74] Following Gopalan, it was reiterated

71. Per Reg.237 in Ch.XX of the Police Regulations.

72. The right to move freely throughout the territory of India.

73. The right to personal liberty.

74. A.I.R. 1963 S.C. 1295, at p.1299.

by the Court that if there was no enacted law the freedom guaranteed by Art.21 would be violated.[75] Hence it was not necessary for the Court to consider either the precise relationship between Art.19 and Art.21 or the content and significance of the words "procedure established by law" in the latter Article. Therefore, in this case, "the sole question for determination",[76] was whether the police surveillance, as set out above, had infringed any of the fundamental rights of the petitioner.

Justice Rajagopala Iyyangar, in his majority opinion, first considered the validity of the surveillance, particularly that of the 'secret picketing of houses'[77] and the 'domiciliary vistis'[78] with reference to Art.19 (1) (d). It was held that though the right to 'move' in Art.19(1) (d) connoted a right of locomotion and the adverb "freely" therein implied the absence of any restriction on that freedom, the right guaranteed by Art.19(1) (d) had reference

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75. Ibid., at p.1301.

76. Ibid., at p.1299.

77. Its object is to ascertain the identity of persons who visit the house of the suspect, and it is to be done without the knowledge of the suspect.

78. It means 'visit to a private dwelling, by official persons, in order to search or inspect it', involving police entry into the premises of the suspect, knock at the door at any hour in day or night, awaking the suspect from his sleep, to have it opened and search it for the purpose of ascertaining his presence in the house etc.

only to 'something tangible and physical and not to the imponderable effect on the mind of the person which might guide his action in the matter of his movement or locomotion'. Therefore it was held that there was no infringement of the 'freedom of movement' guaranteed by Art.19 (1) (d).[79]

The Court, then, considered 'the width, scope and content of the expression 'personal liberty' in Art.21 in response to the argument that the 'domiciliary visit' as authorised by the Police Regulations had infringed the petitioner's right to personal liberty. Interpreting the phrase 'personal liberty', the Court held:

> "Having regard to the terms of Art.19 (1) (d) we must take it that that expression (personal liberty) is used as not to include the right to move about or rather of locomotion. The right to move about being excluded its narrowest interpretation would be that it comprehends nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison; in other words, freedom from arrest and detention, from false imprisonment or wrongful confinement. We feel unable to hold that the term was intended to bear only this narrow

79. A.I.R. 1963 S.C. 1295, at p.1301.

interpretation but on the other hand consider that 'personal liberty' is used in the Article (21) as a compendious term to include within itself all the varieties of rights which go to make-up the 'personal liberties' of man other than those dealt with in the several clauses of Art.19(1). In other words, while Art.19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Art.21 takes in and comprises the residue".[80]

Having thus defined 'personal liberty' as a compendious and residuary concept, the majority held cl.(b) of Reg.236 which authorised 'domiciliary visits' as violative of the petitioner's right to 'personal liberty in Art.21.[81] For, according to the majority, the 'domiciliary visit' was 'an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence'.[82]

Thus the Court construed the word 'personal liberty' so as to include within its ambit the right to the

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80. Ibid., at p.1302.

81. Ibid., at p.1303.

82. Ibid., at p.1302.

sanctity of one's home, the right to personal security and the right to sleep. Fortifying this liberal interpretation, the Court further observed:

> "It might not be inappropriate to refer here to the words of the Preamble to the Constitution that is designed to 'assure the dignity of the individual' and therefore of those cherished human values as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as 'personal liberty' having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives".[83]

The Court also took recourse to the decision of the U.S. Supreme Court in Wolf V. Colorado[84] in order to emphasise the point that 'an unauthorised intrusion into a person's home and the disturbance caused to him thereby is, as it were, the violation of a common law right of a man - an ultimate essential of ordered liberty, if not of the very concept of civilization'.[85]

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83. Ibid.

84. (1948) 338 U.S.25.

85. Kharak Singh, op.cit., p.1302.

It may be noticed that the above liberal formulation of the concept of 'personal liberty' in Art.21 as a compendious term seems to be consistent with the definition of that concept in Gopalan, as discussed earlier. In fact, Ayyengar, J. appears to have adopted the view taken by Das, J. in Gopalan; but, unfortunately without even referring to Gopalan. It is submitted that had Ayyengar, J openly acknowledged his reliance on Gopalan on the question of the definition of 'personal liberty', much of the misgivings about Gopalan's interpretation of the expression 'personal liberty' in Art.21 could have been avoided.

The eminent jurist, H.M.Seervai[86] criticises the definition of 'personal liberty' in Kharak Singh as 'incorrect' and 'contrary' to Gopalan, for according to him the majority judgement adopted the view of 'personal liberty' taken by Das, J. in Gopalan 'without realising that the majority of the judges had taken a different view in that case".

The above criticism seems to proceed on the basic assumption that the majority judges in Gopalan construed 'personal liberty' to mean only freedom from physical restraint or coercion.[87] In assuming so, it is submitted

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86. H.M.Seervai, Constitutional Law of India, Vol.I, 3rd ed., pp.705-6.

87. See ibid.

respectfully, Seervai appears to have adopted the view of 'personal liberty' taken by Mukherjea, J. in Gopalan without realizing (i) that the majority of judges in that case did not take the same view as that of Mukherjea, J. on the meaning of the expression 'personal liberty';[88] (ii) that even Mukherjea, J. held 'freedom from physical restraint or coercion' not as the exclusive meaning and content of 'personal liberty'; but only as the "essence" of 'personal liberty';[89] and (iii) that Mukherjea, J.'s view of 'personal liberty' as the 'antithesis of physical restraint or coercion of any sort'[90] was capable of growth and expansion from within, as Subba Rao, J. ably demonstrated in his minority judgement[91] in Kharak Singh - a judgement which Seervai considers 'unnecessary' to discuss.[92]

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88. This aspect is made clear earlier by referring to the opinion of all the judges in Gopalan. Especially Kania, C.J. and Das,J. construed 'personal liberty' so as to include a variety of positive rights within that concept; and no other judge among the majority seem to have contradicted or disagreed with the views of those two judges. Interestingly, Seervai does not seem to have given any importance to the observations of those two judges as regards the positive contents of 'personal liberty'.

89. A.I.R.1950 S.C.27 at pp.96,97.

90. Ibid.

91. A.I.R. 1963 S.C.1295, at p.1305. The minority opinion will be examined shortly.

92. See, Seervai, op.cit.

As it has been pointed out earlier, according to majority in Gopalan though the 'primary meaning' and 'essence' of 'personal liberty' may be 'freedom from any kind of physical restriaint or coercion', that expression has been used in Art.21 as a 'compendious term including within its meaning all the varieties of rights which go to make up the personal liberties of man'. Obviously, it is this view of 'personal liberty' that has been adopted by the majority judgement in Kharak Singh. Even as regards the non-inclusion of the distinct freedoms separately dealt with in Art.19 (1) within the meaning of 'personal liberty' in Art.21 the majority in Kharak Singh seems to be in complete agreement with Gopalan. Therefore, to say that the definition of 'personal liberty' by the majority in Kharak Singh is contrary to the meaning given to that expression in Gopalan seems to be erroneous and misleading.

However, despite the liberal and expansive meaning ascribed to the expression 'personal liberty', the majority opinion in Kharak Singh also contains certain narrow and restrictive aspects, which may be pointed out here.

First, while upholding the validity of cl.(9) of Reg.236 the majority refused to accept that 'secret picketing' of the petitioner's house violated his right to personal liberty in Art.21.[93] According to the Court 'in

93. A.I.R. 1963 S.C. 1295, at p.1300

dealing with a fundamental right such as right to personal liberty, that only can constitute an infringement which is both direct as well as tangible',[94] implying thereby that there can be no protection in Art.21 against indirect as well as intangible infraction of personal liberty. The Court ignored the sense of insecurity created in the mind of the petitioner by the 'secret picketing' of his house as "mere personal sensitiveness".[95] This position taken by the majority, it is submitted, appears to be logically incompatible with its broad formulation of "personal liberty", as has been noted earlier.

Secondly, the majority upheld the validity of cls.(c), (d) and (e) of Reg.236 as not violative of the right to personal liberty in Art.21.[96] Though the actions covered by these clauses consisted of the shadowing of the 'history sheeters'[97] and of obtaining information relating to persons with whom they come in contact or associate, the Court held that Art.21 had 'no relevance in the context'. For, according to the majority, 'the right of privacy is not a guaranteed right under our Constitution and therefore the

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94. Ibid.

95. Ibid.

96. Ibid., at p.1303

97. The suspects in respect of whom the Police maintains history sheets under the Regulations.

attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III'.[98] It is respectfully submitted that the above reasoning of the majority for the non-recognition of 'the right of privacy' as a fundamental right, forming part of 'personal liberty' seems to be self-contradictory in view of the Court's recognition of the rights to the sanctity of home, to personal security and to sleep as fundamental rights as forming part of 'personal liberty' eventhough, like privacy, these rights are also not explicitly guaranteed anywhere in Part III. Similarly, the refusal of the majority to accept 'the right of privacy' of the petitioner as protected by Art.21 does not seem to be consistent with the conceptualisation of 'personal liberty' as a compendious and residuary right.

But the minority judgement of Subba Rao, J. (for himself and Shah, J.) on the other hand, appears to be more liberal and revolutionary, taking the concept of 'personal liberty' to further heights. In fact, the minority opinion of Subba Rao, J. in Kharak Singh can legitimately be described as the beginning of 'judicial activism' in the area of 'personal liberty'.

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98. Kharakh Singh, op.cit., p.1302.

His Lordship, unlike the majority, declared all the acts of police surveillance as provided by cls. (a) to (f) in Reg.236 unconstitutional because they were violative of both Arts.19(1) (d) and 21.[99]

Holding the surveillance as violative of 19(1)(d), Subba Rao, J. interpreted creatively the adverb "freely" in that Article and gave a larger content to that freedom. Thus it was held:

> "If a man is shadowed, his movements are obviously constricted. He can move physically, but it can only be a movement of an automaton. How could a movement under the scrutinizing gaze of the policemen be described as a free movement? The whole country is his jail..."[100]

Then, dealing with the scope and content of 'personal liberty' in Art,21, His Lordship referred to Gopalan wherein that expression was described to mean the antithesis of physical restraint or coercion.[101] Even from the point of view of this apparently restrictive definition

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99. Ibid., at p.1303. The majority declared only cl.(b) of Reg.236 as unconstitutional; all other clauses were upheld as valid.

100. Ibid., at p.1306.

101. Per Mukherjea J., A.I.R.1950 S.C. 27 at pp.96-97.

of 'personal liberty', Subba Rao.J. held that the expression 'coercion' could not be construed in a narrow sense in the modern age where the psychological restraints were more effective than physical ones,[102] thereby implicitly refuting the majority view that Art.21 took cognizance only of 'direct and tangible'[103] restraints on liberty. His Lordship observed:

> "The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channelling one's actions through anticipated and expected grooves. So also creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints".[104]

Expanding the domain of 'personal liberty' still further, it was held that right 'takes in not only a right to be free from restrictions placed on his movements, but also free from encroachment on his private life'. Though the Constitution does not expressly guarantee a right to privacy, Subba Rao J., unlike the majority, recognized the

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102. A.I.R. 1963 S.C.1295 at p.1305.

103. Ibid. Per Ayyengar J. at p.1300.

104. Ibid., at pp.1305-6.

said right as 'an essential ingredient of personal liberty'.[105] He observed:

> "Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle"; it is his rampart against encroachment on his personal liberty".[106]

In support of his view, His Lordship referred to the opinion of Frankferter J. in Wolf V. Colorado[107] wherein he emphasised the importance of the security of one's privacy against arbitrary intrusion by the police; and cautioned about the deleterious effect which a calculated interference with privacy could have on a man's physical happiness and health.[108]

His Lordship, then, proceeded to define the concept of 'personal liberty' in Art.21, in these words:

> "We would, therefore, define the right of personal liberty in Art.21 as a right of an individual to

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105. Ibid., at p.1306.

106. Ibid.

107. (1948)338 U.S. 25.

108. Ibid. Kharak Singh, op.cit., p.1306.

be free from restrictions or encroachments on his person, whether those restrictions or enchroachments are directly imposed or indirectly brought about by calculated measures".[109]

Evidently, the minority opinion appears to be more liberal and inclusive so far as it recognizes, unlike the majority, even the 'personal sensitiveness' and 'right to privacy' as integral parts of 'personal liberty' in Art.21. Nevertheless, it may be noticed that the inclusion of those rights into the concept of 'personal liberty' does not seem to be in any way contradictory to or inconsistent with the broad conceptualisation of 'personal liberty' in Art.21 as contained in the majority judgement.

Kharak Singh has undoubtedly, made a notable landmark in the evolution of the concept of 'personal liberty' in Art.21. The Supreme Court has breathed into that concept a new vitality and a spirit of liberalism.[110] The peculiar situation obtained in this case, unlike in Gopalan., presented to the Court an apt and appropriate context - a context other than mere arrest or detention --

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109. Ibid.

110. For the comments on Kharak Singh, see, M.C. Setalvad, The Indian Constitution, 1950-1965, (K.T.Telang Lecture, 1967), p.61; Mohamed Ghouse, A.S.I.L., Vol.XIV:1978, p.395.

to expound the import and meaning of the expression 'personal liberty' in Art.21. And in that process the Court has expanded the meaning and scope of 'personal liberty' by interpreting that term to mean a compendious and residuary concept; and has enriched the contents of that concept by delineating new, unenumerated substantive rights as integral parts of 'personal liberty' in Art.21.

The conceptual framework of 'personal liberty' as structured by judicial process in Kharak Singh, it is submitted, appears to be strong and flexible enough to take in and contain any content that the judiciary may evolve and recognize in response to the changing values and the human rights aspirations of the society, of course, consistent with the constitutional scheme of the country. The subsequent developments in the concept of 'personal liberty' through judicial process also seem to confirm this view.

Satwant Singh Sawhney V. Assistant Passport Officer[111]: In this case the Supreme Court has recognized yet another unenumerated substantive right as an essential ingredient of 'personal liberty' in Art.21 - the right to travel abroad.

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111. A.I.R. 1967 S.C. 1836. The Case was heard by a Five Judges Bench. The majority judgement was delivered by Subba Rao, C.J. for himself and for Shelat and Vaidialingam, JJ; and the dissenting opinion was given by Hidyathllah, J. for himself and for Bachawat. J.

The petitioner, Satwant Singh challenged the validity of the orders passed by the Passport Authorities,[112] withdrawing his passport, and of the order of the Union of India, denying to him passport facilities on the ground that those orders violated his fundamental rights guaranteed by Arts.21 and 14.[113]

In relation to Art.21, the issues before the Court were (i) whether the right to leave India and travel outside and return to India was part of 'personal liberty' in Art.21; and (ii) whether the refusal to give a passport or the withdrawl of one given amounted to deprivation of 'personal liberty' in as much as it was not possible for a citizen to travel abroad without a passport.

After considering the importance of passport in India in the matters of exit from the country for foreign travel, the Court concluded that 'if a person living in India has a right to travel abroad, the government by withholding the passport can deprive him of his right'.[114] That took the Court to the real question: whether a person living in India has a fundamental right to travel abroad.

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112. The orders were passed by the A.P.O., New Delhi, and The Regional Passport Officer, Bombay.

113. _Ibid_., at p.1838.

114. _Ibid_., at p.1841.

The Court took note of the position in American and in English law on the subject. The Court found that in the United States the right to travel abroad was considered to be an integral part of personal liberty.[115] In English law also the right to travel abroad was regarded as a common law right.[116]

The Court, then considered the position of the right to travel abroad in India. Here, the Court had to chalk out its own course, for, the issue came up before it for the first time. In Gopalan,[117] in the context of preventive detention which obviously entails restrictions on the right to move, or to say right to travel, the Court made some observations regarding the scope of that right in relation to both Arts.21 and 19(1) d. But the right to travel abroad was not in issue in Gopalan. Nevertheless, having referred the observations of Fazl Ali J.[118] and of Das J.[119] in that case, Subba Rao C.J. appears to have taken the view that freedom of movement or of locomotion as such is part of personal liberty whereas Art.19(1) (d)

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115. Ibid., at p.1842.

116. Ibid., at p.1843.

117. A.I.R. 1950 S.C. 27.

118. Ibid., at p.138.

119. Ibid., at p.299.

comprehends only a specific and limited aspect of that freedom.[120] His Lordship then referred to the liberal conception of 'personal liberty' as it emerged in Kharak Singh and held that that decision was a clear authority for the position that 'liberty' in our Constitution bears the same comprehensive meaning as is given to the expression 'liberty' by the Fifth and Fourteenth Amendments to the U.S. Constitution;[121] and that the expression personal liberty in Art.21 only excludes the ingredients of 'liberty' enshrined in Art.19 of the Constitution'.[122] "In other words", the Court held, "the expression personal liberty in Art.21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territory of India is not covered by it in as much as it is specifically provided in Art.19".[123] Thus was born a new right to travel abroad as an integral part or content of 'personal liberty' in Art.21.

Having held the right to travel abroad as part of 'personal liberty' in Art.21, the Court quashed the impugned orders as violative of Art.21 on the ground that the deprivation of the right to travel abroad, by withholding

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120. A.I.R. 1967 S.C. 1836 at p.1843.

121. Ibid., at p.1844.

122. Ibid.

123. Ibid.

the passport, was not according to the procedure established by law, for, admittedly there was no enacted law.[124]

In State of Maharashtra V. Prabhakar Pandurang[125]: The Supreme Court has added a new dimension to the scope and meaning of 'personal liberty' in Art.21. Pandurang was detained by the Government of Maharashtra under Rule 30(1)(b) of the Defence of India Rules with a view to prevent him from acting in a manner prejudicial to the defence of India, public safety and the maintenance of public order. While under detention, the respondent wrote a book titled "Inside the Atom" in Marathi Language. He sought permission to send the book outside the jail for publication; but his request was turned down. The High Court found nothing objectionable in the book, which was purely of scientific interest, and hence directed the government to send the book to the detenu's wife, so that it could be published. The state, in appeal, contented, before the Supreme Court that when a person was detained he lost his freedom and was no longer a free man, and therefore he could exercise only such privileges as were conferred on him by the order of

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124. Ibid., at pp.1841-42. For the view that 'if there was no enacted law, the freedom guaranteed by Art.21 would be violated', see, Gopalan, A.I.R. 1950 S.C.27; also Kharak Singh, A.I.R. 1963 S.C. 1295, at p.1301.

125. A.I.R. 1966 S.C.424.

detention.[126] The State appears to have based this argument on the observations of Das. J. in _Gopalan_.[127] It was further argued that the respondent's right to publish a book was only a component part of his freedom of speech and expression and that as the detenu ceased to be free in view of his detention, he could not exercise his freedom to publish his book.[128] Subba Rao J. rejected, it is submitted rightly, this argument of the State and held that the principle accepted by Das J., as relied upon by the State, did not appear to be the _ratio_ of _Gopalan's_ decision.[129] Though by implication, his Lordship took the view that the detention of a person, depriving him of his right under Art.21, need not necessarily result in the extinction of all the freedoms guaranteed to him under Art.19 -- a view which later proved to have tremendous impact on the rights of prisoners. But that by itself would not in any way be sufficient for the Court to do justice to the respondent in this case, by enforcing his right to publish his book. For, while the case was being decided the proclamation of emergency was in force, and consequently Art.19 remained suspended.[130] Besides, the President's Order[131] had

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126. _Ibid._, at p.426.

127. A.I.R. 1950 S.C.27, at p.108.

128. A.I.R. 1966 S.C. 424 at p.427.

129. _Ibid._

130. See the Constitution of India, Art.358.

131. See _ibid._, Art.359.

provided, inter alia, that the right to move the Court for the enforcement of fundamental rights conferred by Art.21 was suspended. Faced with such a situation, Subba Rao J., displaying a remarkable judicial craft, treated the President's Order as a conditional one, that is to say, the right to move the Court remained suspended only if such person had been deprived of his personal liberty under the Defence of India Act, 1962 or a rule or order made thereunder. Accordingly if a person was deprived of his personal liberty not under the Act or a rule or order made thereunder but in contravention thereof, his right to move the Courts in that regard could not be suspended.[132] Therefore the Court proceeded to determine the question whether the respondent's liberty had been restricted in terms of the Defence of India Rules[133] whereunder he was detained. Here, the argument of the State was not that respondent's book was prejudicial to the safety of India etc., but the argument was that the Rules and the Conditions of Detention Order, which laid down the conditions

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132. AIR 1966 SC 424, at p.426. Here, again, Subba Rao J.'s view had proved to be of considerable value in protecting the personal liberty of individuals during emergency regimes. See for eg. Makhan Singh V. State of Punjab, A.I.R. 1964. S.C.381.

133. Under sub r.(4) of Rule 30 of the Defence of India Rules, the State of Maharashtra adopted the Bombay Conditions of Detention Order, 1951 as laying down the conditions regulating the restrictions of liberty of the detenus under the Rules. See, Ibid., at p.426.

regulating the restrictions on the liberty of the detenu, conferred only certain privileges on the detenu, and that as those Rules and Conditions did not provide for a detenu writing a book, or sending it for publication, he could not claim a right to do so. Rejecting that argument, Subba Rao J., rightly, held:

> "If this arguments were to be accepted, it would mean that the detenu could be starved to death, if there was no condition providing for giving food to the detenu. In the matter of liberty of a subject such a construction shall not be given to the said rules and regulations, unless for compelling reasons. We, therefore, hold that the said conditions regulating the restrictions on the personal liberty of a detenu are not privileges conferred on him, but are conditions subject to which his liberty can be restricted. As there is no condition in the Bombay Conditions of Detention Order, 1951, prohibiting a detenu from writing a book or sending it for publication, the State of Maharashtra infringed the personal liberty of the first respondent in derogation of the law whereunder he is detained".[134]

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134. Ibid., at p.428.

Thus His Lordship dismissed the appeal and confirmed the order of High Court - indeed an interesting display of judicial activism sans judicial rhetoric.

In this decision of the Supreme Court, from the point of view of the 'scope and context of personal liberty, two aspects stand out clearly. First, the deprivation of personal liberty in Art.21 by way of imprisonment or detention does not necessarily result in the loss of all the other freedoms guaranteed in Art.19.

Secondly, by recognizing the right to write a book and publish it as part of the personal liberty of the detenu and protecting it under Art.21, the Court can be said to have established the principle that detention or imprisonment of a person does not exhaust his right to personal liberty in Art.21, but there are many more layers of rights within that concept, and that the infraction of each of those layers must be in accordance with the procedures established by law.[135]

In view of those vital aspects in the judgement of Subba Rao J., Pandurang can legitimately be described as the

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135. Of course, it is admitted that there occured in this case a sort of judicial transposition of a component of the freedom of speech and expression in 19(1) (a) into Art.21. But it can be explained only in terms of the exigency of the situation created by the proclamation of emergency and the consequential suspension of Art.19, though it may seem to be logically obscure. After all, logic alone is not the life of the law; pragmatic realism is also very much a part of it.

precursor of a new branch of jurisprudence relating to fundamental rights of prisoners.

As a matter of fact, almost a decade later, those principles in Pandurang were reiterated by the Supreme Court through the judgement of Chandrachud J. in D.B.M. Patnaik V. A.P.[136] The petitioner, who was sentenced to imprisonment and was also an undertrial prisoner in connection with another case, complained that police officers resided in the jail areas and that there were live electric wires placed on the walls of the jail to prevent escape; and he contended that those violated his fundamental rights. In dealing with the rights of convicts, Chandrachud J., having referred to Pandurang, laid down the principles thus:

> "Convicts are not, by mere reason of conviction, denuded of all the fundamental rights which they otherwise possess. As a compulsion under the authority of law, following upon a conviction, to live in a prison-house entails by its own force the deprivation of fundamental freedoms like the right to move freely throughout the territory of India or the right to 'practise' a profession. A man of profession would thus stand stripped of his right to hold consultations while serving out his

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136. A.I.R. 1974 S.C.2092.

sentence. But, the Constitution guarantees other freedoms like the right to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment. Likewise, even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law".[137]

Govind V. State of M.P.[138] is yet another landmark in judicial process, expanding the juristic contours of personal liberty. In this case the Supreme Court again had to grapple with the issue of right to privacy after twelve years from Kharak Singh.[139] In Govind the petitioner challenged the validity of Reglations 855 and 856 of the Madhya Pradesh Police Regulations which were in pari materia with the impugned Regulations in Kharak Singh.[140] The petitioner alleged that the police, treating him as a

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137. Ibid., at p.2094.

138. A.I.R. 1975 S.C. 1378.

139. A.I.R. 1963 S.C. 1295.

140. The various measures of surveillance authorised by Reg.236 of the U.P.Police Regulation which is in pari materia with Reg.856 of the M.P. Plice Regulations has been set out in detail while discussing Kharakh Singh, supra.

habitual offender, had opened a history-sheet against him and put him under surveillance. He contended that the domiciliary vists both by day and night, the secret picketing of his house and the shadowing of his movements by the police surveillance had infringed his fundamental rights under Arts.19(1) (d) and 21.[141]

In dealing with the question whether the surveillance offended any of the fundamental rights of the petitioner, Mathew J., for the Court, referred to Kharak Singh and adopted the liberal meaning given by the majority in that case, to the expression 'personal liberty' in Art 21.[142] Mathew J. also seems to have agreed with the view taken by Subba Rao, J in the above case that 'personal liberty' in Art.21 bears the same meaning as the expression "liberty" in the Fifth and Fourteenth Amendments to the U.S. Constitution.[143]

His Lordship also took note of the opinion of Subba Rao J. in Kharak Singh that the word "liberty" in Art.21 was comprehensive enough to include right to privacy as an integral part of it; that, in the last resort, a person's house where he lives with his family is his castle;

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141. A.I.R 1975 S.C.1378 at pp.1380-1.

142. Ibid., at p.1382.

143. Ibid.

and that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy.[144]

Referring to the value premises of our Constitution, the Court observed:

> "There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realised.... the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore they must be deemed to have conferred upon the individual, as against the government, a sphere where he should be let alone".[145]

Then, dealing with the pointed question whether right to privacy is itself a fundamental right flowing from the other fundamental rights in Part III, Mathew J.,appears to have adopted the theory of penumbral rights as expounded

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144. Ibid., at p.1382.

145. Ibid., at. p.1384.

by the U.S. Supreme Court as a strategy to evolve a constitutional right to privacy.[146]

Mathew, J., thus, articulated cogently the juristic structure and principles that could have evolved and sustained a constitutional right to privacy. Yet, when it came to the crucial conclusion His Lordship held:

> "The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that (emphasis added) the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute".[147]

According to the Court, the impugned Regulations had the force of law and the procedure laid down by that law was reasonable.[148] Though it was realised that 'drastic inroads

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146. Ibid., at p.1383. The Court referred to Griswold V. Connecticut 381 U.S. 479 and Jane Roe V. Henry Wade, 410 U.S. Supreme Court recognized the right to privacy as a penumbral right formed by emanations from the specific right guaranteed in the Bill of Rights.

147. Ibid., at p.1835.

148. Ibid., at p.1836.

directly into the privacy and indirectly into the fundamental rights' would be made by the impugned Regulations, the Court preferred to 'narrow down the scope' of those Regulations by restrictive interpretation and thereby to save them, rather than to declare them as unconstitutional.[149] However the Court was anxious to point out that 'legality apart, these regulations ill-accord with the essence of personal freedoms and the State will do well to revise these old police regualtions verging perilously near unconstitutionality.[150]

A close scrutiny of the opinion of Mathew, J. in Govind would bring to surface two other important aspects. First, there appears to be an element of judicial ambivalence in the conclusion of Mathew, J. regarding the recognition of a constitutional right to privacy. Though the values of liberty and dignity have been raised to 'high constitutional status', His Lordship has preferred only to assume rather than to assert the existence of a fundamental right to privacy. Secondly, as regards the constitutionality of the impugned Regulations also one may reasonably doubt whether the activist "reasoned elaboration"[151] in the judgement has really been matched by

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149. Ibid., at pp.1835-36.

150. Ibid., at p.1836.

151. See Prof. Upendra Baxi, "Introduction" to K.K.Mathew on Democracy, Equality and Freedom, ed. by U.Baxi, (1978), p.XXIX.

the actual decision which, it is submitted, seems to be "restraintivist" in essence.

The reasons behind this judicial restraint and ambivalance may, perhaps, be gathered from the 'problems' which the Court has perceived. The Court said: "The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values".[152] The Court also seems to have felt that 'too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution'.[153] It is submitted that these "serious problems" seem to have been further confounded by the conceptualization of 'privacy' as a 'penumbral right', emanating from a plurality of explicitly guaranteed fundamental rights.

However, suffice it to say here that Govind has definitely expanded the juristic contours of 'personal liberty' in Art.21 consistent with the meaning and definition of that concept as laid down in Kharak Singh[154]

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152. A.I.R. 1975 S.C. 1378, at p.1385.

153. Ibid., at p.1384.

154. A.I.R. 1963 S.C. 1295.

and followed by Satwant Singh.[155] Though from the point of view of right to privacy Govind appears to have left much to be desired, that decision can, undoubtedly, be said to have paved the way for the recognition of a fundamental right to privacy by a future Bench without any conceptual obstacle or consitutional impediment.[156]

In Shivakant Shukla[157] too, ironically enough, the Supreme Court gave the most expansive meaning to the expression 'personal liberty' in Art.21. In view of the argument of the detenus that they were entitled to the protection of the right to personal liberty available under

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155. A.I.R. 1967 S.C. 1836.

156. Prof. Baxi has described the opinion of Mathew, J. in Govind as "an example of judicial creativity at its best level" See, Baxi, supra., f.n.151, at p.LXXIV.

157. A.D.M. Jabalpur V. Shivakant Shukla, (1976) 2 S.C.C.521. In this case, the Court dealt with a situation where the petitioners were deprived of their personal liberty through preventive detention under the Maintenance of Internal Security Act, 1971 in the wake of the emergency proclaimed by the President in June, 1975 under Art.352 of the constitution. The Presidential Proclamation issued under Art.359 suspended, inter alia, the right to enforce the fundamental right guaranteed by Art.21. In these circumstances, the petitioners' claim for the writ of habeas corpus was resisted by the government on the ground that the petitioners' did not have any locus standi to file the petition, for, to do so would be to enforce their right under Art.21 which, according to the government, was the 'sole repository' of 'personal liberty'. Unfortunately, the Court accepted the arguments of the government, upheld the validity of the MISA and the order of detention there under and refused to issue the writ of habeas corpus.

the Common Law, the natural law and the law of nations notwithstanding the suspension of the enforcement of the right to personal liberty as guaranteed by Art.21 by virtue of the Presidential Proclamation under Art.359, the Court held that the natural rights available under the existing law or other laws relating to personal liberty had no separate existence and that Art.21 was the "sole repository of personal liberty" and "all aspects of personal liberty" were comprised in Art.21.[158]

Thus during the period under survey, i.e. from Gopalan to Shivakant, the concept of personal liberty in Art.21 appears to have received through judicial process a remarkable liberal scope and expansive meaning.

Now let us examine whether this liberalism of the Supreme Court in interpreting the expression 'personal liberty' has been matched by the Court's attitude towards the protection of 'personal liberty' in Art.21.

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158. Ibid., at p.592, 611, The irony is that though the dynamics of "all aspects of personal liberty" has broadened the concept of personal liberty in Art.21, the Court did not allow any protection to the 'personal liberty' of the detenus.

CHAPTER IV

"PROCEDURE ESTABLISHED BY LAW" IN ARTICLE 21 - THE PROTECTION OF PERSONAL LIBERTY

The Scheme Article 21:

Article 21 recognizes personal liberty[1] of the individual as a fundamental right; it recognizes the power of the State to restrain or regulate or even to deprive the personal liberty of the individual; and it lays down a standard according to which alone the State can deprive a person of his personal liberty. It is this standard that serves as a limitation on the powers of the State.[2] It is this limitation on the powers of the State that operates as the protection for personal liberty against the State and makes the right of personnal liberty a fundamental right.[3]

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1. For a detailed analysis of the meaning and content of 'personal liberty' in Art.21, see the preceeding chapter.

2. State here means 'State' as defined in Art.12, which includes the executive as well as Parliament and the Legislatures of the States.

3. The two essential aspects of a fundamental right are first, the right is a limitation on the legislative powers of the State; and second, the enforceability of that limitation through judicial review and the consequential invalidation of legislative action if it transgresses that limitation. See, Art.13 cls.(1) and (2).

The standard that Art.21 confers as a protection for personal liberty is the "procedure established by law".[4] It is obvious therefore, that the nature and extent of the protection of personal liberty in Art.21 would depend on the meaning and scope of the standard, i.e., the "procedure established by law", which, in turn, would ultimately depend on the interpretation of the expression "procedure established by law" through judicial process.

Gopalan's Case - An Analysis

The first major judicial attempt in search of a proper meaning of the expression "procedure established by law" was made by the Supreme Court in Gopalan's Case.[5] In Gopalan the petitioner challenged the validity of the Preventive Detention Act[6] under which he was detained on the ground, interalia, that the Act passed by Parliament did not conform to the standard of 'procedure established by law' as laid down in Art.21 and so was violative of the constitutional protection guaranteed under that Article.

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4. Art.21: "No person shall be deprived of his life or personal liberty except according to the procedure established by law".

5. A.K. Gopalan V. State of Madras, A.I.R.1950 S.C.27. The facts and the major constitutional issues involved in the case had already been referred to in the preceeding chapter.

6. Preventive Detention Act (No.IV of 1950) passed by Parliament.

While on the one hand it was contended by the Attorney-General that the words "procedure established by law" meant simply any procedure established or prescribed by a State-made law; on the other hand it was argued by the petitioner that the expression "procedure established by law" should be interpreted in a wider sense as meaning what was understood in American constitutional law as "procedural due process".[7]

In ruling on this point the majority of the Court held that "procedure established by law" only meant procedure prescribed by the law of the State and that those words were to be taken to refer to a procedure which had statutory origin.[8]

Chief Justice Kania observed:

> "No extrinsic aid is needed to interpret the words of Art.21, which in my opinion, are not ambiguous. Normally read, and without thinking of other Constitutions, the expression "procedure established by law" must mean procedure prescribed by the law of the State. If the Indian Constitution wanted to preserve to every person

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7. A.I.R. 1950 S.C. 27 at p.37.

8. Ibid., at pp.39, 72, 103 and 114. The majority of the Court consisted of Kania C.J., Patanjali Sastri, Mukherjea and Das JJ. Mahajan J did not consider this question in detail. The dissenting opinion of Fazl Ali J. is separately dealt with.

the protection given by the due process clause of the American Constitution there was nothing to prevent the Assembly from adopting the phrase or if they wanted to limit the same to procedure only, to adopt that expression with only the word 'procedure' prefixed to 'law'. However, the correct question is what is the right given by Art.21? The only right is that no person shall be deprived of his life or personal liberty except according to procedure established by law. One may like that right to cover a larger area, but to give such a right is not the prerogative of the Court; it is the prerogative of the Constitution".[9]

As to the meaning of the word "procedure" Justice Sastri was of the view that 'Art.21 like its American prototype in the Fifth and Fourteenth Amendments to the Constitution of the United States, present an example of the fusion of procedural and substantive rights in the same provision'. He observed: 'process' or 'procedure' in this context connotes both the act and the manner of proceeding to take away a man's life or personal liberty".[10] According to Mukherjea.J. the expression 'procedure' meant 'the manner

9. Ibid.

10. Ibid., at p.71.

and form of enforcing the law' which provided for the deprivation of liberty".[11] And Das, J. held: "The word 'procedure' in Arts.21 must be taken to signify some step or method or manner of proceeding leading up to the deprivation of life or personal liberty. According to the language used in the Article, this procedure has to be 'established' by law".[12]

On the meaning of the word "law" in Art.21, the majority of the Court did not accept the contention of the petitioner's counsel that the word 'law' in Art.21 meant law in the sense of natural law, i.e., jus and not mere state-made law, i.e. lex.[13] According to the majority the word "law" in Art.21 was not used in the sense of "general law" connoting what had been described as the principles of natural justice outside the realm of positive law; and "law" in that Article was equivalent to State-made law.[14] The majority also took recourse to the dictionary meaning of the word "established" in Art.21 to further reinforce their opinion that "law" in that Article could only mean law enacted by State.[15]

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11. Ibid., at.p.97.
12. Ibid., at p.114.
13. Ibid., at p.39.
14. See, ibid., at pp.39, 72, 102 and 114.
15. Ibid., at pp.39, 102 and 114.

Thus Kania C.J. observed:[16]

"To read the word 'law' as meaning rules of natural justice will land one in difficulties because the rule of natural justice, as regards procedure, are nowhere defined and in my opinion the Constitution cannot be read as laying down a vague standard. This is particularly so when in omitting to adopt 'due process of law' it was considered that the expression "procedure established by law" made the standard specific. It cannot be specific except by reading the expression as meaning procedure prescribed by the legislature... The word 'established' itself suggests an agency which fixes the limits. According to the dictionary this agency can be either the legislature or an agreement between the parties. There is, therefore no justification to give the meaning of "jus" to 'law' in Art.21".

Patanjali Sastri, J. held:

"... I am unable to agree that the term "Law" in Art.21 means the immutable and universal principles of natural justice. "Procedure established by law"

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16. Ibid., at p.39.

must be taken to refer to a procedure which has a statutory origin, for no procedure is known or can be said to have been established by such vague and uncertain concepts as "the immutable and universal principles of natural justice" In my opinion 'law' in Art.21 means "positive or State-made law".[17]

Thus in Gopalan the Court held by a majority that the words 'procedure established by law' meant simply any procedure as might be laid down by a State-made law and that the Court could not, under Art.21, go into the reasonableness of the 'law' so made, or the 'procedure' so laid down. The court rejected the contention that the word 'law' in Art.21 implicitly incorporated the principles of natural justice so that a law to deprive a person of his personal liberty could not be valid unless it incorporated those principles in the procedure laid down by the State. The majority also rejected the contention that the expression "procedure established by law' implied the concept of 'procedural due process' which would enable the Court to see whether the law fulfilled the requisite elements of due procedure.

But on all these crucial points pertaining to the meaning and scope of the expression 'procedure established

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17. Ibid., at p.72. For the similar views of Mukherjea, J, see ibid., at p.102; and of Das, J. at p.114.

by law', Fazl Ali.J. dissented from the majority view and the dissenting opinion of the judge forms an interesting contrast to the attitude of the majority.

According to Fazl Ali J. it is permissible to interpret the expression 'procedure established by law' as meaning all that the American writers have read into the words "procedural due process",[18] an expression which does not exclude certain fundamental principles of justice which inhere in every civilized system of law.[19]

On the question whether the word 'law' means nothing more than statute law, Fazl Ali J. took the view that irrespective of the meaning of the expression 'due process of law', the word 'law' was common to that expression as well as 'procedure established by law'. He was inclined to derive guidance from the decisions of the American Supreme Court construing the word 'law' as used in the expression 'due process of law' in so far as 'it bears on the question of legal procedure.'[20]

Having referred to the decisions of the U.S. Supreme Court, His Lordship observed:

> "Thus, in America, the word 'law' does not mean merely State-made law or law enacted by the State

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18. Ibid., at p.57.

19. Ibid.

20. Ibid., at p.58.

and does not exclude certain fundamental principles of justice which inhere in every civilized system of law and which are at the root of it. The result of the numerous decisions in America has been summed up by Professor Willis in his book on "Constitutional Law" at p.662, in the statement that the essentials of due process: (1) notice, (2) opportunity to be heard, (3) an impartial tribunal, and (4) orderly course of procedure.... The real point however is that these four elements are really different aspects of the same right, viz., the right to be heard before one is condemned. So far as this right is concerned, judicial opinion in England appears to be the same as that in America. In England, it would shock one to be told that a man can be deprived of his personal liberty without a fair trial or hearing. Such a case can happen only if the Parliament expressly takes away the right in question in an emergency as the British Parliament did during the last two world wars in a limited number of cases".[21]

Considering, then, specifically whether the "principle that no person can be condemned without a hearing by an impartial tribunal, which is well recognized in all

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21. Ibid.

modern civilized systems of law"[22] could be regarded as part of the law of India, Fazl Ali J. held:

> "The principle being part of the British system of law and procedure which we have inherited, has been observed in this country for a very long time and is also deeply rooted in our ancient history, being the basis of the panchayat system from the earliest times. The whole of the Criminal Procedure Code.... is based upon the foundation of this principle and it is difficult to see that it has not become part of 'the law of the land' and does not inhere in our system of law. If that is so, then, "procedure established by law" must include this principle, whatever else it may or may not include".[23]

His Lordship has rightly referred to the importance of the protection in Art.21 and to the undesirable consequence of allowing any procedure enacted by statute, however draconian and arbitrary it may be, as 'procedure established by law' if that protection is given a restrictive interpretation.[24] He said: "Art.21 purports to

22. Ibid., at p.60.

23. Ibid.

24. Ibid.

protect life and personal liberty and it would be a precarious protection and a protection not worth having, if the elementary principle of law under discussion, which, according to Halsbury, is on a par with fundamental rights, is to be ignored and excluded".[25] And hence he concluded:

> "It seems to me that there is nothing revolutionary in the doctrine that the words "procedure established by law" must include the four principles set out in Professor Willis' book, which, as I have already stated, are different aspects of the same principle and which have no vagueness or uncertainty about them. These principles... are not absolutely rigid principles but are adaptable to the circumstances of each case within certain limits. I have only to add that it has not been seriously controverted that 'law' in this article means valid law and "procedure" means certain definite rules of proceedure and not something which is a mere pretence for procedure".[26]

Justice Fazl Ali, then, considered the argument that the expression "without due process of law" was deliberately dropped in the Constituent Assembly in favour

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25. Ibid.

26. Ibid., at p.61.

of the present expression "except according to the procedure established by law".[27] His Lordship's suggestion here, however, was that the reason for the change was that the Constituent Assembly wanted to avoid that "very elastic meaning" given to the 'due process' clause by the U.S. Supreme Court in its "substantive" as distinct from "procedural" aspect.[28]

It is submitted that if the liberal and 'purposive',[29] interpretation of the phrase "procedure established by law" as adopted by Fazl Ali.J. had been accepted by the majority, it could have been possible for the court to enquire whether the 'procedure' laid down by law for deprivation of personal liberty incorporated atleast certain 'fundamental principles of justice' and to test whether the 'law' so enacted by the legislature fulfilled the requisite elements of due procedure. Then, at least, a limited scope for judicial review of the 'procedure' and the 'law' made by the State for the deprivation of personal liberty could have been secured. Such an interpretation would have made the phrase "procedure established by law" as a normative standard binding even on Parliament, and, hence,

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27. Ibid., at pp.56-57.

28. Ibid.

29. 'Purposive' interpretation is to be understood as interpretation giving due regard to the spirit and purpose of the Constitution and of the fundamental rights guaranteed therein.

as a genuine protection for personal liberty against possible legislative vageries of the State, making personal liberty as a fundamental right in its real sense. Had Justice Fazl Ali's liberal mode of constitutional interpretation been adopted by the majority, the gorwth of liberty jurisprudence in this country would not have been stultified for more than two and a half decades.

By contrast, the right to personal liberty in Art.21 has received a stifling treatment in the hands of the majority. The view taken by the majority, as has already been noted, comes to this: Personal liberty which, according to the court, is 'the substratum of personal freedom on which alone the enjoyment of all other rights including Art.19 rests'[30] can be deprived of only according to the 'procedure established by law'. But the 'procedure established by law' means nothing but any procedure as may be prescribed by the legislature. And the reasonableness of the 'procedure' laid down by the law and of the 'law' so made by the State are non-justiciable and so are beyond the pale of judicial review.[31]

This 'restrictive' interpretation of the expression "procedure established by law" has failed to recognize that expression as a normative standard, limiting

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30. Ibid., at p.69, per Sastri J.

31. See, ibid., at p.39, per Kania C.J.

the powers of the State including the legislature. It has totally emasculated the potential of that standard as a protection for personal liberty, reducing the safeguards in Art.21 to "mere verbiage",[32] as rightly commented by a Jurist. For, the decision of the majority, in effect, meant that a fundamental right which was essentially a right against the State including the legislature, and which by reason of the provisions of Art.13 the legislature could not override, was no fundamental right at all against the legislature; and if a person was deprived of his personal liberty by a law enacted by the legislature, however drastic and unreasonable the law, he would be rightly deprived of his personal liberty.[33]

Another significant aspect of the majority holding in Gopalan lies in the fact that decision being one of first major occasions for constitutional adjudication under the new Constitution the judges of the Supreme Court in Gopalan were in a real sense charting out a new course of constitutional interpretation for the future. In that

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32. Edward McWhinney, Judicial Review, 4th ed. (1969), p.135. For some of the criticisms of the majority view, see also Alan Gledhill, "Life and Liberty in Republican India", 2 JILI (1960),241; Schwartz, "A comparative view of the Gopalan Case", 1950 Ind.L.R. 276; C.H. Alexandrowicz, Constitutional Developments in India, (1957), pp.21-34.

33. For a similar view, see, M.C. Setalvad, The Indian Constitution, 1950-1965, (K.T.Telang Lecturer), 1967, p.52 et seq.

respect, the modes of constitutional interpretation adopted by the judges in <u>Gopalan</u> as well as their individual role perceptions seem to be of transcendental importance having far reaching consequences.[34] Therefore a brief reference to the interpretative techniques involved in the judicial process in this case may not be out of place here.

The Interpretative Techniques:

Any mode of consitutional interpretation must inevitably explain two important dimensions underlying the judicial role.[35] They are: the relation of the judge to written law, and the relation of the court to other branches of government.[36]

The dissenting and the majority opinions in <u>Gopalan</u> on the interpretation of the expression "procedure established by law" in Art.21 indicate two sharply diverse modes of constitutional interpretation.

Justice Fazl Ali, in his dissenting judgement, seems to have adopted a 'policy making'[37] type of approach

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34. See, McWhinney, <u>op.cit</u>., p.135.

35. For a detailed discussion and analysis of different modes of constitutional interpretations, see Craig R.Ducat, <u>Modes of Constitutional Interpretation</u>, West Publishing Co., 1978.

36. <u>Ibid</u>., at pp.37-39.

37. See McWhinney, <u>op.cit</u>., pp.130, 135.

which is marked by certain characteristic features such as the willingness of the judge to look to the spirit or purpose of the fundamental right provisions[38] without slavishly surrendering to the letter of the Constitution; the readiness of the judge to look beyond the text of the Constitution to certain 'fundamental principles of justice which inhere in every civilized system of law'[39] as a source for guidance to interpret the text of the Constitution; a conscious and frank consideration of possible or probable consequences of a decision before making it;[40] and the willingness of the judge to play an 'activist'[41] role as 'protector and guarantor' of the fundamental rights by making inevitable policy choices, even if such polices may often conflict with the policies of other major decision-makers-the executive and the legislature. It is, indeed, remarkable that Justice Fazl Ali could demonstrate as early

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38. Ibid.

39. A.I.R. 1950 S.C. 27, at p.60.

40. Ibid., at pp.37-39.

41. The notion of Judicial activism has different connotations. According to Glendon Schubert, "the Court is activist whenever its policies are in conflict with those of other major decision-makers", Judicial Policy Making, (Rev.ed.1974), p.213. Prof. Baxi also adopts the above meaning of the term 'judicial activism', See Upendra Baxi Introduction to K.K.Mathew on Democracy, Equality and Freedom, Ed. by Baxi (1978) pp.XXVIII-XLV. To Prof. Ducat, "Judicial activism is the willingness of judges to use their power to either expand present policy or to create new policy". See Ducat, op.cit., p.39.

as in 1950 the role of judicial process as a bulwark of personal liberty and as an agency of constitutional change through his 'policy-making' 'activist' mode of constitutional interpretation[42] in Gopalan.

But, unfortunately, the story of the opinions of the majority of the Court on the meaning of "procedure established by law" has been one of cramped, fettering approach on the part of the judges who have adopted a "rule-oriented" - 'restraintivist' mode of constitutional interpretation.[43] The opinions of the majority judges are characterised by certain unique features which are typical of 'analytical positivism'[44] or legal 'absolutism'.[45] Thus the majority appears to have treated the constitutional provision as an ordinary statute, subjecting it to the same restrictive connons of statutory construction.[46] As is

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42. For the distinction between the two modes, i.e. the 'rule-oriented' and the 'policy-making' of interpretations, see, Ducat, op.cit., pp.37 et. seq.,

43. McWhinney, op.cit., p.130.

44. For a detailed analysis of 'analytical positivism' see, Bodenheimer, Jurisprudence: "The Philosophy and Method of Law", Ch.7 (1962); and Friedmann, Legal Theory, Chs.22-24 (5th ed. 1967).

45. See, Ducat, op.cit., ch.2. The author uses the expression "absolutism" as a mode of constitutional interpretation and it is similar, in approach and method, to 'analytical positivism'. The hallmarks of this mode are: literal interpretation, deductive logic and judicial self-restraint.

46. McWhinney, op.cit., pp.130-136.

evident from the judgements, the judges have insisted on a strict and literal interpretation of the Constitution as the guiding principle of construction and attempted to ascertain the "intention" of the framers' from the words of the constitution,[47] assuming that the words themselves have absolute meaning that can be discovered through pure reasoning, of course, often with the help of the dictionary;[48] and deliberately refused to consider other valuable extrinsic materials such as the legislative history or the speeches in debates in the Constituent Assembly as a guide to ascertain the meaning of the constitutional provision.[49] Thus Chief Justice Kania was truly reflecting the attitude of the majority in Gopalan when he baldly stated thus: "No extrinsic aid is needed to interpret the words of Art.21, which, in my opinion are not ambiguous. Normally read, and without thinking of other constitutions, the expression "procedure established by law" must mean procedure prescribed by the law of the State".[50]

Again, the 'positivist' texture of the majority opinion is evident from the refusal of the judges to look to

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47. A.I.R. 1950 S.C.27, at pp.39, 101.

48. For the repeated resort to dictionary to interpret the word 'established' in Art.21, see, ibid., at pp.39, 102, and 114.

49. Ibid., at pp.38-39, 73, 101.

50. Ibid., at p.39.

the spirit and philosophy of the Consitution or to the purpose of the fundamental rights provisions in the Consitution[51] or to certain 'immutable and fundamental principles of justice'[52] in order to ascertain the proper meaning of the constitutional protection in Art.21. As elsewhere, here too Chief Justice Kania epitomised the approach of the majority when he declared thus:

> "There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred on the Legislature we cannot declare a limitation under the notion of having discovered something in the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the soveriegn legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority".[53]

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51. Ibid., at p.42.
52. Ibid., at p.72.
53. Ibid., at p.42.

Another conspicuous aspect of the majority opinion has been a total lack of concern for the consequences of the decision; and of course, this unwillingness on the part of the judges to consider the possible or probable consequences of their decisions, before making it,[54] is fully consistent with their opposition to any policy-making role for them. Quite logically, this approach has been accompanied by an attitude of "self-restraint"[55] on the part of judges, which often perilously verges on an abdication of judicial responsibility to uphold the fundamental human freedoms and the norms of fairness and justice which are inherent in those freedoms. A few excerpts from the majority opinions would suffice to make the point clear.

In response to the argument of the petitioner as to the atrocious consequences that would follow if the expression "procedure established by law" was interpreted as meaning any procedure that might be prescribed by the legislature, Justice Das held:[56]

> "A procedure laid down by the legislature may offend against the Court's sense of justice and

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54. See, <u>ibid</u>. at pp.39, 119.

55. 'Self-restraint' implies a position which counsels the limited and infrequent use of judicial power. See Ducat, <u>op.cit</u>., p.39.

56. A.I.R. 1950 S.C. 27, at p.119.

fair play and a sentence provided by the legislature may outrage the Court's notions of penology, but that is wholly irrelevant consideration. The Court may construe and interpret the Constitution and ascertain its true meaning but once that is done the Court cannot question its wisdom or policy.... Our protection against legislative vagaries, if any, lies in ultimate analysis in a free and intellignet public opinion which must eventually assert itself" (emphasis added).

When the Court's attention was specifically invited to the anomalous consequence that Art.21 would not be a restriction on legislation and Art.13(2) would have no operation so far as this provision was concerned if 'law' was taken to mean State-made law, Justice Mukherjea's response was this: "Apparently this is a plausible argument but it must be admitted that we are not concerned with the Policy of the Constitution".[57]

And in the same vein Chief Justice Kania, too, observed:[58] "one may like that right (given by Art.21) to cover a larger area, but to give such a right is not the

57. Ibid., at p.102.

58. Ibid., at p.39.

function of the Court; it is the function of the Constitution". After emphasising the significance of the deliberate omission of the word 'due' from Art.21, His Lordship categorically declared: "... the justiciable aspect of law, i.e. to consider whether it is reasonable or not by the Court, does not form part of the Indian Constitution.... By adopting the phrase "procedure established by law" the Consitution gave the legislature the final word to determine the law".[59]

Having 'discovered' the 'true' meaning of the expression "procedure established by law" in Art.21 and thereby determined the 'major premise', what remainied for the court was only to 'apply' that law to the dispute in question, the conclusion beiing obvious and automatic.

Thus, according to the majority under Art.21 a person could be validly deprived of his personal liberty if such deprivation was in accordance with the procedure prescribed by any law that might be enacted by the State. The petitioner in this case had been deprived of his personal liberty according to the precedure laid down by the Preventive Detention Act which was a law enacted by the State. Hence the Preventive Detention Act and the detention

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59. Ibid.

made thereunder were not violative of Art.21 and were constitutional.

The entire decision has been projected by the majority judges as the inevitable consequence of constitutional compulsion. The judges seem to have 'assumed the role only of "law-appliers" and not "law-makers", for they claimed to have no discretion or leeway for choice, and consequently no responsibility for their decision, the decision being what they logically deduced from the 'major premise' in Art.21.[60]

This is the picture of judicial process which the majority judgements in Gopalan present -- A judicial process which consists of two exclusive tools; literal interpretation and deductive logic. It is submitted there is an inherent fallacy in the Court's attempt to create a judicial process where there is no exercise of judgement. Such a conception of judicial process can only be a myth, especially in the field of constitutional adjudication, which involves inevitable conflicts of policies and interests and consequential inevitability of making choices

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60. This kind of judicial process is rightly described by Ducat as 'misrepresenting the decisional process; see, Ducat, op.cit., pp.100-104.

among such conflicting interests and competing policies,[61] for at its best a constitution is a compromise statement of conflicting policies and intersts.

The myth of 'mechanical jurisprudence'[62] in Gopalan can be exposed by taking a still closer took at the decision, piercing the cloak of logic. Despite the disclaimer by the majority of any discretion or leeway for choice, the fact still remains that Art.21, particularly, the expression "procedure established by law" is what the judges say it is. We have already seen that what the expression "procedure established by law" meant to Justice Fazl Ali is totally divergent from what it meant to the majority judges; and that the dissenting and the majority judges have arrived at divergent meanings by adopting diverse modes of consitutional interpretation. The dissenting opinion of Fazl Ali J. along-side the majority opinion thus clearly shows the existence of alternate modes of constitutional interpretation which the judges are free

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61. It is too late today to doubt whether an apex court engaged in constitutional adjudication is a policy-making, political institution. For a discussion of this aspect, see, Peltason, Federal Courts in the Political Process (1955); Cardozo, The Nature of Judicial Process (1921); Friedmann, Legal Theory, Chs.25-28 (5th ed. 1967); Prof. Upendra Baxi, The Indian Supreme Court and Politics, (1980), pp.5-26.

62. This theory of the judges' function is that 'the judge merely repeats the words that the law has spoken into him...' See Cohen, Law and the Social Order, (1933), p.113.

to choose and the resultant indeterminancy of the 'major premise'. Therefore, it is submitted, the choice of particular mode of constitutional interpretation made by the majority is not and cannot be the dictate of the text of any constitutional provision; but is essentially a policy-choice of crucial significance which the judges have made independently of the text of the constitution, in exercise of their judgement and discretion. It is also a truism that the choice of a particular mode of constitutional interpretation, often, begets the very decision which the judges like to make in the case, though they may attempt to structure the decision in a syllogistic framework. In this context, it is to be noted that the majority judgements are not so much concerned with explaining the process of thinking that led up to the decision as they are concerned with justifying their decision.[63] It may be so because, as it often happens in judicial process, the opinions present only a reconstructed logic and not the logic of reaching the decision.[64]

As Jerome Frank has ably demonstrated, people do not always reach a decision through a neat ordered logical

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63. See, Ducat, op.cit., p.101.

64. Ibid. For a detailed discussion of this aspect of judicial process, see, Edward H. Levi, An Introduction to Legal Reasoning (1949) Reprint 1972. Also see Dworkin, "Hard Cases", 88 Harv L.Rev., (1975), 1057.

pattern, the decision invariably "... begins... with a conclusion more or less vaguely formed; a man ordinarly starts with such a conclusion and afterwards tries to find the premises which will substantiate it. If he cannot, to his satisfaction, find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitary or mad, reject the conclusion and seek another".[65]

Thus it appears to be reasonable to surmise that the majority in Gopalan has, in exercise of its own judgement and discretion independently of any "rule" in the Constitution, adopted an "absolutist" mode of constitutional interpretation for ascertaing the 'true' meaning of the expression "procedure established by law" as part of its effort to forge 'the premises' which would substantiate or justify the 'conclusion' which the majority thought desirable.

Now, the most vital aspect which remains to be considered is this: Why the majority in Gopalan has thought the 'conclusion' they arrived at as desirable? In other words, what factors must have influenced the majority in upholding the constitutional validity of the Preventive

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65. Jerome Frank, Law and the Modern Mind, (1930), p.108.

Detention Act, in agreeing with the policy decisions made in the Act by Parliament and in refusing to consider the reasonableness of the law and the procedure it laid down? It may be remembered that the answers to these questions would also explain why the majority judges have adopted 'positivist' mode of constitutional interpretation which led them to the restrictive meaning of the standard of protection for personal liberty in Art.21. Not suprisingly, the majority opinions do not provide any direct answer to these questions. Instead, the majority attempts to justify the decision only in the language of logic, without acknowledging openly any policy considerations or other factors which may have actually influenced their decision. Perhaps, at this juncture, it may be instructive to recall the memorable words of Justice Holmes:

> "The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgement as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgement, it is true, and yet the very root and nerve of the whole

proceeding. You can give any conclusion a logical form...."[66]

It is submitted, 'behind the logical form' of the majority decision of the Court in Gopalan lies a judgement as to the relative worth and importance of the competing values of personal liberty and public interest; and in the process of reconciling these two conflicting interest, what weighed with the Court must have been not logic but "the lamentable political and social upheavals which accompanied the formation of new independent State".[67] And of course, in the process of resolving this conflict the cause of personal liberty suffered a set back at the hands of the Court.[68]

In the process of reconciling the conflict between personal liberty and preventive detention; the fact that the fundamental rights chapter itself provides for preventive detention; and the atmosphere of social and political

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66. Oliver Wendel Holmes, "The Path of Law", 10 Harv.L.Rev., (1897) pp.457,466.

67. C.H.Alexandrowicz, Constitutional Developments in India: "Personal Liberty and Preventive Detention, (1957), p.23.

68. As to the influence of the prevailing social and political upheavels on the Supreme Court in Gopalan. see also M C. Setalvad, The Indian Constitution, 1950-1965 (K.T.Telang Lecture) 1967, at. p.51.

turmoils that prevailed at the time of the decision appear to have considerably influenced the Court in its approach towards the interpretation of Art.21, particularly the expression "procedure established by law".[69] For instance, in dealing with the validity of the impugned Act with reference to Art.21, Sastri J. observed:

> "The outstanding fact to be borne in mind in this connection is that preventive detention has been given a constitutional status. This sinister-looking feature, so strangely out of place in a democratic constitution which invests personal liberty with the sacrosanctity of a fundamental right and so incompatible with the promises of its preamble is doubtless designed to prevent an abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant Republic. It is in this spirit that cls.(3) to (7) of Art.22 should, in my opinion, be construed and harmonized as far as possible with Art.21...."[70]

Thus, we find on the one hand the realisation of the Court as to the inherently unreasonable nature of the

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69. Ibid.; also see, McWhinney, op.cit., p.135.

70. A.I.R. 1950 S.C. 27, at pp.75-76.

sinister-looking feature of preventive detention which militates against the sacro-sanctity of personal liberty as a fundamental right, and on the other hand the Court's anxiety to uphold the validity of preventive detention which, according to the Court's evaluation of the prevailing social and political circumstances, has been designed to prevent the anti-social and subversive activities which might imperil the welfare of the Republic.[71] This was the dilemma in Gopalan. The Court resolved that dilemma by making a value judgement - a naked policy-decision. It preferred preventive detention to personal liberty and decided to uphold preventive detention. Obviously, then, the Court could uphold the validity of preventive detention on the face of Art.21 only by interpreting the expression "procedure established by law" so as to exclude altogether the requirements of due process and reasonablness. This is what precisely the Court did in Gopalan. And, it is submitted, this alone can explain what lies behind the logical form of the court's decision, and why the majority judges have resorted to a 'positivist' mode of constitutional interpretation.

It is respectfully submitted that even on the face of preventive detention, which, undoubtedly, has been given a 'constitutional status', the Court could have reconciled

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71. Ibid.

it with personal liberty without totally eliminating the requirements of due process and judicial review. For, as rightly emphasised by Fazl Ali. J, the requirements of due process are not rigid strait jackets, which are oblivious to the needs of public interst, but, on the contrary, they only provide a flexibile standard capable of being adapted according to the circumstances of the case, without unduly sacrificing the principles of justice and fairness in State actions.[72] But, unfortunately, by equating 'procedure established by law' merely to any 'State-made law', the court, instead of reconciling public interest with personal liberty, has sacrificed the latter for the former at the altar of legislative supremacy and thus in the issue of liberty versus authority, authority triumphed at the expense of liberty.

Now, of the justifications offered by the Court in support of the restrictive interpretation of the phrase "procedure established by law", a few of them deserve a closer attention.

Confronted with "possibly the strongest argument" in support of the petitioner that if law is taken to mean State-made law, then Art.21 would not be a restriction on legislation at all,[73] the majority seems to have taken

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72. Ibid., at p.61.

73. A.I.R. 1950 S.C.27, at p.102.

different defenses to fortify their interpretations. First, the Court tried to meet the argument in these words:

> "The fundamental rights not merely impose limitations upon the legislature, but they serve as checks on the exercise of executive powers as well, and in the matter of depriving a man of his personal liberty, checks on the high-handedness of the executive in the shape of preventing them from taking any step which is not in accordance with law, would certainly rank as fundamental rights.... It is all a question of policy as to whether the legislature or the judiciary would have the final say in such matters (of protection of personal liberty) and the constitution makers of India deliberately decided to place these powers in the hand of the legislature".[74]

The above argument, it is submitted, does not seem to carry any conviction for more than one reason. At the outset, to conceive of a fundamental right which does not limit the legislative power of the State is not only to do violence to the very concept of fundamental rights,[75] but

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74. Ibid., pp.102-103.

75. For the position that 'the very purpose of fundamental rights is to impose limitations upon the legislature', see, Lord Acton, The History of Freedom and Other Essays, at p.3; Hobhouse, Social Evolution and Political Theory, p.199; Cardozo, Paradoxes of Legal Science, From The selected Writings of B.N. Cardozo, p.327; also per Jackson J., Board of Education V. Barnette (1943) 319 U.S. 624.

also to ignore the scheme of fundamental rights in Part III of the Indian Constitution.[76] It is evident in view of Art.13, which forbids the State from making any law which takes away or abridges the rights conferred by Part III and of Art.12 which defines 'State' as including the Legislatures of States and Parliament that the Constitution clearly intends to give some primacy for the fundamental rights over legislation and therefore there is no warrant to assume that the fundamental rights to personal liberty has been subjected to legislative supremacy unless, by express provision in the Consitution, Art.13 has been made inapplicable to 'law' in Art.21.[77]

Another significant aspect which the Court has failed to appreciate, in maintaing the above argument, is the peculiar relationship between the executive and the legislature in a parliamentary form of government as we have

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76. For the views of the Members of the Constituent Assembly on the primacy of fundamental rights, see C.A.Deb., Vol.II, p.273, Vol.III, pp.465 et seq.

77. For a similar view, see Setalvad, op.cit., p.53 In fact, one of the majority judges, Sastri J., appears to be terribly perturbed about the absurd consequence of leaving personal liberty at the mercy of the legislature. Referring to the Court's suggested interpretation of "procedure established" as any procedure 'prescribed' by the law enacted by the State, Sastri J said, "it completely stultifies Art.13(2) and indeed the very conception of a fundamental right. It is of the essence of that conception that it is protected by the fundamental law of the Constitution against infrigement by ordinary legislation...."

adopted in our Constitution. As one eminent scholar has rightly pointed out, the protection of personal liberty by the legislature may under this system become problematic in the absense of a powerful public opinion. "If the legislature is not likely to refuse laws to the executive which the latter thinks proper to obtain, and if such laws affect personal liberty, the individual must look for ultimate protection to the judges".[78]

Having, perhaps, realised the inherent weakness in the above argument, the Court then appears to have taken refuge under Art.22.[79] Thus Kania. C.J. suggested that 'Art.21 has to be read as supplemented by Art.22' which provides for certain valuable safeguards against arrest and detention. "Reading in that way", he said, "the proper mode of construction will be that to the extent the procedure is prescribed by Art.22, the same is to be observed; otherwise Art.21 will apply".[80] In the same vein Mukherjea. J. added: "... Art.22 was introduced with a view to provide for some sort of check in matters of arrest and detention and the

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78. C.H. Alexandrowicz, op.cit., p.22.

79. Art.22 cls.(1) and (2) provide for certain valuable procedural safeguards in cases of arrest and detention; cl.(3) denies those safeguards in cases of preventive detention. But cl.(4) to (7) specifically provide for certain protections in cases of preventive detention. For the text of Art.22, see Annexure VIII, infra.

80. A.I.R. 1950 S.C. 27, at p.40.

protection it affords places limitations upon the authority of the legislature as well".[81]

The above stand taken by the court involves a clear shift in its position on the issue whether Art.21, imposes any limitation on the legislature. Unlike the previous argument, now the court appears to argue that Art.21 limits not only the executive powers but it limits also, the legislative powers of the State at least in so far as the law enacted by the legislature affecting personal liberty will not be a valid' law in Art.21 unless that law complies with the procedures prescribed by Art.22. And consequently the judiciary will have the 'final say' at least in ensuring that the 'law' in Art.21 complies with Art.22. This new arguement squarely comes into conflict with the previous one where it has been claimed that Art.21 checks only the 'high-handedness' of the executive and that 'matters relating to the protection of personal liberty have been deliberately placed in the hands of the legislature which has the final say on such matters'[82] These apparent contradictions are only indicative of the inner tension that the Court must have experienced as a result of the totally unconvincing interpretation which it gave to the expression "procedure established by law" in art.21.

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81. Ibid., at p.102.

82. Ibid., at p.103, per Mukherjea J.

Apart from the logical contradictions, the above argument of the court is fraught with still more serious infirmities. First, the reliance on Art.22 does not seem to bring about any qualitative change in the standard of protection for personal liberty in Art.21 in so far as the reasonableness of the 'law' and the procedure prescribed thereunder are still non-justiciable. Secondly, the argument based on Art.22 proceeds on the wrong assumption that 'personal liberty' in Art.21 consists only of freedom from arrest and detention and consequently arrest and detention are the only possible modes of deprivation of personal liberty. But, even according to the Court in Gopalan, the concept of 'personal liberty' in Art.21 is a 'compendious term' consisting not only of freedom from arrest and detention but of a variety of other valuable rights which go to make up the personal liberty of the individual.[83]

Hence, it is submitted, the above argument would lead to the absurd consequence that, even if Arts.21 and 22 are read together, a person will have protections against the legislature only in respect of some aspects of personal liberty such as freedom from arrest or detention, but in respect of all other rights forming part of personal liberty in Art.21 he will have absolutely, no protection against

83. Ibid., at. p.37, Per Kania C.J.; at p.111, per Das J.

legislature, for, 'procedure established by law' in Art.21 still means any law enacted by the legislature.

Finally, perturbed by the perplexing consequences of such a narrow construction of the expression 'procedure established by law" it was expressly stated by one of the majority judges, Justice Mukherjea, and assumed by the others forming part of the majority, that the enacted law spoken of in Art.21 had to be a 'valid law'.[84]

Justice Mukherjea said:

> "My conclusion, therefore, is that in Art.21 the word 'law' has been used in the sense of State-made law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice. The article pre-supposes that the law is a valid and binding law under the provisions of the constitution having regard to the competency of the legislature and the subject it relates to and does not infringe any of the fundamental rights which the constitution provides for".[85]

The above observation of Mukherjea J. goes a step further than the preceeding argument of the Court with

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84. Ibid., at p.103, per Mukherjea J.:at p.41, per Kania, C.J.

85. Ibid., at p.103.

reference to Art.22. For, now the Court seems to argue that even though 'procedure established by law' has been interpreted to mean State-made law, the State-made law in Art.21 must be a 'valid law'; and to be a 'valid law' in Art.21, the law must not infringe any of the fundamental rights in the Constitution. And accordingly the Court appears to maintain that the requirment that 'law' in Art.21 must be a 'valid law' amounts to a limitation on the legislature and hence on that score the Court's interpretation of Art.21 is not liable to be attacked.

It is respectfully submitted that the above argument of the Court only reiterates what has already been provided in the Constitution, and it does not introduce any thing new to mitigate substantially the rigour of the restrictive interpretation of Art.21. On closer scrutiny, one can notice a fallacy in the argument of the Court. That is to say, though it is claimed that 'law' in Art.21 must be a 'valid law' and to that extent it imposes a limitation on the legislature, in reality the limitation on the legislature is not the result of Art.21, the limitation does not proceed from Art.21; but the limition is the result of Art.13, which states in unambiguous words that any 'law' to be valid must not infringe any of the fundamental rights in Part III.

A law depriving personal liberty can be subjected to judicial review only on the ground that law infringes any other fundamental right than the right in Art.21. That is to say, if a law does not infringe any other fundamental right, but it infringes only the personal liberty of the individual under Art.21 there would be no scope for judicial review, for Art.21 by itself, does not provide a standard any more than a State-made law, which does not and cannot impose any limitation on the legislature.

Moreover, in view of the majority ruling in Gopalan that the rights in Arts.21 and 19 are mutually exclusive,[86] the above mentioned observation of Mukherjea J. can hardly secure any better protection for personal liberty in Art.21. In this context it may be pointed out that even if the theory of over-lapping of rights is accepted, there can still be situations where the right of personal liberty can be violated without necessarily violating any other rights explicitly guaranteed in Art.19.

Of course the only "glimmer of hope"[87] which one may find in the statement of Mukherjea J. seems to be this: If the court may take a wider view of 'personal liberty' in Art.21 so as to include all aspects of personal liberty that

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86. Ibid., at p.37, per Kania C.J.: p.71, per Sastri J.; pp.94-95, per Mukherjea J.; at p.110, per Das J.

87. Setalvad, op.cit., p.57.

are specifically and separately dealt with in Art.19, then and only then the 'valid law' formula would necessitate that the 'law', depriving personal liberty must also comply with the standard of "reasonableness" as required under cls.(2) to (6) of Art.19.

Undoubtedly, the above consequence could not have been in contemplation of the majority judges in Gopalan including Mukherjea J for two obvious reasons: first, the inflexible view of the majority on the inter-relationship between Art.21 and 19 as mutually exclusive; and second, their concerted and deliberate attempt to exclude the standard of reasonableness from Art.21. Nevertheless, the observation of Justice Mukherjea has proved to be a promise for the future, for, in later cases the judges seem to have made use of the above mentioned observation in order to invent a higher standard of protection for personal liberty in Art.21.[88]

Another major effort to justify the restrictive interpretation of 'procedure established by law' as "state-made law has been made by the court on the basis of 'the intention of the framers of the Constitution'.

At the outset, it is noticeable that the majority seems to have attempted to ascertain the 'intention of the

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88. This aspect will be fully discussed in Chapter V, infra.

makers' from the words as expressed in the Constitution, assuming that the words of the Constitution are so plain and self-speaking that they would readily unfold the 'intention' of the makers without having the necessity of looking into any extrinsic materials such as the debates, Committee Reports or speeches in the Constitutent Assembly or the experiences and functioning of other parallel constitutions which served as our models or our own historical background of constitution making.[89] This approach of the Court is clearly indicative of its positivistic attitude.[90] Chief Justice Kania was reflecting the views of the majority when he put it bluntly thus: "No extrinsic aid is needed to interpret the words of Art.21, which in my opinion, are not ambiguous. Normally read, and without thinking of other Constitutions, the expression "procedure establsihed by law" must mean procedure prescribed by the law of the State".[91]

Despite the above catagorical statement, the fact remains that the majority of the judges in Gopalan did refer to and rely on such 'extrinsic aids' as the Reports and debates in the Constituent Assembly and they did 'think of

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89. A.I.R. 1950 S.C. 27, see at pp.39, 101.

90. McWhinney, op.cit. p.130.

91. A.I.R. 1950 S.C. 27 at p.39.

other constitutions'[92] in interpreting the words of Art.21. Even here, as regards the extent of use and admissibility of the extrinsic aid, the majority judges appear to have been guided by the English rules of statuory interpretation.[93] Thus, according to the majority the speeches and statements of the individual member of the Constituent Assembly cannot be admitted in aid of evidence;[94] but the Reports of the Drafting Committee of the Assembly on Art.21 and the corresponding debate expressing group intention are admissible.[95] Further, as stated by Kania C.J. even to these Reports and debates 'resort may be had... only when latent ambiguities are to be resolved'.[96]

Morever, the majority judges claimed that they allowed reference to the debates only to show that the 'due process of law' clause, as known in American constitutional

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92. The judges have repeatedly referred to the Constitutions of the United States and Japan for interpreting the expression 'procedure established by law'. See ibid. at pp.39, per Kania C.J.; at p.71, per Sastri J., ; pp.100-101, per Mukherjea J.; and at pp.116-117, per Das J.

93. Thus the majority relied on authorities such as Maxwell on Interpretation of Statutes; and Crawford on Satutory Construction, see, ibid., at p.39.

94. Ibid., at pp.38-39, 73.

95. Ibid., p.39, 101.

96. Ibid. If this is so, one would wonder why Kania C.J. allowed reference to the reports of the Committee, for, he held that 'the words of Art.21 are not ambiguous'.

law, was deliberetely dropped from Art.21 by the Constituent Assembly.[97]

However, the majority of the judges repeatedly referred to the Report of the Drafting Committee which suggested the substitution of "procedure established by law" in the place of "due process of law" and to the debates thereon not merely to show that the "due process of law" clause was deliberately dropped from Art.21,[98] but also to drive support for certain crucial conclusions of far-reaching consequences. For instance, Kania C.J. relied on the fact of the omission of 'due process' clause to support his restrictive interpretion of 'law' in Art.21.[99] At another place he said: "...the deliberate omissions of the word "due" from Art.21 lends strength to the contention that the justiciable aspect of law, i.e. to consider whether it is reasonable or not by the court does not form part of the Indian Constitution".[100] The majority judges have heavily relied on the above mentioned Report and debates and particularly on the omission of the word "due" from Art.21 to support their narrow interpretation of the expression 'procedure established by law" as procedure prescribed by

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97. Ibid., at pp.39, 101-102.

98. Ibid.

99. Ibid., at p.39.

100. Ibid.

State-made law.[101] The majority appears to have held the view that to give any other meaning to that expression so as to secure a standard of fairness or justice as protection for personal liberty would be to stultify the intention of the Constituent Assembly.[102]

It is respectfully submitted that the entire approach of the Court towards the 'intention of the makers of the Constitution' both with reference to the notion of 'intention' and the methodology of ascertaining the 'intention' appears to have been positivistic, unhistorical and self-contradictory. The Court has attempted not only to limit the range of Constituent Assembly proceedings that are admissible in aid of ascertaining the 'intention', but also to restrict the purposes for which even these limited materials can be referred to.

The Court in its reseach for the intention of constitution makers, unfortunately, adopted the exclusionary rule' of statutory interpretation, leading to the total exclusion of a very important and relevant source of recorded evidence as to the intention of framers as contained in the volumes of the Constituent Assembly

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101. Ibid., at pp.39, per Kenia C.J; p.102, per Mukherjea J.; p.118, per Das J.

102. Ibid.

Debates.[103] Had the Court taken recourse to that valuable source of evidence, it is submitted, the court could not have given the kind of restrictive meaning to the expression "procedure established by law" in Art.21 as it did. A candid reference to the Constituent Assembly Debates and an objective analysis thereof, as has been attempted earlier in this study,[104] would have helped the Court in appreciating the real purpose and spirit with which the fundamental rights and judicial review in general and personal liberty and its protection in particular had been discussed and adopted in the Constituent Assembly;[105] and such an appreciation could have helped the Court in avoiding the startling conclusions which it drew regarding the protection of personal liberty in Art.21.

It may not be an exaggeration to say that the Court was not really searching for the intention of the

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103. For a similar view, see, Alexandrowicz, op.cit., pp.9-13. The exclusionary rule of statutory construction is quite inappropriate to constitutional interpretations. In the United States the debates on the drafting and adoption of the Constitution and the Amendments thereto are admissible as indicative of their intended purpose. See Cooley's Constitutional Law, (1931) p.195; In French Law also, the preparatory work, called, travaux preparatoires is always admissible to ascertain the intention of the legislature. This is the rule in the case of International instruments. See, Alexandrowicz, ibid., at pp.14-15.

104. For the detailed analysis of the Debates on Art.21, see Ch.II, supra.

105. Ibid.

Constituent Assembly; but it was only searching for a justification to support its decision. Thus, in that process, the Court seems to have thought it convenient to look only to the Report of the Drafting Committee in order to make sure, with its help, that all the shadow of the 'due process of law' has been definitely and deliberately eliminated from Art.21.

The above criticism can further be substantiated by a brief reference to yet another important aspect. As regards the 'manipulation'[106] of even the limited sources such as the Reports of the Drafting Committee, the attitude of the majority judges seems to be a pre-determined one. The Drafting Committee Report, no doubt, contained the recommendation to substitute the clause "procedure established by law" in the place of "due process of law"; but it also contained the reason for the change. And the Constituent Assembly accepted both the change as well as the reason for the change as contained in the Report.[107] But,

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106. Quite often the "intention of constitution-makers" as "found" by judges are in the nature of fictions, which would help the judges to cast their value judgements in the mould of the "intention of the framers", reducing the whole exercise to the charade of "pick your framer". For a neat discussion of this aspect, see William Anderson, "The Intention of the Framers: A Note on Constitutional interpretation", 49 American Political Science Review, (1955), 340.

107. Draft Constitution, first footnote, p.8. The committee cited as its precedent Art.31 of the Japanese Constitution of 1946. See, C.A.Deb., 13th December,1948.

unfortunately, the majority appears to have made only a partial use of the Report to serve its partisan purpose, for, it claimed that reference to the Report is allowed only to show that the 'due process of law' clause as existed in American Constitutional law has been <u>deliberately</u> dropped from Art.21. Whereas the reason for the change as given in the Report does not seem to have received the importance and attention which it deserves from the majority judges. It may be recalled that the reason given in the Report for the suggested changes is that the words "procedure established by law" are more <u>specific</u> when compared to the clause "due process of law".[108]

If the Committee Report is the only permissible extrinsic aid to interpret the text of Art.21, and if the Court has really interpreted that text in the light of the intention of the makers as disclosed in that Report, it could hardly have been possible for the Court to construe Art.21 in the way the majority did. For, the intention of the makers in dropping "due process of law" clause, as is evident from the Report, was only to make the standard of protection in Art.21 more specific; the intention was not to make that standard an illusory or sterile one, totally devoid of fairness and justice or to make the right to personal liberty an ordinary legal right, imposing no

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108. <u>Ibid</u>., For the details, see Ch.II, <u>supra</u>.

limitation on the legislature. But, unfortunately, the majority seems to have failed to appreciate the significance of the reason for the change as contained in the Drafting Committee Report, inspite of the pointed argument of the petitioner on this point.[109] Justice Fazl Ali, on the other hand, appears to have agreed with the petitioner's contention that in view of the somewhat uncertain and fluid state of law as prevailing in America on the subject, the Drafting Committee recommended an alteration for the purpose of making the language more specific and that it was made specific in the sense that instead of being extended over the whole sphere of law, substantive as well as adjective, it was limited to what is known as "procedural due process".[110] Yet another noticeable feature, in this regard, is the discriminatory attitude of the majority in making use of the Reports of the Drafting Committee. For instance, in the case of the Report, recommending the dropping of 'due process' clause, the majority appears to have ignored the significance of the statement of the reason for the change contained in the Report; but in the case of another Report of the Drafting Committee, recommending the addition of the word 'personal' qualifying "liberty" in

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109. A.I.R. 1950 S.C.27, at p.101.

110. *Ibid.*, at p.57, per Fezl Ali J.

Art.21,[111] the majority judges seem to have given considerable significance for the statement in the Report as to the reason for the suggested change; and accordingly interpreted "personal liberty" in Art.21 'so as not to include the freedoms dealt with in Art.19'.[112]

It is respectfully submitted that the whole process adopted by the majority in order to ascertain the "intention of the constitution-makers" seems to have been afflicted with a series of flaws such as the positivistic exclusion of the relevant and valuable evidence available in the Constituent Assembly Debates; the selective use of the Drafting Committee Reports for certain pre-determined purposes; the partial use of certain parts of the Report, ignoring the rest; and the attitude of double standard in making use of the Reports in interpreting the different expressions contained in the same Art.21. And consequently, the very objectivity of the process appears to have been seriously impaired, affecting considerably the accuracy of the "intention" as it emerged from that process, and thereby, weakening substantially the very efficacy of that "intention" as a justification for the restrictive

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111. See, B.N. Rau, Draft Constitution, Clause 16. This change has considerably narrowed down the scope and meaning of liberty. For a similar view, see also Alexandrowicz., op.cit., pp.11-13.

112. A.I.R. 1950 S.C.27, at pp.70-71, per Sastri J.

interpretation of the expression" procedure established by law in Art.21.

Even the juristic[113] justification extended to the decision as well as to 'positivist' approach of the judges in Gopalan on the ground that the judges were deeply influenced by the "English judicial tradition and patterns of thought" does not seem to be fully true and plausible atleast for two obvious reasons. First, in the light of the historical development of personal liberty as well as the recognition of habeas corpus as the constitutional remedy to protect that liberty in England,[114] one can hardly believe that the judges, while dealing with the petition of A.K.Gopalan, were greatly influenced, by the English legal tradition. If the judges were so influenced, they could not have refused to go into the sufficiency of grounds of detention. For, in English law it is imperative that the judges in habeas corpus proceedings would always go into the sufficiency of grounds of detention.[115] Similarly, while upholding the validity of Sec.3(1) of the Preventive Detention Act [116] which provided for preventive detention of

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113. McWhinney, op.cit., p.130. M.C. Setalvad also expressed the similar view, see Setalvad, op.cit., p.51.

114. For a detailed discussion of this historical developments in England, see Ch.I, supra.

115. See, Alexandrowicz, op.cit., pp.26-27.

116. See, A.I.R. 1950 S.C. 27, at pp.42-43, 77.

persons on the subjective satisfaction of the executive, the judges claimed to have followed the English law, particularly the House of Lords decision in Liversidge V. Anderson.[117] While claiming so, it is submitted, the judges seem to have forgotten that they were applying the rules known to English emergency law to a non-emergency case in India. Therefore, as Prof. Alexandrowicz has rightly pointed out, "its claim, of having acted on the decision in Liversidge V. Anderson in its entirety is not quite justified".[118]

Secondly, if the attitudes of 'legal positivism' and judicial 'self-restraint' have become the ingrained qualities of the Indian judges due to their historical acquaitence with the English tradition, then they would have evinced the same attitude towards the entire text of the Constitution. But it was not to be. If such influence of of inherited 'judicial tradition' has been immense and deep, then the differential standards adopted by the Court in the fields of liberty and property rights would seem to be quite inexplicable. Suffice it to refer to a single example to

117. 1942 A.C.106. As a matter of fact, one of the majority judges in Gopalan, Sastri J., has held one year later in State of Madras V. V.G.Row (A.I.R. 1952 S.C.196) that 'the formula of subjective satisfaction of the Government... cannot receive judicial approval as a general pattern of reasonable restrictions on Fundamental Rights'.

118. See, Alexandrowicz, op.cit., p.29.

prove the point. As it has been noted earlier, the majority judges in Gopalan repreatedly emphasised the absence of the word "due" in the clause "procedure established by law in Art.21 and on that ground refused to introduce any element of 'due process' or 'reasonableness' in Art.21.[119] But on the contrary, in State of West Bengal V. Bela Banerjee,[120] while interpreting the word 'compensation' in Art.31(2), despite the absence of the words "just" ('just' is equivalent to 'due') or 'adequate' preceeding the word 'compensation', the judges held that 'compensation' meant 'just' or 'adequate' compensation, that is to say, 'full indemnification of the owner of the expropriated property. While in Art.21 the judges relied heavily on the fact that the word 'due' was deliberately omitted by the Constituent Assembly, in Art.31(2) the fact that the words 'just' or 'adequate' had also been deliberately omitted by the Constituent Assembly[121] was conveniently ignored. Lastly, while in Art.21 the Drafting Committee Reports and debates have been used to ascertain the intention of the constitution-makers as to the meaning of "procedure established by law", such preparatory works of the Assembly have not been used to interpret the word 'compensation' in Art.31(2). Thus, towards the interpretation of Art.31(2),

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119. A.I.R.1950 S.C. 27, at pp.39, 102, 118.

120. A.I.R. 1954 S.C. 170.

121. See, C.A.Deb., Vol.IX, p.1191.

unlike in the case of Art.21, the judges seem to have followed a liberal 'policy-making' - mode of constitutional interpretation. It is, therefore, submitted that the influence of the "English judicial tradition and patterns of thinking" supposed to have been inherited by the judges cannot satisfactorily explain or justify the adoption of a 'positivist-restraintivist' mode of constitutional interpretation in Gopalan in view of the above activistic approaches taken by the judges towards the 'liberty' and 'property' provisions in the Constitution.[122] This, once again, shows that even the decision of a judge whether to be a 'positivist' or to be an 'activist' itself is dependent on a value judgement.

From what we have discussed so far, it follows that the interpretation of the expression "procedure established by law" in Art.21 by the majority judges in Gopalan is clearly wrong. For, to interpret that expression to mean merely 'procedure prescribed by any law enacted by the legislature' is to render the standard of protection for personal liberty in Art.21 sterile and illusory and to convert the fundamental right to personal liberty into a non-justiciable constitutional right which does not impose any limitation on the legislature.

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122. See, Alexandrowicz, op.cit., pp.12-14.

It is submitted that if the Court had treated the Constitution as an organic document, which governs the government and regulates the relation between the government and the governed,[123] to be construed liberally giving due regard to the purposes that the document is intended to serve and to the policies that the instrument is intended to embody,[124] it could have avoided the above mentioned undesirable consequences. It is further submitted that the provision in Art.21 must have been treated as not merely prescribing a legal rule, but as laying down a constitutional principle of great importance.[125] If Art.21 had been perceived as a constitutional principle which combines together both the personal liberty of individual and the police power of the State to regulate, control or even to deprive that liberty in public interest, the Court could have better appreciated the crucial place and significance of a standard, capable of serving as a

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123. See, K.C. Wheare, Modern Constitutions, (1958) p.81; C.F.Strong, Modern Political Constitutions, 8th ed.(1975) p.10.

124. See, McWhinney, op.cit., p.136.

125. For a detailed discussion about the difference between legal principles and legal rules, see, Ronald Dworkin, "Is Law a system of Rules?" in Summers, ed., Essays in Legal Philosophy (1968) p.37 et. seq. See, also Ducat, op.cit., pp.44-50, 95-100. The author describes the attitude of the judges to treat constitutional provisons as a system of rules as a serious drawback in the "absolutist" mode of constitutional interpretation, which is otherwise known as analytical positivism. Also see W.Friedmann, Law in A Changing Society (1959) p.61.

'guarantee of "reasonableness" in relations between Man and the State'.[126] In that case the Court could have recognized that it is that 'guarantee of "reasonableness" in relations between Man and State' the expression 'procedure established by law' in Art.21 comprehends. For, that can be the only purpose and function of that expression in the context of Art.21, that is, to serve as a standard of protection of personal liberty of the individual against arbitrary, intolerent or oppressive exercise of the police power of the State.[127] And such a liberal conception of Art.21 could have definitely led the Court to construe the expression "procedure established by law" as equivalent to the concept of 'due process of law'. For, 'due process of law' as a standard, only operates as a limitation upon the power of the legislature in as much as 'the determination by the legislature of what constitutes proper execise of police power is not final or conclusive, but is subject to the

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126. See, McWhinney, op.cit., p.205. Having referred to the different aspects of Due Process, the author generalises the position thus: "Taken in its modern, expanded sense, ... the American Due process clause stands as a high-level guarantee of "reasonableness" in relations between Man and the State...."

127. This was precisely the expectation of the members of the Constituent Assembly while adopting Art.21. See the discussion in Ch II, supra. Also see, K.M.Munshi, Pilgrimage to Freedom, pp.298-99.

supervision by the courts".[128] In this context it may be observed that the apprehensions aired by the majority judges in Gopalan as to the 'vagueness' of 'due process'[129] and as to complications involved in enunciating the corresponding doctrine of 'police power'[130] are misplaced, for, the substance of 'due process' and 'police power' are very much there in Par.III, particularly in the scheme of rights in Art.19,[131] as much as the "restiction" cls.(2) to (6) import the essence of police power, and the standard of "reasonableness" provided therein begets the concept of 'due process'.[132] Therefore it is wrong to assume that the concepts of 'due process' and 'police power'[133] are a lien to the Indian Bill of Rights. This scheme could have been

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128. Meyer V. Nebraska, (1923) 262 U.S. 390, 400. It is interesting to note that a similar view is held by one of the majority judges in Gopalan a few months later. In Chintamanrao V. State of M.P., A.I.R.1951 S.C.118, Sastri J. held: "The determination by the legislature of what constitues a reasonable restriction is not final or conclusive; it is subject to the supervision by this court".

129. A.I.R.1950 S.C.27, pp.39, 72-73, 102.

130. Ibid., at pp.73, 118.

131. This aspect has been elaborately discussed by Dr.D.D.Basu in his 1972 Tagore Law Lectures, see D.D. Basu, Limited Government and Judicial Review: Lecture V - "Due Process under the Indian Constitution".

132. Ibid., at p.131. For the clear judicial approval of this view see Kesavanda Bharati V. State of Kerala A.I.R. 1973 SC 1461,1946, per Mathew J.

133. D.D. Basu, ibid., at p.225.

reasonably read into Art.21, "procedure established by law" being the standard of "due process of law", and the power of the State to deprive a person of his personal liberty being the 'police power' of the State. A well reputed writer on the police power calls it "the law of overruling necessity" and then adds: "The law of necessity has been stated to be an exception to all human ordinances and consitutions, yet has been frequently decided to be subject to the law of reason, and subject to the control of the courts".[134] And G.W.Wickersham says:

> "The entire doctrine of the police power of the states is the creation of the courts, evolved from the necessity of harmonizing provisions of written consitutions of states and nations with the imperative needs of civilized society. It is the result of the application of the "rule of reason" in the construction of written constitutions".[135]

Thus even the very doctrine of police power implies that power is subject to 'law of reason' and hence is subject to judicial supervision. And what lies at the heart of 'due process' is this 'law of reason: A perception of Art.21, as suggested above, could have also reminded the juges in

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134. W.P.Prentice, The Police Power, p.6.

135. George W.Wickersham, "The Police power, A product of the Rule of Reason", 27 Harv. L. Rev. (1914), 297.

Gopalan of their proper role in the construction of constitutional provisions made for the protection of the individuals.[136] And they could have realised that their role is not mere mechanical application of the provision in Art.21; but that their task is to work out the constitutional principle in Art.21 so as to effect a just and proper balance between the conflicting interests of liberty and public interest in a given case. They could have then realised, as Justice Holmes said, "practical lines have to be drawn and distinctions of degree must be made".[137] Such a dynamic 'role perception' on the part of the judges could have led them to give a 'purposive' and 'contextual' interpretation to the expression 'procedure established by law", giving due regard to the spirit and philosophy of the Constitution, to the high value and purpose of the fundamental rights, to the history of freedom struggle and constitution - making,[138] to the debates and proceedings in the Constituent Assembly,[139] to the cultural and philosophical heritage of this country;[140] and to the

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136. See, Justice Potter Stewart, The Role of the Supreme Court In American Life, (1966), p.4.

137. Per Holmes, in Diamond Glue Co. V. US.Glue Cox. 187 US.611, 616.

138. For a detailed discussion of this aspect, see Ch.II, supra.

139. A detailed analysis of the Constitutuent Assembly Debates has been given in Ch.II, supra.

140. Ibid.

history and constitutional experiences in other countries.[141] Such a liberal approach could have eventually led the judges to construe "procedure established by law" in Art.21 as "due process of law", evolving thereby a just normative standard for the protection of personal liberty in Art.21.

But, unfortunately, the majority judges in Gopalan had taken a totally different positivist course, and had marched, in the words of Cardozo, "to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them' no alternative".[142] And thus the majority has failed to introduce the due process concept into the expression "procedure established by law" and thereby failed to provide for adequate protection in Art.21 for personal liberty against the 'legislative vagaries'. This judicial failure in Gopalan to integrate liberty with justice[143] has resulted not only in the denial of both in Gopalan, but also in the handing down of a legacy of legal positivism for the future, doing incalculable damage to the development of liberty jurisprudence in free India for nearly three decades.

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141. See, Ch.I, supra.

142. B.N.Cardozo, The Growth of Law, (1926) p.66.

143. For a discussion as to the inseparable nature of liberty and justice and other related aspect, see I.P.Massey, "Concept of personal Liberty In Pre-Independence Era", 4 KLJ (1978) 80.

The legecy of the positivist approach towards the protection of personal liberty, as laid down by Gopalan seems to have meant also a characteristically mechanical attitude to the question of stare decisis and the binding force of precedents.[144] Consequently, throughout the period under survey, what one finds is a phase of faithful perpetuation of the legacy of Gopalan, culminating into its ugliest form in Shivakant Shukla.[145]

No let us turn to that phase of the legacy of Gopalan.

The Legacy of Gopalan:

At the outset it is submitted that on the issue of the interpretation of the expression "procedure established by law" in Art.21, a detailed discussion of the decided cases during this period does not seem to be necessary or profitable in view of the fact that all aspects of the interpretation of that phrase have already been elaborately

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144. This is so because in a positivist or 'absolutist' mode of constitutional interpretation, the rule of law constituting the major permise is a command embodied in a constitutional provision. Therefore, as Ducat says, "An opinion drawn along these lines not only justified the conclusion reached by the court in a given case, but for many years was believed to explain the process of decision simply because rules were perceived to be the only operative force in reaching a legal judgement". See, Ducat, op.cit., pp.48-49. See also McWhinney, op.cit., p.17.

145. A.D.M. Jabalpur Vs. Shivakant Shukla AIR 1976 S.C.1207.

discussed with reference to the decision of the Court in Gopalan; and also in view of the fact that the position laid down by the Court in Gopalan on the meaning and scope of "procedure established by law" has not been overruled or even altered by any of the Court's subsequent decisions during this period. Hence it is proposed to make only a brief reference to those cases that are relevant to the issue under discussion.

The key-note of judicial process as regards the protection of personal liberty in Art.21 during this period has been a téndency to exalt law and order at the expense of liberty - an attitude of incorrigible 'restraintivism'.[146] The Court adhered steadfastly to the Gopalan's dictum on the meaning of "procedure established by law" in a catena of cases,[147] and contented itself with some procedure

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146. It involves, among other things, an unwillingness on the part of the judges to strike down legislative or executive action on the ground of existence of some conflict with the constitution's substantive provisions; and presumption of constitutionality of legislative and executive actions. See, McWhinney op.cit., pp.213-14; Ducat, op.cit., p.39.

147. State of Bombay, V. Atma Ram, A.I.R. 1951 S.C.157; Ram Singh V. State of Delhi, A.I.R. 1951 S.C.270; Krishnan V State of Madras, A.I.R.1951 SC 301; State of Punjab V. Ajaib Singh, AIR 1953 SC 10; Purushottam V. B.M.Desai, AIR 1956 SC 20; Collector of Malabar V. E. Ebrahim, AIR 1957 SC 688; M.S.M. Sharma V. Srikrishna Sinha, AIR 1959 SC 395; Kharak Singh V. State of U.P., AIR 1963 SC 1295; In re, under Art.143, Constitution of India, AIR 1965 SC 745;State of Maharashtra Prabhakar Pandurang AIR 1966 S.C.424. Satwant Singh V. A.P.O.: New Delhi, AIR 1967 SC 1836; Harish Uppal V. Union of India, AIR 1973 SC 258; and Govind V. State of M.P., AIR 1975 SC 1378.

prescribed by a State-made law as a justification for the deprivation of personal liberty.

Even the limited scope of judicial review in cases of arrest and detention with reference to Art.22 has further been deflated by the Court, construing restrictively the clauses in Art.22 which provide for certain procedural safeguards in matters of arrest and preventive detention.[148] Following Gopalan, the Court appears to have consistently refused to interfere with the subjective statisfaction of the executive in cases of preventive detention; and it refrained from looking into the sufficiency of ground for detention and thereby denigrated further even the minimal procedural justice as secured by Art.22(5).[149]

In State of Bombay V. Atma Ram,[150] the respondent, a trade union leader, was detained under Sec.3 of the

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148. See, ibid. Atma Ram, Ram Singh; Krishnan, Ajaib Singh; and West Bengal V. Ashok Dey, AIR 1972 SC 1660; Fagu Shah V. West·Bengal, AIR 1974 SC 613; H.Saha V. West Bengal, AIR 1974 SC 2154; A few exceptions to the above restrictive approach can be seen in Sambu Nath Sarkar V. West Bengal, AIR 1973 SC 1425; Bhut Nath V. W.Bengal AIR 1974 SC 806; and Khudiram V. West Bengal, AIR 1975 SC 550.

149. See, ibid. Atma Ram; Ram Singh; and H. Saha. Art.22 Cl(5) says: "When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order".

150. AIR 1951 SC 157.

Preventive Detention Act, 1950 on the subjective satisfaction of the Government that 'he was engaged and was likely to be engaged in promoting acts of sabotage on railway and railway property in Greater Bombay.[151] The respondent contended that the ground communicated to him was vague and did not contain sufficient particulars enabling him to make a representation against the order of detention at the 'earliest opportunity' as mandated by Art.22(5).[152] The Court unanimously rejected the petition. Kania C.J.[153] held that under Art.22(5) a detenu was entitled to two related but distinct rights, the one to have the 'grounds' communicated and the other to have the "opportunity of making a representation". He further held that while the sufficiency of the 'grounds' and the 'particulars' supplied to the detenu, for enabling him to make a proper representation was justiciable, it was not for the Court to judge whether the 'grounds' supplied to the detenu were "sufficeint" to justify the detention.[154] But Sastri and Das JJ. in their concurring judgements held that the Court could not judge even the sufficiency of the 'grounds' and particulars supplied to the detenu for making a

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151 Ibid., at pp.158-59.

152. Ibid.

153. For himself and Fazl Ali, Mukherjea, and Chandrasekhara Aiyar JJ. (Mahajan and Bose JJ. dissenting).

154. Ibid., at pp.161-62; also at pp.164-65.

representation.[155] According to Sastri J. to suggest that the 'grounds' communicated to the detenu should be sufficient to render the right of making a representation effective and meaningful was "not to construe the clause (5) of Art.22 in its natural meaning but to stretch it by the process of implication, so as to square with one's preconceived notions of justice and fairplay".[156] And so he held:

> "... it is not the province of the Court to examine the sufficiency of the grounds for the purpose of making a representation, a matter left entirely to the discretion of the executive authority. An argument in support of the liberty of the subject has always a powerful appeal but the Court should, in my opinion, resist the temptation of extending its jurisdiction beyond its legitimate bounds".[157]

In the same positivist vein, Das, J. held that, as explained in Gopalan's case, procedure established by law meant procedure enacted by the legislature, i.e., State-made procedural law and not any rule of natural justice; that

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155. Ibid., at pp.167-68, 173-74.

156. Ibid., at p.168.

157. Ibid., at p.169.

such 'procedure' must conform only to the constitutional requirements as set forth in Art.22; that those constitutional requirements were incorporated in the Preventive Detention Act; and that the order of detention thus made under Sec.3 of the said Act was valid since it was in accordance with the procedure established by law as laid down by Art.21.[158] Agreeing with Sastri J. on the scope of Art.22(5), Das J stated, in a baldly positivist language thus:

> "... under cl. (5) the authority is to communicate the grounds on which the order has been made.... If the grounds were vague it is the vague grounds that must be communicated, for it was upon those vague grounds that the order has been made. That is the express provision of the first part of cl.5. This being the express requirement the implication that the grounds communicated must be sufficient to enable the detenu to make a representation cannot be read into the clause, for that will militate against the express requirement".[159]

Again, in Ram Singh V. State of Delhi,[160] where the petitioner was detained under Sec.3 of the Preventive

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158. Ibid., at p.171.

159. Ibid., at p.172.

160. AIR 1951 SC 270.

Detention Act, 1950 with the avowed object of preventing him from making certain speeches, allegedly, arousing communal hatred between the Hindus and the Muslims in Delhi, the Court again refused to go into the sufficiency or validity of the 'grounds' for the detention, leaving the matter entirely to the subjective satisfaction of the executive as provided under Sec.3 of the said Act. Sastri J.[161] said, for the Court, that 'the validity of a law authorising deprivation of personal liberty depended only on its compliance with the requirements of Arts.21 and 22, and as Sec.3 satisfied those requirements, it was constitutional'.[162] As to the 'vagueness' and 'insufficiency' of 'grounds' for making an effective 'representation', Sastri J. only reiterated his own views in Atma Ram, as noted above, and held that they were not justiciable,[163] thereby undoing even the limited scope of review of the sufficiency of the 'grounds' for making the representation under Art.22(5), as conceded by the majority in Atma Ram. When the attention of the Court was invited to the 'anomaly' that while a State Government should not be allowed to interfere with the freedom of speech or of the

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161. For himself and Kania C.J., and Das J. (Mahajan and Bose JJ. dissenting).

162. AIR 1951 SC 270, at pp.271-72.

163. Ibid., at pp.273-74.

press by way of stopping the circulation of newspapers[164] or by pre-censorship[165] of news, the Government should, for the same object be entitled to place a person under preventive detention which was a much greater restriction on personal liberty than any restriction on a newspaper ever could be, Sastri J. responded in his typical style of 'restraintivism' thus:

> "The anomaly, if anomaly there be in the resulting position, is inherent in the structure and language of the relevant Articles, whose meaning and effect as expounded by this Court by an overwhelming majority in the cases referred to above must now be taken to be settled law, and Courts in this country will be serving no useful purpose by discovering supposed conflicts and illogicalities and recommending parties to re-agitate the point thus settled".[166]

Even as late as in 1974 the Court in Haradan Saha V. West Bengal,[167] reverberating the same attitude of positivism and 'restraint as it had done in the above

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164. Romesh Thappar V. The State of Madras, AIR 1950 SC 124.

165. Brij Bhushan V. The State of Delhi, AIR 1950 SC.129.

166. AIR 1951 SC 270, at p.272.

167. AIR 1974 SC 2154.

mentioned cases, upheld the constitutional validity of the Maintenance of Internal Security Act, 1971 (MISA) though the impugned Act, as contended by the petitioner, made no provision for the objective determination of the facts on which the order of detention was based; imposed no duty on the detaining authority to set out all the facts to enable the detenu to disprove them to establish his innocence; and contemplated detention of persons even for performing legitimate acts. Ray C.J., for the Court, seems to have held the view that the protection of procedure established by law in the case of preventive detention should conform only to the safeguards as provided in Art.22, and those safeguards were incorporated in the impugned Act. According to the Court Art.22 did not impose any duty on the detaining authority to disclose to the detenu the available evidence or information against him.[168] And Ray C.J. said that if "a statutory provision excluded justice then the court did not completely ignore the mandate of the legislature". He further observed: "Even if Art.19 is examined with regard to preventive detention, it does not increase the content of reasonableness required to be observed in respect of orders of preventive detention".[169] Thus, unfortunately, the deprivation of personal liberty through preventive detention

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168. Ibid., at pp.2156-57.

169. Ibid., at pp.2159-60.

has been left to the prerogative of the executive which can exercise it on its own subjective satisfaction without being subjected to any requirement of 'due process' or reasonableness, provided, of course, that the executive follows strictly the procedure prescribed by a State-made law which, in turn, must comply only with the provisions of Art.22. What is still unfortunate is that the Court has construed those clauses in Art.22, particularly cl.(5) as in this case, restrictively to the extent of accommodating such a drastic legislative measure as the MISA, yielding reverentially to the 'mandate of the legislature to exclude justice', thus reducing the constitutional mandate of Art.22 to a vanishing point. Besides, the Court has made it clear that even the standard of 'procedural reasonableness' of Art.19 would not increase the content of 'reasonableness' required to be observed in respect of preventive detention.

Similarly, through another line of cases[170] the Court has considerably reduced the efficacy of the procedural protections provided by cls.(4) and (7) of Art.22[171] by taking recourse to restrictive interpretation of those clauses. In Krishnan V. State of Madras,[172] in

170. Krishnan V. State of Madras, AIR 1951 SC 301; West Bengal V. Ashok Dey, AIR 1972 SC 1660 Fagu Shah V. West Bengal, AIR 1974 SC 613.

171. For the text of Art.22, see Annexure VIII, infra.

172. AIR 1951 SC 301.

order to uphold the validity of the Preventive Detention (Amendment) Act, 1951 which did neither prescribe expressly the maximum period of detentions nor provide for the classes of cases and the circumstances in which a person might be detained beyond three months without the intercession of an Advisory Board, the Court appears to have read down the scope of Art.22(7) (a) and (b). Following Gopalan, the Court, held that the power of Parliament to prescribe the maximum period of detention under cl.(7)(b) was only permissive and not mandatory; and that cl.(7) (a) being an 'enabling provision', the word 'and' should be understood as 'or', i.e. in a disjunctive sense so that Parliament need not lay down both the classes of cases as well as the circumstances in which detention beyond three months without the intercession of the Advisory Board could be permitted.[173]

Though the above ruling on the interpretation of cl.7(a) has been overruled in Sambu Nath Sarkar,[174] the

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173. Ibid., at pp.302-304, per Sastri J. for himself and Kania C.J. at pp.305-308, per Mahajan and Das J.J. (Bose J. dissenting).

174. S.N. Sarkar V. West Bengal, AIR 1973 SC 1425. In this case the court, declaring Sec.17A of MISA as unconstitutional, held that the word 'and' in Art.22(7) (a) should be understood in conjunctive sense and that Parliament should prescribe both the circumstances and classes of cases as mandated by cl.7(a).

interpretation of cl. 7(b) as a 'permissive' provision has been kept alive by the Court in Ashok Dey.[175]

In Fagu Shah[176] also the Court, while upholding the validity of Sec.13 of the MISA which provided that a person could be detained for twelve months or till the expiry of the Defence of India Act, whichever is later, reiterated that Art.22(7) (b) did not impose a mandatory duty on Parliament to fix the maximum period of detention. The Court appears to have been anxious to protect 'the operative vigour of the State's power to enact laws on preventive detention', and not to preserve the procedural safeguards as provided in Art.22.[177]

Even as regards the procedural safeguards in cases of arrest as provided under Art.22(1) and (2),[178] the Court seems to have taken a restrictive approach. For instance,

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175. West Bengal V. Ashok Dey, AIR 1972 SC 1660 where the Court, relying on Gopalan and Krishnan, held that under Art.22(7)(b) Parliament is not under a mandatory obligation to prescribe the maximum period.

176. Fagu Shah V. West Bengal, AIR 1974 SC 613.

177. For the criticism of Fagu Shah, see, Prof. U.Baxi, in Introduction to K.M.Mathew on Democracy, Equality and Freedom ed. by U.Baxi, Eastern Book Co., (1978), p.LXV et.seq. Mohammed Ghouse, A.S.I.L., Vol.X:1974, pp.398-403.

178. Art.22 Cl.(1) provides for the right to be informed of the grounds of arrest and the right to consult and to be defended by a lawyer of his choice; and Cl.(2) provides the right to be produced before the Magistrate within 24 hours of the arrest.

in State of Punjab V. Ajaib Singh,[179] the Court held that a detention under the Abducted Persons (Recovery and Restoration) Act,1949, was not an 'arrest' within the meaning of Art.22(1) which did not define arrest and therefore that the detention, to be valid, should only be in accordance with the procedure prescribed by the Act as required by Art.21. This was followed in Purushottam V. B.H. Desai,[180] involving arrest under the Bombay Land Revenue Act, 1876; in Collector of Malabar V. Ebrahim[181] for arrest under the Madras Recovery of Revenue Act (2) of 1864; and in M.S.M.Sharma V. Sri Krishna Shinha[182] arising out of arrest for contempt of Parliament. In all these cases the Court upheld the validity of the arrests and the consequential deprivations of personal liberty on the ground that the deprivation was according to the procedures prescribed by the enactments, for that being the only protection available in Art.21.

Thus the above brief survey of the cases involving deprivation of personal liberty by arrest or detention already shows that the approach of the Court in this area

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179. AIR 1953 SC 10.

180. AIR 1956 SC 20.

181. AIR 1957 SC 688.

182. AIR 1959 SC 395.

has been predominantly positivist and "pro-Governmental".[183] The Court appears to have consistently maintained that the procedure established by law in cases of arrest and detention should conform only to the requirements of Art.22; and that the concern of the Court in such cases would be only to ensure that the executive acts strictly in accordance with such procedure as prescribed by the legislature. Besides, the survey also shows that the scope and efficacy of even Art.22, as a limitation on the legislature and therefore as a basis for judicial review of legislative infractions of personal liberty, has been considerably reduced by virtue of the positivist interpretation of the clause in Art.22.

Now, even in cases[184] where the Court had to grapple with situations of deprivation of personal liberty other than by arrest and detention, the Court does not appear to have shown any inclination to deviate from the meaning of the expression "procedure established by law" in Art.21 as laid down in Gopalan.

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183. See, Rajeev Dhavan, The Supreme Court of India - A Socio-Legal Critique of its Juristic Techniques, (N.M.Tripathi, 1977), pp.225, et. seq.

184. See, for instance, Kharak Singh V. U.P., AIR 1963 SC 1295; Satwant Singh V. A.P.O., New Delhi, AIR 1967 SC 1836; and Govind V. M.P., AIR 1975 SC 1378.

In Kharak Singh,[185] the Court gave a liberal meaning to the expression 'personal liberty' by holding that that expression meant not merely freedom from arrest and detention but it was used in Article 21 as a compendious term to include within itself 'all the varieties of rights which go to make up the personal liberties of man other than those dealt with in Art.19(1)';[186] and held that the right to sleep and to preserve the sanctity of home formed part of 'personal liberty' in Art.21. But the Court declined to express any opinion on the meaning of the phrase "procedure established by law" in view of the fact that the impugned U.P. Police Regulations, which infringed the rights of the petitioner were made, admittedly, without legislative sanction and so were not having the force of law as required by Art.21.[187] So the Court held: ".... it is unnecessary to pause to consider.... the content and significance of the words "procedure established by law" which was the subject of elaborate consideration by this Court in A.K.Gopalan V. State of Madras..."[188]

In Satwant Singh[189] also the Court followed the liberal conception of personal liberty as laid down in

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185. AIR 1963 SC 1295.

186. Ibid., at p.1302.

187. Ibid., at p.1299.

188. Ibid., at p.1301.

189. Satwant Singh V. A.P.O. New Delhi, AIR 1967 SC 1836.

Kharak Singh and further enriched the contents of personal liberty by holding that the right to travel abroad was a fundamental right forming part of personal liberty in Art.21. Here, again, the Court did not consider the meaning of the "procedure established by law", but appeared to have accepted the meaning as laid down in Gopalan. For in this case also, as conceded by the State, there was no enacted law regulating the right of a person to travel abroad.[190]

Again in Govind,[191] the Court has further expanded the juristic contours of personal liberty in Art.21, in the context of police surveillance and domiciliary vists. The Court seems to have suggested the incorporation of right to privacy into the concept of personal liberty in Art.21. And in this case, unlike in Kharak Singh and Satwant Singh, the impugned Police Regulations were held as having the force of law,[192] presenting, thus, an appropriate opportunity to the Court to test the validity of those Regulations with reference to Art.21 and in that process to determine afresh the meaning and significance of the expression "procedure established by law" in Art.21. But, unfortunately, the Court appears to have evaded that onerous task and, instead, preferred to follow the dictum of Gopalan. The Court said: "As

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190. Ibid., at pp.1841-42.

191. Govind V. M.P., AIR 1975 SC 1378.

192. Ibid., at p.1381.

regulation 856 has the force of law, it cannot be said that the fundamental right of the petitioner under Art.21 has been violated by the provisions contained in it: for, what is guaranteed under that Article is that no person shall be deprived of his life or personal liberty except by the procedure established by law.[193] Further, the Court also added an innocuous statement that the procedure provided by the regulation was "reasonable",[194] without explaining whether that certificate of reasonableness was given as required by Art.21 or by Art.19.

Thus, the above mentioned cases show that while the meaning and contents of 'personal liberty' had expanded progressively, the protection for that liberty in Art.21 had remained to be the sterile standard of 'procedure prescribed by any State-made law', as laid down in Gopalan. As a result of this development the new rights read into personal liberty were without any procedural safeguard and were left completely at the mercy of the legislature.[195] And what one may find in this course of judicial process is an unmistakable asymetry between the judicial liberalism in

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193. Ibid., at p.1386.

194. Ibid.

195. A similar view has been expressed by Prof. Mohammed Ghouse, see, A.S.I.L., Vol.XIV: 1978, p.395. He pointed out that 'Govind and Kharak Singh showed that a law enacted by State could eat up with ease such bare rights'.

'personal liberty' and the judicial positivism in "procedure established by law".

Thus throughout this period the standard of protection available in Art.21 for personal liberty has continued to be some 'procedure' that may be prescribed by a 'State-made law' whether that 'procedure' and 'law' be reasonable or not. The protection has been only against executive arbitrariness and not against legislative vagaries. Obviously, therefore, the scope of judicial review in Art.21 has been limited to ensuring the basic legality of the deprivation of personal liberty, i.e. to see that the executive acts strictly in accordance with the procedure prescribed by law. If this be the measure of protection of personal liberty even during normal times while Art.21 is in operation, the consequence that would follow the suspension of Art.21 during an emergency is quite understandable. The consequence would be fatal and disastrous, indeed. And Sivakant Shukla[196] has proved the point beyond doubt.

In A.D.M. Jabalpur V. Shivakant Shukla,[197] the appeals before the Supreme Court arose out of habeas corpus

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196. A.D.M. Jabalpur V. Shivakant Shukla, (1976)2 S.C.C. 521, which is commonly known as the Habeas Corpus Case.

197. Ibid. For a detailed analysis of this case, see Seervai, The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism, (1978); U. Baxi, The Indian Supreme Court and Politics, (1980) pp.79-116.

petitions filed by several detenus detained under the MISA. seven High Courts[198] rejected the preliminary objection raised by the State that the habeas corpus petitions were not maintainable in view of the Presidential Order dated June 27, 1975, which, inter alia suspended the right to move any court for enforcement of Art.21; and held that though the petitioners could not move the Court to enforce their fundamental right under Art.21, they were entitled to show that the order of detention was not in compliance with the law or was malafide. When the seven High Courts listed the petitions for hearing on merits, the State and the Union Governments brought the whole matter before the Supreme Court by way of appeals.[199]

Brushing aside the opinions of all the seven High Courts, the Supreme Court by a majority of 4:1[200] held:

> "In view of the Presidential Order under Art.359(1) no person has locus standi to move any writ petition under Art.226 before a High Court for Habeas Corpus or any other writ, order or direction to challenge the legality of an order of detention

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198. The High Courts of Allahabad, Bombay, Delhi, Karnataka, Madhya Pradesh, Punjab and Rajasthan. The High Courts of Andhra Pradesh, Kerala and Madras upheld this preliminary objection.

199. (1976) 2 Sec.521, p.523.

200. Ray C.J., Beg J., Chandrachud J., and Bhagwati J. (Khanna J. dissenting).

on the ground that the order is not in accordance with the Act or is illegal, or is vitiated by malafides factual or legal, or is based on extraneous considerations".[201]

The Court further held that Art.21 was the sole repository of rights to life and personal liberty against the State, and so any claim for a writ of habeas corpus was enforcement of Art.21 and was therefore barred by the Presidential Order.[202]

Thus the decision of the Court left the people of India with no legal remedy against illegal, arbitrary and mala-fide deprivation of their life and liberty by the executive during the emergency. The decision has not only shaken the conscience of every freedom-loving citizen of this country, but also has inflicted an irrepairable injury to the status and image of the Court as a national institution.[203]

But the fact remains that the majority could reach the above conclusion irrespective of its absurd

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201. Ibid., at pp.591-92, per Ray C.J.,;pp.643-44, per Beg J.; pp.678-79, per Chandrachud J.; and p.733, per Bhagwati J.

202. Ibid.

203. Seervai describes this Case as "the most glaring instance in which the Supreme Court of India has suffered most severely from a self-inflicted wound"., op.cit., p.59.

consequences, without much difficulty, through an undaunted course of constitutional logic. In this context, it is submitted that the majority decision in the Habeas Corpus Case seems to be nothing short of a deductive leap from the Gopalan's[204] dictum on Art.21. As has already been shown, ever since Gopalan the accepted position as regards the measure of protection available in Art.21 for personal liberty has been only this: the executive cannot deprive a person of his personal liberty unless it acts strictly in accordance with the procedure prescribed by law made by the State. Evidently, in this case, the Presidential Order under Art.359(1) suspended the protection secured by Art.21 for personal liberty during the emergency. Obviously the majority concluded that while Art.21 was suspended no one was entitled to the protection, that the executive should always comply with the authority of law in depriving the personal liberty of the individuals and so during such period even the basic legality of detention was not justiciable. If the conclusion was absurd and disastrous, and if the majority could reach such a conclusion with comparative ease, it was so because the legacy of Gopalan made available to them not only a handy and convenient major premise in Art.21, but also the techniques of legal

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204. AIR 1950 SC 27.

positivism and deductive logic.[205] And it is submitted that the reasoning of the majority that 'Art.21 is the sole repository of right to life and personal liberty' is only a logical offshoot of the positivist interpretation of Art.21, which the majority had additionally adopted as a legal strategy in order to accomplish the decision which it has chosen to reach.

Thus the Court has prefaced the decision by saying this: "The safeguard of liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. if extraordinary powers are given, they are given because the emergency is extraordinary....".[206] To the majority, "the Courts of law are competent only in normal times to weigh the competing claims of individuals and governments".[207] The Court was anxious to make clear that "matters of policy... are outside the sphere of judicial determination".[208] And it seems, the majority judges would like them to be seen only as the faithful executors of 'the fundamental law found in the Constitution' which is paramount,[209] having no

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205. For the detailed analysis of Gopalan in this respect, see the early part of this Chapter, supra.

206. (1976) 2 SCC 521, p.571, per Ray C.J.

207. Ibid., at pp.572.

208. Ibid., at pp.263, per Beg J., p.651, per Chandrachud J.

209. Ibid., at p.598.

responsibility for their decision, for, the decision being the inevitable result that flows from the Constitution. Thus says Justice Bhagwati:

> "... in the ultimate analysis, the protection of personal liberty and the supremacy of law which sustains it must be governed by the Constitution itself. The Constitution is the paramout and supreme law of the land and if it says that even if a person is detained otherwise than in accordance with law, he shall not be entitled to enforce his right of personal liberty whilst a Presidential Order under Article 359, clause (1) specifying Article 21 is in force, I have to give effect to it. Sitting as I do, as a Judge under the Constitution, I cannot ignore the plain and emphatic command of the Constitution for what I may consider to be necessary to meet the ends of justice".[210]

As to the presumption of validity of the governmental actions, Beg J.[211] has this to say: "It seems to me that courts can safely act on the presumption that powers of preventive detention are not being abused".

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210. Ibid., at p.723.

211. Ibid., at p.643; also p.633, per Ray C.J.

Ironically enough the majority has gone even beyond mere presumption; it has expressed its deep faith in the emergency regime and in the 'parental' exercise of emergency powers by the executive. It has even admonishoned those who have expressed suspicion and fear as to the possible abuse of emergency power. Ray C.J. said:

> "There is no record of any life of an individual being taken away either in our country during emergency or in England or America during emergency in their countries.... People who have faith in themselves and in their country will not paint pictures of diabolic distortion and mendacious malignment of the governance of the country....".[212]

Reacting, in the same vein, to the argument made by some of the counsels for the respondents as to the possible consequences, if the Court held that during an emergency deprivation of personal freedom by the executive was not justiciable, Beg J. remarked:

> "I do not think that it is either responsible advocacy or the performance of any patriotic or public duty to suggest that powers of preventive

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212. _Ibid._, at p.572.

detention are being misused in the current emergency.... Further more, we understand that the care and concern bestowed by the State authorities upon the welfare of detenus who are well-housed, well-fed, and well-treated, is almost maternal".[213]

From what we have set out above it becomes clear that not only in actual decision but also in the methodology of decision-making, Shivakant reflects the legacy of Gopalan - a legacy marked by an attitude of positivism and restraint and by a pretense of 'mechanical jurisprudence'[214]

Now, coming to the actual decision on the impact of the suspension of Art.21 by the Presidential Order under Art.359(1) on the right to personal liberty, the majority judges heavily relied on the interpretation of Art.21 in Gopalan.

Regarding the scope and extent of protection in Art.21 for personal liberty Beg.J. held:

"So far as Article 21 of the Constitution is concerned, it is abundantly clear that it protects the lives and liberties of citizens primarly from unwarranted executive action. It secures rights to

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213. Ibid., at pp.642-43.

214. See, the discussion on Gopalan's Case, supra.

> "procedure established by law". If that procedure is to be established by statute law, as it is meant to be, this particular protection could not, on the face of it, be intended to operate as a restriction upon legislative power to lay down procedure.... Art.21 was only meant, on the face of it to keep the exercise of executive power, in ordering deprivation of life or liberty, within the bounds of power prescribed by procedure established by legislation".[215]

He approvingly referred to Gopalan and said that there the majority judges held that Art.21 furnished the guarantee of "lex", which was equated with statute law only, and not of "jus" or a judicial concept of what procedural law ought really to be.[216]

Ray C.J. has also referred to Gopalan and expressed the same view, as noted above, on the meaning and scope of the expression "procedure established by law" in Art.21.[217]

Proceeding on the above lines, Chandrachud J went one step further and held catagorically that in so far as

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215. Ibid., at pp.606.

216. Ibid.

217. Ibid., at pp.578, 580.

the right to personal liberty was concerned one of the objects of the emergency provisions was to ensure that no proceeding would be taken or continued was enforce that right against the executive during the operation of the emergency.[218]

Bhagwati, J. proceeded to consider quite comprehensively 'the question as to what is the scope and content of the right conferred by Art.21, for without defining it, it would not be possible to determine whether the right sought to be enforced by the detenus in their writ petitions is the right guaranteed under Art.21 or any other distinct right'.[219] Having stated that the expression "personal liberty" in Art.21 is a comprehensive one, including "all atributes of personal liberty",[220] Bhagwati J. dealt with specifically the question as to 'the nature and extent of protection' which Art.21 gives against deprivation of personal liberty. According to him,

> "...it is clear from the language of Art.21 that the protection it secures is a limited one. It says... that no one shall be deprived of his personal liberty except by the procedure prescribed

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218. Ibid., at p.664.

219. Ibid., at p.689.

220. Ibid., at p.695.

by law. The meaning of the word 'law' as used in this Article came to be considered by this Court in A.K.Gopalan's case and it was construed to mean 'enacted law' or 'State law'.... The only safeguard enacted by Art.21, therefore, is that a person cannot be deprived of his personal liberty except according to procedure prescribed by 'State-made' law".[221]

Then, referring to the effect of suspension of enforcement of Art.21 by the Presidential Order, Bhagwati J. held:

"The right conferred by Art.21 is the right not to be deprived of personal liberty except according to procedure prescribed by law. Therefore, when the Executive detains a person without there being any law at all authorising detention or if there is such a law, otherwise than in accordance with its provisions, that would clearly be in violation of the right conferred by Art.21 and such violation would *a fortiori* be immune from challenge by reason of the Presidential Order. It must follow inevitably from this that when a *detenu* challenges an order of detention on the ground that it is *mala fide* or is not in accordance with the provisions of

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221. *Ibid.*, at pp.695-96.

the Act or is outside the authority conferred by the Act, he would be seeking to enforce the right of personal liberty conferred on him under Art.21 and that would be inhibited by the Presidential Order".[222]

Thus the Court has clinched the real issue in the Habeas Corpus Case solely as a logical conclusion from the 'nature and extent of protection' for personal liberty in Art.21 as determined by the Court in Gopalan. As a matter of fact it is the 'remorseless' constitutional logic behind this conclusion that has brought forth the issue whether 'Art.21 is the sole repository of right to life and personal liberty' as the focal point;[223] and has made the respondents' counsels to launch their "grandiose"[224] strategy of arguments, which found favour with the dissenting judge Justice Khanna. And it is the realisation, in view of the above logic, that so long as Art.21 is viwed

222. Ibid., at pp.697-98.

223. This issue seems to have been treated as the core issue both by the counsels who argued the case as well as the entire court, including the dissenting judge. This might have been so because, as Prof.Baxi points out, often 'the argumentative strategies' set 'the context of judgement-making'. See, Prof.U.Baxi, op.cit., p.84. But the real reason for shifting the focus on this issue as the 'heart of the problems' appears to be the awareness on the part of the Bench and the Bar as to the Constitutional position regarding the measure of protection of personal liberty in Art.21.

224. See U. Baxi, Ibid., at pp.79 et.seq.

only as a protection against executive arbitrariness in deprivation of personal liberty, as determined in Gopalan, no protection against the executive could be secured from within the Constitution while Art.21 is suspended, that has made Justice Khanna plunge into the high seas of 'natural rights',[225] 'pre-existing' common law and statutory rights[226] and the international human rights in search of some principle independently of Art.21 of the Constitution to protect the personal liberty of the individuals even during emergency. This valiant effort of Justice Khanna to keep aloft the values of liberty and rule of law during the darkest days of our Democracy has earned 'universal esteem' not only for his humanism and courage but also for his inflexible judicial independence,[227] (Though it caused him great personal loss!).[228]

Thus, upholding the 'grandiose' arguments of the respondents, Justice Khanna, in his dissenting judgement, held that Art.21 could not be considered to be the sole repository of the right to life and personal liberty, for,

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225. (1976)2 SCC 521, p.748. To him, the principle "that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution".

226. Ibid., at pp.746-49.

227. See, Seervai, op.cit., p.58; U.Baxi, op.cit., p.84.

228. He lost his Chief Justiceship as he was superceded for unexplained reasons.

even in the absence of Art.21 in the Constitution the State had got no power to deprive a person of his life or personal liberty without the authority of law.[229] To him, 'that is the essential postulate and basic assumption of the rule of law in every civilized society'.[230] He then said that Art.226 which empowered the High Courts to issue writ of _habeas corpus_ was an integral part of the Constitution, and that the principles which should be followed by the courts in dealing with petitions for writ of _habeas corpus_ to challenge the legality of detention were well established.[231] And Khanna J. further held:

> "There is no antithesis between the power of the State to detain a person without trial under a law of preventive detention and the power of the Court to examine the legality of such detention. In the exercise of such power the Court only ensures that the detaining authority acts in accordance with the law providing for preventive detention".[232]

There can be no doubt that the above conclusion of Khanna J. is pre-eminently desirable and is quite consistent with the purpose, philosophy and scheme of our Constitution

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229. (1976) 2 SCC 521, p.776.

230. _Ibid_.

231. _Ibid_., at p.777.

232. _Ibid_.

and the Bill of Rights therein. But, unfortunately, the opinion of Khanna J. did not come to be one of the Court. And the reason for that misfortune is not obscure. According to Khanna J. even during emergency while Art.21 is suspended, the right to personal liberty would continue to receive the protection of the principle of 'rule of law'; the principles of legality and ultra vires; the principle of legal protection available to the 'pre-existing' rights to life and liberty; and the general principles governing the issuance of writ of *habeas corpus*.[233] A close look at those principles would clearly show that the nature and extent of protection secured by each of those principles to which Khanna J. has taken recourse comes only to this: no person can be deprived of his personal liberty by the executive except in accordance with the authority of law.[234] Paradoxical though it may seem, this is exactly the nature and extent of protection of personal liberty available even during normal times while Art.21 is in operation.[235] For, as held by the majority, Art.21 incorporates only this limited protection that no one shall be deprived of his personal liberty by the executive otherwise than in accordance with State-made law[236] and to the majority

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233. See, *ibid*., at pp.776-77.

234. See *ibid*.

235. *Ibid*., at p.578, per Ray C.J; p.611, per Beg J.; p.664 per Chandrachud, J., pp.695-96, per Bhagwati J.

236. *Ibid*., at pp.666, 697-98.

judges, the protection that has precisely been suspended by the Presidential Order under Art.359(1) cannot simultaneously be retained as well, whether that protection is conferred by the Constitution or exists apart from or independently of it. To do so would be to render Art.359(1) as redundant and meaningless.[237] On the face of this position taken by the majority with reference to the measure of protection of personal liberty in Art.21, the argument that 'Art.21 is not the sole repository of right to personal liberty' appeared to be no answer.[238]

Thus from the foregoing analysis it follows that the dissenting opinion of Khanna J. could have prevailed, and the minimal protection of personal liberty against artbitrary deprivation by the executive could have been secured even during the emergency only if the Court was

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237. Ibid.

238. Perhaps, having realised the weakness in that argument, Khanna J appears to have attempted to advance an argument with reference to Art.21 as well. Accordingly, he said: When Art.21 is in force, law relating to deprivation of life and personal liberty must provide both, for the substantive power as well as the proceudre for the exercise of such power. When ..... Art. 21 is suspended, it would have the effect of dispensing with the necessity of prescribing procedure for the exercise of substantive power to deprive a person of his life or personal liberty, it cannot have the effect of permitting an authority to deprive a person of his life or personal liberty without the existence of such substantive power". It is respectfully submitted that this interpretation of Art.21 seems to be neither convincing nor has it been supported by any authority See, ibid., p.776.

prepared to bid farewell to the legacy of Gopalan and was willing to reconsider the interpretation of the expression "procedure established by law" in Art.21. Instead of squarely facing this interpretative challenge posed by Art.21, the judges including the dissenting judge, seem to have adopted the issue whether 'Art.21 is the sole repository of right to life and personal liberty' as the real central issue before the court. Even the respondents' counsels seem to have failed to incorporate this aspect in their 'grandiose' arguments.[239] It is therefore, submitted that this total unwillingness on the part of both the Bench and the Bar to reconsider Gopalan dictum on the nature and extent of protection of personal liberty in Art.21 is the 'real tragedy'[240] of Shivakant.

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239. U. Baxi, op.cit., p.83, Baxi describes the arguments of the respondents' counsels which 'sought to reserve maximum power of judicial review of detention orders by High courts' as the 'grandiose' strategy. He finds fault with this strategy only for its failure to challenge the legality of the declaration of emergency and of the 38th Constitutional Amendment - The argument aimed at securing minimum fairness and minimum adherence to legality on the part of the executive is described as the 'minimal' strategy.

240. Prof. Baxi refers to the failure of both the 'minimal' and 'grandiose' strategies, as reflected in the Order of the Court which denied 'any locus standi to move any petition' even on the ground that the detention order is illegal or mala fide, as the 'tragedy of Shivkant'. See U. Baxi, op.cit., p.110. But it is respectfully submitted that the above 'tragedy' appears to be only a symptom of a more serious constitutional deficiency in Art.21 which has, ever since Gopalan, been denigrated and treated only as a protection against executive arbitrariness.

It is submitted that if the Court had addressed itself to the real issue and was prepared to reconsider Gopalan on the meaning and content of the standard of protection of personal liberty in Art.21, the Court could have averted the tragic conclusion in Shivakant which rendered the people utterly helpless against illegal and even mala fide deprivation of their life and liberty by the executive during the emergency.

In the process of determining anew the nature and extent of protection which Art.21 guarantees to personal liberty if the Court had given, a liberal and purposive interpretation to the expression "procedure established by law" in Art.21, giving due regard to the spirit and purpose of the Constitution and the fundamental rights, the Court could have, as suggested earlier, held that expression in Art.21 meant 'due process of law'. The Court, in this context, must have apprciated the fact that Art.21 did not confer the right to life and personal liberty which were pre-existing, inherent and inalienable birth-rights of man;[241] but that Art.21 only recongised those rights and gave them an additional protection even against the

241. (1976)2 SCC 521, pp.747-49, per Khanna J.; Kesavananda V State of Kerala, AIR 1973 SC 1461, pp.1938-1941, per Mathew, J.; Gopalan's Case, AIR 1950 SC 27, p.93, Per Mutherjea J.; also see Seervai, The Habeas Corpus Case, op.cit., p.36.

legislative powers of the State.[242] And, in fact, it is this additional protection which the Constitution confers on the rights of the individuals that makes those rights fundamental. And the very fact that the right to personal liberty was conceived as a fundamental right by including it

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242. See, Seervai, ibid., at pp.20, 30-31, 36. Seervai rightly maintains that the distinction between an ordinary right and a fundamental right lies in the fact that the latter is given an additional protection against the legislative power; and in the context of Art.19 he says that the emergency provisions in Arts.358 and 359 would remove only that addtional protection so that during emergency the legislature may pass a law even in derogation of Art.19, leaving the obligation of the executive to be bound by law intact - at p.20.

But when it comes to Art.21, it is respectfully submitted that Seervai's 'addiction' to Gopalan becomes manifest. Confronted with the innocuous interpretation of Art.21 in Gopalan, he appears to concede that.... Art.21, taken by itself, appears at first blush open to the objection that it does not confer a fundamental right. For, if "law" in Art.21 means a law enacted by a legislature, as rightly held in Gopalan's Case (emphasis added), then Art.21 appears to confer no fundamental right, for fundamental rights are limitations on legislative power and Art.21 contains no such limitation since it only requires the authority of "law". Still, Seervai could find fault only with the poor 'draftsmanship' of the Drafting Committee of the Constituent Assembly; and not with the stifling interpretation in Gopalan which reduced the fundamental right in Art.21 into an ordinary right. Seervai's suggestion to remove the 'objection' that Art.21 does not confer a fundamental right, seems to be not a judicial reconsideration of Gopalan, but a re-drafting of Art.21, i.e., by removing cls(1) and (2) from Art.22 and bringing them as cls.(2) and (3) of Art.21 so that Art.21 may have some elements within it which would impose some limitation on the legislature, and that Article may, thus, regain the status of a fundamental right. pp.28-30. It is submitted that Seervai's juristic positivism matches well with the judicial positivism of the majority judges in Gopalan.

in part III of the Constitution would, by necessary implication, lead to the inference that the standard of protection provided in Art.21 could have been only a standard higher than positive or State-made law, for, such a higher standard alone can serve as a limitation on the legislative power of the State.[243] Thus, if Art.21 had been construed as conferring the protection of "due process of law" to personal liberty, that standard of protection would have become a "limitation on the legislature and thus the right to personal liberty would have re-born[244] as a fundamental right in the Constitution. And if such a construction had been given to Art.21, it is submitted, the suspension of the right conferred by Art.21 by the Presidential Order under the emergency provision of Art.359(1) would have resulted only in the suspension of the additional protection of "due process of law" conferred by Art.21 against the legislative power of the State, and not in the absurdity of the suspension of the ordinary protection available against the executive that it shall not interfere with the life and personal liberty of the

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243. It must be a standard to measure the rightness and justice of positive law which authorises deprivation of life and personal liberty of the individuals. The guarantee of such a standard is the essence of a fundamental right. See, Corwin, The Higher Background of the American Constitutional Law, p.5; Kesavananda op.cit., pp.1939-40.

244. For, it is maintained that personal liberty as a fundamental right met with its death in Gopalan.

individuals otherwise than in accordance with the authority of law.[245] That is to say, while Art.21 is suspended the legislature would be free from the limitation of "due process" and would be competent to enact any law, however unreasonable may be the law or the procedure prescribed thereunder; but the executive would still be under the obligation to act strictly in accordance with the law enacted by the legislature. To wit, during the suspension of Art.21 though the reasonablness of the law authorising the deprivation of personal liberty may not be justiciable, the basic legality of the deprivation of personal liberty would be justiciable. Then, of course, the Court could have held in Shivakant, as Khanna J. rightly held, that even during the emergency while Art.21 is suspended 'no one could be deprived of his life or personal liberty without the authority of law', that proetection being 'the essential postulate and basic assumption of the rule of law in every civilized society'.[246] And thus the memorable dissenting opinion of Khanna J. could have become one of the Court in the Habeas Corpus Case.

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245. This view can further be supported by the anology of Art.19 which has always been treated as limitation on the legislature, and the effect of the emergency provision of Art.358 and 359 on the protection of the freedom under Art.19. See, Seervai, The Habeas Corpus Case, op.cit., p.20.

246. (1976)2 SCC 521, p.776.

But, unfortunately that was not to be. History often repeats itself. And certainly in the Habeas Corpus Case the decision as well as the decisional process of Gopalan repeated itself. It is respectfully submitted that the 'due process-phobia', if it may be so called generated by the Court in Gopalan has eventually devoured the fundamental right to personal liberty in Shivakant, to the utter dismay and disillusionment of the people.[247]

Thus from Gopalan to Shivakant the attitude of the Supreme Court towards the protection of personal liberty in Art.21 appears to have been passive and positivist. The interpretation of the expression "procedure established by law" as 'procedure prescribed by State-made law' held sway over the entire period under survey, rendering that standard of protection in Art.21 as a sterile and precarious one. The Court does not seem to have made any attempt to introduce the elements of 'due process' or reasonablness into the standard of protection for personal liberty in

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247. The decision of the Court in Union of India V. Bhanudas (1977) 1 SCC, 834, which Prof.Baxi has rightly described as 'the last nail in the coffin of personal liberty' (See, U.Baxi, op.cit., p.116), further reinforces the above conclusion. Bhanudas demonstrated with telling effect the disastrous consequence of the total demise of even the ordinary right to personal liberty in Shivakant during emergency. Legality of detentions apart, the Court has refused to look into even the conditions of detention in Bhanudas, leaving the plight of the detenus to the absolute power of the executive.

Art.21. The Court's preoccupation with 'law and order' and its misplaced apprehensions about the 'dangers' of 'due process' appear to have led to an inflexible judicial adherence to the precedent of _Gopalan_ on the meaning and content of the expression "procedure established by law" in Art.21.

Perhaps, having found itself placed in between its own obsession with 'due process' and the resultant unwillingness to reconsider _Gopalan_ on the one side and its awareness as to the gross inadequacy of the standard of protection for personal liberty in Art.21 as determined in _Gopalan_ on the other, the Supreme Court appears to have attempted during this period to evolve gradually an alternate strategy to secure some meaningful protection for personal liberty in Art.21. And it is this 'alternate strategy' that one may perceive in the attempts of the Court to interlink the right to personal liberty in Art.21 with the specific attributes of liberty that are separately dealt with in Art.19.

Let us now turn to that facet of the 'alternate strategy' for the protection of personal liberty.

CHAPTER V

PROTECTION OF PERSONAL LIBERTY: AN ALTERNATE STRATEGY - THE INTER-RELATION BETWEEN ARTICLES 19 AND 21

The Issues Involved In The Inter-relation:

The inter-relation between the right to personal liberty in Art.21 and the fundamental freedoms dealt with by Art.19(1) involves two distinct but related issues. First, whether the contents of "personal liberty" in Art.21 also include the distinct freedoms separately dealt with in Art.19(1) or not; and second, whether a law depriving a person of his personal liberty must stand the test of reasonableness provided under Cls.(2) to (6) of Art.19(1).[1] Unlike in the case of the "due process" clause,[2] the question of inter-reationship of Art.21 with other fundamental rights in Part III, particularly with the rights in Art.19 did not seem to have evoked any serious debate in the Constituent Assembly. This might have been so,

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1. The text of Art.19 is given in the Annexure.VIII, infra.
2. For the detailed analysis of the Constituent Assembly Debates on the 'due process' clause, see supra, Ch.II.

presumably, because the Constituent Assembly had not enternained any doubt or apprehension about Art.21 on this score.

As to the first issue, it is submitted, the Constituent Assembly could not have intended that the right guaranteed under one Article could be read into another right dealt with by a different Article, for, to do so would be to render the entire process of enacting different Articles defining, delimiting and regulating different rights a sheer exercise in futility. For instance, the 'liberty' clause as originally accepted by the Constituent Assembly, in the April-May 1947 session was in form as follows:

"No person shall be deprived of his life or liberty without due process of law nor shall any person be denied equality before the law within the territories of the Union".[3] But, later the official amendment to the above clause which finally emerged from the Drafting Committee of the Constituent Assembly ran thus:

"No person shall be deprived of his life or personal liberty except according to procedure established by law". This clause was eventually accepted by the Constituent Assembly as the present Art.21.[4]

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3. C.A.Deb., 29th April, 1947, Vol.VII, p.441.
4. See, ibid.

Thus the right to equality was taken out of the 'liberty' clause and was separately dealt with as an independent right under the present Art.14. And as recommended by the Drafting Committee, the word 'liberty' was qualified by the insertion of the word 'personal' before it, 'for otherwise it might be construed very widely so as to include even the freedoms already dealt with in the present Art.19'.[5] Unlike the removal of the "due process" clause which attracted stiff resistence and serious debates both within and without the Constitutent Assembly, the separation of the equality right from the liberty clause as well as the addition of the word "personal" so as to ensure the non-inclusion of the Art.19(1) freedoms within the meaning of "personal liberty" in Art.21 were accepted by the Constituent Assembly virtually without any resistence or debate.[6] Therefore, it is reasonable to assume that the intention of the Constituent Assembly was to treat the rights conferred under different (Arts.19 and 21) Articles as separate and independent rights without one right being read into another. This is neither to suggest that there can be no factual overlapping between the rights, nor is to deny the organic unity of the different attributes of liberty in its general and abstract sense.

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5. B.N.Rau, Draft Constitution, February 1948, f.n. to Article 15; also Rau, Indian Constitution, ed. by B.Shiva Rao, p.303.

6. Ibid.

Even as regards the second issue, the intention of the Constituent Assembly can reasonably be inferred from the schematic framework of the fundamental rights in Part III of the Constitution as well as from the sweep of Art.13(2).[7] The only permissible means of State regulation of the rights conferred in Part III is law; and the law must be a valid law. Art.13(2) is comprehensive enough to include any 'law', as a result of which no law can be valid if it is inconsistent with any of fundamental rights guaranteed by Part III of the Constitution, including Art.19. The 'law' in Art.21 must also be a valid law and so cannot be an exception to the general sweep of Art.13(2). Therefore, it logically follows that a law providing for the deprivation of personal liberty in Art.21 must also stand the test of reasonableness under the relevant clauses of Art.19 if, and in so far as such law infringes upon any of the rights guaranteed by Art.19(1).

It is worthwhile to emphasise at this juncture that the distinction between the two issues referred to above is a fine and real one, which, unfortunately, is often missed or misconceived.[8] It is one thing to say that the

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7. See, The Constitution of India, Art.13.

8. A lack of proper appreciation of this nice distinction seems to be evident both in Gopalan's Case as well as in Maneka Gandhi's Case, but of course in different ways.

rights guaranteed under Art.19(1) are separate from, and independent of, the right to personal liberty in Art.21; and it is entirely a different thing to say that a law providing for deprivation of personal liberty in Art.21 must also be amenable to the test of reasonableness, if any of the rights guaranteed under Art.19(1) is factually infringed by such law.

With this backdrop, let us look at the judicial response to this question of inter-relationship of Arts.19 and 21.

The Judicial Response:

In Gopalan,[9] it may be recalled, it was argued, though unsuccessfuly, by the petitioner's counsel that imprisonment or detention involved curtailment of freedom of movement and consequently the guarantee of freedom from arrest and imprisonment should be found by the Court in Art.19(1) (d), according to which all citizens shall have the right "to move freely throughout the territory of India". Along with this argument, it was further contended that the various freedoms guaranteed under Art.19(1) could not be exercised when a person was placed under detention, that any law authorising preventive detention abridged those

9. AIR 1950 SC 27.

freedoms; and that consequently such law must stand the test of "reasonable restriction" as provided under Art.19 cls (2) to (6).[10] In taking resort to these arguments, it is submitted, the attempt of the petitioner's counsel seems to have been to forge an alternate strategy to secure the standard of reasonableness through Art.19 for the protection of personal liberty in Art.21 and thereby to persuade the court to apply that standard of reasonableness to the validity of the impugned law.[11] Prof.Tripathi has rightly pointed out this contextual aspect of the petitioner's argument. He observed:

> "Realising that article 21 by itself guaranteed no standard for the procedure it required, and further, that the guarantee of Article 22 was expressly denied to Gopalan who was detained under a law of preventive detention, Gopalan's counsel looked around for some provision in the Constitution which could be set up as the guarantee against unsatisfactory procedure in cases of detention. If any of the sub-clauses of clause (1)

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10. Ibid., pp.34-35.

11. See, P.K.Tripathi, "Preventive Detention. The Indian Experience", 9 American Journal of Comparative Law (1960), pp.219-248; B.Errabi, "The Right to Personal Liberty in India: Gopalan Revisited with a Difference", Comparative Constitutional Law, ed.by M.P.Singh (1989) pp.299-300.

of article 19 could be harnessed for the purpose there would be the addtional advantage of examining the law restrictive of freedom on the touchstone of reasonability. Article 19(1) (d) offered some opportunity for such use. That article guarantees the right to freedom of movement throughtout the territory of India".[12]

Thus the abvove arguments as well as their contexts have brought forth two crucial issues before the Court: the constitutional impact of the preventive detention of the petitioner on his rights conferred under Art.19 (1); and, as a logical corollary of the first, the answerability of the impugued law to the test of reasonableness under cls.(2) to (6) of Art.19. And it seems apparent that the acceptance of any of the petitioner's arguments, as mentioned above, would have compelled the Court to examine the validity of the impugned law not only under Art.21 read with Art.22(4) to (7)[13] but also with reference to the standard of reasonableness under Art.19(1) read with cls.(2) to (6) of that Article.

Confronted with such a perspective and predicament, the majority of the Court, which appears to

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12. P.K. Tripathi, Spotlights On Constitutional Interpretation (1972), p.164.

13. The procedural safeguards secured to those who are placed under preventive detention.

have been determined to resist all the attempts of the petitioner to introduce any element of 'due process' or 'reasonableness' as a protection for personal liberty in Art.21, had no hesitation to reject the above arguments of the petioner's counsel in toto.

The majority held that Arts.19(1) and 21 were mutually exclusive and that 'contents and subject-matters of Arts.19 and 21 were thus not the same and they proceeded to deal with the right covered by their respective words from totally different angles'.[14]

Chief Justice Kania said:

> "... it appears to me that the concept of the right to move freely throughout the territory of India is an entirely different concept from the right to personal liberty contemplated by Art.21. 'Personal liberty' covers many more rights in one sense and has a restricted meaning in another sense. For instance, while the right to move or reside may be covered by the expression "personal liberty" the right to freedom of speech... or the right to acquire, hold or dispose of property... cannot be considered a part of the personal liberty of a

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14. AIR 1950 SC 27, pp.37, 69, 97, 112.

citizen. They form part of the liberty of a citizen but the limitation imposed by the word "personal" leads one to believe that those rights are not covered by the expression 'personal liberty'. So read there is no conflict between Art.19 and 21".[15]

In the same vein, Sastri J. observed:

"... The power of locomotion is no doubt an essential element of personal liberty which means freedom from bodily restraint, and detention in jail is a drastic invasion of that liberty. But the question is: Does Art.19, in its setting in part III of the Constitution, deal with the deprivation of personal liberty in the sense of incarceration? Sub.cl.(d) of cl.(1) does not refer to freedom of movement simpliciter but guarantees the right to move freely "throughout the territory of India".... Reading these provisions (Art.19(1) (d), (e) and 19 (5)) together, it is reasonably clear that they were designed primarily to emphasise the factual unity of the territory of India and to secure the right of a free citizen to move from one place in India to another... unhampered by any barriers

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15. Ibid., at pp.36-37.

which narrow-minded provincialism may seek to impose".[16]

Refering to the insertion of the word 'personal' before 'liberty' as suggested by the Drafting Committee, he added:

> "The acceptance of this suggestion shows that whatever may be the generally accepted connotation of the expression "personal liberty", it was used in Art.21 in a sense which excludes the freedoms dealt with in Art.19, that is to say, personal liberty in the context of Part III of the Constitution is something distinct from the freedom to move freely throughout the territory of India".[17]

It is submitted that the ruling of the majority that the expression "personal liberty" in the sense in which it was used in Art.21 did not include the specific freedoms that were separately dealt with in Art.19(1) appears to be right and consistent with the schematic framework of Part III of the Constitution.[17a] But that by itself could not

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16. Ibid., p.69.

17. Ibid., p.71; pp.94-95, Per Mukherjea J., p.113, per Das.J.

17a. Errabi, op.cit., p.300; See also Seervai, Constitutional Law of India, Vol.II, 3rd ed., pp.699-700.

have saved the impugned law from the challenge of Art.19 in view of the obvious fact that the detention of the petitioner has really resulted in the factual infringement of his 'freedom of movement' in Art.19(1) (d). Even if it is conceded that the 'freedom of movement' is an independent right distinct from the right to personal liberty in Art.21, the factual situation that obtained in Gopalan brings to light the truth that even as between two independent rights there can be factual overlapping.[18] Besides, even in the absence of such an overlapping, it is perfectly possible that a law depriving 'personal liberty' in Art.21 may simultaneously result in the direct and substantial encroachment upon another independant right protected by any of the sub-clauses of cl.(1) of Art.19[19] or, for that matter, by any other Article in Part III.[20] But, instead of recognising this plain constitutional reality, the majority of the Court, which appears to have been determined to save the impugned law from the challenge of Art.19, held that the deprivation of the personal liberty of an individual by

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18. See, the dissenting opinion of Fazl Ali J. in Gopalan and Subba Rao J. in Kharak Singh, infra.

19. Ram Singh's Case has brought to light this aspect. See Infra.

20. There are many instances where a law, depriving personal liberty in Art.21 has been tested with reference to Art.14. See, State of West Bengal V. Anwar Ali, AIR 1952 SC 284; Kathi Raning V. State of Saurastra, AIR 1952 SC 123.

virtue of detention would not be deemed to have affected or infringed his rights under Art.19. And the majority seems to have resorted to a plurality of strategic theories in order to exclude totally the applicability of Art.19 to test the validity of the impugned law which provided for the deprivation of the personal liberty of the petitioner under Art.21.

Thus, Kania C.J., joined by Mukherjea J., enunciated what may be described as the theory of directness of legislation and held:

> "Article (19) has to be read without any preconceived notions. So read, it clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble... etc., the question whether the legilsation is saved by the relevant saving clause of Art.19 will arise. If, however, the legislation is not directly in respect of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Art.19 does not arise. The

approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenue's life".[21]

Another strategy adopted by the majority was the theory of 'self-contained code'. According to this theory, Art.21 along with Arts.20 and 22 formed an exhaustive code relating to personal liberty and, therefore, the validity of a law depriving a person of personal liberty could not be challenged on the ground that it violated the requirements of Art.19.[22]

Then, resorting to the theory of 'deprivation' it was held by the majority that 'deprivation' (total loss) of personal liberty in Art.21 was quite different from the restriction (which is only a partial control) of the rights as safeguarded by Art.19(1); and, hence, a law which authorised a total deprivation of personal liberty in Art.21 could not be said to impose a restricting on the rights under Art.19.[23]

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21. Ibid., at p.35; p.96, Per Mukherjea J.

22. Per Mahajan J., Art.22(4) to (7) was self-contained code in respect of a law dealing with preventive detention to the exclusion of Arts.21 and 19; ibid., at p.103. According to the other majority judges, Art.22 read with Art.21 form a self-contained code to the exclusion of Art.19; ibid., at pp.40-41, 75 and 94.

23. Per Kania C.J; Sastri, Mukherjea and Das JJ., ibid., at pp.37, 69-70, 93,43.

Yet another theory laid down by the majority for the exclusion of Art.19 was the theory of 'free citizen', according to which the rights guaranted by Art.19(1) were capable of being enjoyed by a person only so long as he remained free. As soon as he was deprived of his liberty as a result of detention, punitive or preventive, he could no longer complain of infraction of any of the rights guaranteed by Art.19.[24]

Thus the response of the majority of the Court in Gopalan to the question of inter-relationship of Arts.19 and 21 appears to be highly unsatisfactory. First, though it is justifiable for the Court to hold that the distinct freedoms that are separately dealt with in Art.19(1) cannot be read into the right to personal liberty in Art.21, it seems to be unrealistic for the Court to deny the possibility of factual overlapping of those independent rights under Arts.19 and 21, as it really was the case in Gopalan. Secondly, the total exclusion of the applicability of Art.19 to the validity of the impugned law, which deprived the petitioner's personal liberty in Art.21, notwithstanding the fact that the law has also directly and substantially infringed one of the freedoms guaranteed by Art.19(1), appears to be, it is submitted, clearly wrong and

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24. Per Kania C.J., Sastri and Das JJ., ibid., at pp.37, 69-70,113.

unjustifiable.[25] By such a calculated exclusion of Art.19, accomplished through the various theories, as mentioned above, the majority has successfully thwarted the attempt made by the petitioner's counsel, as an alternate strategy, to introduce the requirements of reasonableness as a protection against legislative deprivation of personal liberty in Art.21. Lastly, the restrictive and positivist theories which the Court has enunciated in order to exclude Art.19 has, ironically enough, recoiled on Art.19 itself, rendering the protection of the freedoms secured by that Article quite vulnerable against a law which deprives personal liberty in accordance with the minimal requirements of Art.21 read with Art.22.[26]

As elsewhere, here also on the inter-relationship of Arts.19 and 21, the dissenting judgement of Justice Fazl Ali struck a liberal and progressive note. He held the view that the scheme of the chapter dealing with the fundamental rights does not contemplate that each Article is a code by itself and is mutually exclusive. He said:

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25. For the reasons stated in the beginning of this chapter.

26. For, the implication of the theories of 'deprivation'; 'exclusion or self-contained code'; and 'free citizen' seems to be that once a person is validly deprived of his personal liberty according to the requirements of Art.21 read with Art.22, he would cease to be a free man and would become incapable of excercising or enjoying his freedoms under Art.19(1), thus rendering Art.19 as a dependent and subservient right. See, Errabi, op.cit., pp.300-301.

"In my opinion it cannot be said that Arts.19, 20, 21 and 22 do not to some extent-overlap each other. The case of a person who is convicted of an offence will come under Arts.20 and 21 and also under Art.22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in Art.22, also amounts to deprivation of personal liberty which is referred to in Art.21, and is a violation of the right of freedom of movement dealt with in Art. 19(1) (d). That there are other instances of overlapping of articles in the constitution may be illustrated by a reference to Art.19(1) (f) and Art.31 both of which deal with right to property and to some extent overlap each other".[27] (emphasis added).

Further, considering the argument that preventive detention not only takes away the right in Art.19(1) (d) but also takes away all the other rights guaranteed by Art.19(1), Fazl Ali J. observed:

"Where exactly this argument is intended to lead us to, I cannot fully understand, but it seems to me that it involves an obvious fallacy, because it

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27. AIR 1950 SC 27, pp.52-53.

preventive detention operates on the right referred overlooks the difference in the modes in which to in sub cl.(d) and other sub-clauses of Art.19(1). The difference is that while preventive detention operates on freedom of movement directly and inevitably, its operation on the other rights is indirect and consequential and is often only notional"[28] (emphasis added).

Thus Fazal Ali J. appears to have held the view that while all the distinct freedoms guaranteed under 19(1) cannot be read into the right to personal liberty in Art.21, there can be factual overlapping of some of the freedoms such as the freedom of movement in Art.19(1)(d) and Art.21. It is submitted that this theory of overlapping enunciated by Fazl Ali J. should not be mistaken as a theory of total inclusion or assimilation of Art 19(1) freedoms into the right to personal liberty in Art.21.[29]

As regards the applicability of the criterion under Art.19 to the validity of the deprivation of personal liberty in Art.21 also the opinion of Fazl Ali J. has been marked by a thorough consitutional realism. Referring to the restrictive and exclusionary theories resorted to by the

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28. Ibid., at pp.55-56.

29. Such a tendency is evident from the judgement of Bhagwati J. in Maneka Gandhi V. Union of India, AIR 1978 SC 597. See, infra Ch.VI.

majority for the exclusion of Art.19. His Lordship rightly observed:

> "There is nothing in Art.19 to suggest that it applies only to those cases which do not fall under Arts.20, 21 and 22. Confining ourselves to preventive detention, it is enough to point out that a person who is preventively detained must have been, before he lost his liberty, a free man. Why can't he say to those who detained him: "As a citizen I have the right to move freely and you cannot curtail or take away my right beyond the limits imposed by cl.(5) of Art.19".... If he has been detained under some provison of law imposing restriction on the freedom of movement, then the question will arise whether the restrictions are reasonable".[30]

Further, even assuming that there exists no overlapping of rights and that the freedom of movement in Art.19(1) (d) has nothing to do with personal liberty, His Lordship held: "There can be no doubt that preventive detention does take away even this limited freedom of movement directly and substantially and, if so, I do not see

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30. AIR 1950 SC 27, p.52.

how it can be argued that the right under Art.19(1) (d), is not infringed...."[31] (emphasis added)

Thus, whether based on the theory of overlapping of the rights under Arts.19(1) (d) and 21 or otherwise, Fazl Ali J. concluded that 'preventive detention could not but be held to be a violation of the right conferred by Art.19(1) (d)'. He said:

> "In either view, therefore, the law of preventive detention is subject to such limited judicial review as is permitted under Art.19(5). The scope of the review is simply to see whether any particular law imposes any unreasonable restrictions. Considering that the restictions are imposed on a most valuable right, there is nothing revolutionary in the legislature trusting the Supreme Court to examine whether an Act which infringes upon that right is within the limits of reason".[32]

But, unfortunately Justice Fazl Ali's realistic appraisal of the relationship between Arts.19 and 21 did not find favour with the majority of the Court. Had it been so

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31. Ibid., at p.55.

32. Ibid., at p.56.

that Court could have replenished the minimal standard of legality[33] in Art.21 with some elements of reasonableness and thereby the Court could have secured atleast a limited scope for judicial review of legislative deprivation of personal liberty in Art.21.

The view held by the majority in Gopalan as to the exclusion of Art.19 appears to have been followed by the Court in a few later cases[34] that came up immediately after Gopalan. For instance, Ram Singh v. State of Delhi,[35] the Court held that the petitioner, who was detained on the ground that he had been allegedly making speeches arousing communal hatred between the Hindus and the Muslims of Delhi, was not entitled to raise before the Court the question whether such speeches were entitled to constitutional protection under Art.19.[36] Following the exclusionary theories laid down in Gopalan, the Court reiterated the position thus: "... a law which authorises deprivation of personal liberty did not fall within the purview of Art.19

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33. Art.21, as construed by the majority in Gopalan, affords protection only against arbitrary executive action without the authority of law, the protection being the requirement that the executive should follow the procedure prescribed by a state-made law.

34. Ram Singh V. State of Delhi, AIR 1951 SC 270; State of Punjab V. Ajaib Singh, AIR 1953 SC 10; Collector of Malabar, V. Ibrahim, AIR 1957 SC 688.

35. AIR 1951 SC 270.

36. Ibid., p.272.

and its validity was not to be judged by the criteria indicated in that Article but depended on its compliance with the requirements of arts.21 and 22...."[37] The court, then, held: "It follows that the petitions now before us are governed by the decision in Gopalan's Case, notwithstanding that the petitioner's right under Art.19(1) (a) is abridged as a result of their detention under the Act".[38]

Thus, even admitting that the detention was made avowedly to take away the petitioner's freedom of speech guaranteed by Art.19, the Court refused to apply the criteria of reasonableness under that Article to test the validity of the detention.[39] It is submitted that Ram Singh's Case seems to have brought to light the disastrous consequences that would ensue from an inflexible adherence to the exclusionary theories resorted to by the majority in Gopalan.

But, the triumph of the exclusionary theories as enunciated in Gopalan and reaffirmed in Ram Singh has proved to be short-lived. Through a series of subsequent decisions

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37. Ibid.

38. Ibid.

39. For the criticism of Ram Singh's Case, See P.K. Tripathi, supra, n.11.

those theories have been knocked down by the court one after another.[40]

In Kochunni's Case,[41] for the first time, the majority opinion in Gopalan on the inter-relationship of Arts.19 and 21 appears to have received a gentle knock from Justice Subba Rao who brought in the Supreme Court 'a new angle of approach to interpretation and enforcement of fundamental rights'.[42] In this case the petitioner, a 'sthanee' of 'tarwad' was deprived of his properties under the Madras Marumakkathayam (Removal of Doubts) Act 1955, which provided that the properties of the stanee 'shall be deemed and shall be deemed always to have been properties belonging to the tarwad'. The Act was challenged as violative of Arts.14, 19(1) (f) and 31.[43] It was argued by respondent, obviously based on the reasoning of the majority in Gopalan, that Art.31(1) excluded the operation of Art.19(1)(f), for, a person's fundamental right under

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40. The Court could not strictly adhere to the theory that Art.21 & 22 formed an exhaustive code relating to personal liberty in as much as it is obliged to hold that a law depriving 'personal liberty in Art.21 would be invalid if it violated the requirements of Art.14 or Art.20. See State of West Bengal V. Anwar Ali; AIR 1952 SC 284; Kathi Raning V. Saurashtra, AIR 1952 SC 123; Shiv Bahadur V. State U.P. (1958) SCR 1188.

41. Kavalappara Kottarathil Kochunni V. State of Madras, AIR 1960 SC 1080.

42. M.C. Setalvad, op.cit., p.59.

43. AIR 1960 SC 1080, p.1084.

Art.19(1) (f) to acquire, hold and dispose of property was conditioined by the existence of property and if he was deprived of that property by authority of law under Art.31(1), his fundamental right under Art.19(1) (f) would disappear with it.[44]

Subba Rao J., speaking for the Court, pointed out, at the outset, the importance and the "transcendental position" of the fundamental rights in the Constitution, and said that it might be possible that the operation of a fundamental right in respect of a specific matter might be excluded either by any other Article in the Constitution or by an Article embodying another fundamental right.[45] The Court said:

> "But before such a construction excluding the operation of one or other of the fundamental rights is accepted, every attempt should be made to harmonise the two Articles so as to make them co-exist, and only if it is not possible to do so, one can be made to yield to the other. Barring such exceptional circumstances, any law made would be void if it infringes any one of the fundamental rights".[46]

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44. Ibid., at p.1089.
45. Ibid.
46. Ibid.

Then, considering the argument of the State that the validity of 'law' in Art.31 need not stand the test of Art.19(1)(f) read with Art.19(5), for, both the Articles are mutually exclusive, the Court held:

> "... the law must statisfy two tests before it can be a valid law, namely, (1) that the appropriate legislature has competency to make the law; and (2) that it does not take away or abridge any of the fundamental rights enumerated in Part III of the Constitution. It follows that the law depriving a person of his property will be an invalid law if it infringes either Art.19 (1) (f) or any other article of Part III".[47]

Relying on the reasoning of the majority in Gopalan it was contended further by the respondent that "law" in Art.31(1) as in Art.21 was not to be subject to scrutiny in regard to its validity from the points of view of the various clauses of Art.19.[48] Rejecting the above argument, Subba Rao J. appears to have distinguished the case from Gopalan, by maintaining that in Gopalan 'this Court held that the concept of the right" to move freely throughout the territory of India" referred to in

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47. Ibid., at p.1092.

48. Ibid.

Art.19(1)(d) was entirely different from the concept of the right to "personal liberty" referred to in Art.21 and that Art.21 should not, therefore, read as controlled by the provisions of Art.19.[49] Further, he said:

> "Though the learned judges excluded the operation of Art.19 in considering the question of fundamental right under Art.21, the judgement of the Court discloses <u>three shades of opinion</u>.... The views of the learned judges may be broadly summarised under three heads, <u>viz</u>.,
>
> (1) to invoke Art.19(1), a law shall be made directly infringing that right;
>
> (2) Arts.21 and 22 constitute a self-contained code; and
>
> (3) the freedoms in Art.19 postulate a free man".[50]

Having referred to the above theories on the basis of which the Court in <u>Gopalan</u> had excluded Art.19 from the purview of 'law' in Art.21, Subba Rao J.held: "Had the question been <u>res integra</u> some of us would have been inclined to agree with the dissenting view expressed by Fazl Ali J., but we are bound by this judgement".[51]

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49. <u>Ibid</u>.

50. <u>Ibid</u>., at p.1093.

51. <u>Ibid</u>.

Thus, the judgement of justice Subba Rao, in Kochunni's Case appears to have clearly shaken the foundation of the exclusionary theories in Gopalan, in so far as he has refused to hold Arts.31 and 19(1) (f) as mutually exclusive self-contained codes. He has, infact, applied the criterion of reasonableness in Art.19(5) to test the validity of 'law' in Art.31.[52] As regard Art.21, it is submitted that while he was expressing his 'inclination to agree with Fazl Ali J.'s dissenting view in Gopalan' he was really preparing the ground for the future. Further, it is submitted that the opinion of Subba Rao J. appears to have marked the beginning of an interesting process of introducing the judicial liberalism in property rights into the liberty jurisprudence in Art.21.[53]

In Kharak Singh's Case[54] the majority of the Court did not consider the precise question of the inter-relationship between Arts.19 and 21.[55] Nevertheless, while

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52. This case was followed by K.T. Moopil Nair's Case (1961) 3 SCR.77 where the majority of the Court, including Subba Rao J., construing the word 'law' in Art.265, re-affirmed the position that "law" meant a law which could stand the tests of Arts.14, 19(1) (f) and 31, i.e. a valid law. Also it was followed by the Court in State of M.P. V. Ranojirao Shinde, AIR 1968 SC 1053.

53. See, Mohammad Ghouse, A.S.I.L. Vol.XIV, 1978, p.395.

54. Kharak Singh V. State of U.P. AIR 1963 SC 1295. For the details of this case, see, supra., Ch.III.

55. Ibid., at p.1301.

dealing with the 'scope and content of 'personal liberty' in Art.21 the majority held that 'personal liberty' in Art.21 was used as a 'compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man <u>other than those dealt with in several clauses of Art.19(1)</u>'.[56] In support of its view as to the non-inclusion of 'those elements or incidents of "liberty" already dealt with in Art.19(1) into the "liberty" guaranteed by Art.21', the majority referred to the insertion of the qualifying word "personal" before the expression "liberty" in Art.21, as well as to 'the context of the difference between the permissible restrictions which might be imposed by cls.(2) to (6) of Article 19 on the several species of liberty dealt with in the several clauses of art.19(1)'.[57] So far so good. But, the statement of the majority that 'while Art.9(1) deals with particular species or attributes of that freedom, 'personal liberty' in Art.21 takes in and comprises the residue',[58] seems to indicate that it has not fully appreciated the possibility of factual overlapping between some of those freedoms in Art.19(1) and 'personal liberty' in Art.21. The majority seems to have, it is submitted, wrongly believed that the insertion of the

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56. <u>Ibid</u>., at p.1302.

57. <u>Ibid</u>., at p.1301.

58. <u>Ibid</u>., at p.1302.

word "personal" before "liberty" in Art.21 was intended to 'avoid overlapping between those elements or incidents of "liberty"... dealt with in Art.19(1) and the "liberty" guaranteed by Art.21'[59] In fact, the intention seems to have been only to avoid a total inclusion of all those distinct freedoms that are separately dealt with in Art.19(1) into the concept of 'personal liberty' in Art.21 through a wide construction.[60] It is, further, submitted that there does not seem to exist any contradiction between the non-inclusion of Art.19(1) freedoms into the concept of 'personal liberty' in Art.21, as contemplated by the Constituent Assembly, and the possibility of a factual overlapping of some of those freedoms in Art.19(1) and the 'personal liberty' in Art.21, as Fazl Ali J. has rightly pointed out in Gopalan.[61]

Justice Subba Rao, in his minority judgement, for himself and Shah J., appears to have agreed, as he promised in Kochunni, with the dissenting view of Fazl Ali J. in Gopalan on the question of interrelationship of Arts.19 and 21. Thus, Subba Rao J. held, unlike the majority,[62] that

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59. Ibid., at p.1301.

60. See, supra, n.5.

61. AIR 1950 SC.27, pp.52-55.

62. According to the majority, the Police Regulation violated only Art.21 and not Art.19(1) (d). See, AIR 1963 SC 1295, p.1303.

the impugned Police Regulations were violative of both Arts.19(1) (d) and 21; and proceeded to 'ascertain the scope of the said two provisions and their relation *inter se*. His Lordship held:

> "Both of them are distinct fundamental rights. No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression "personal liberty" in Art.21 excludes that attribute. In our view, this is not a correct approach. *Both are independent fundamental rights, though there is overlapping*. There is no question of one being carved out of another"[63] (emphasis added).

And also as regards the applicability of Art.19 to the validity of 'law' in Art.21 Subba Rao. J appears to have disapproved the exclusionary theories of *Gopalan*[64] by declaring thus:

> "If a person's fundamental right under Art.21 is infringed the State can rely upon a law to sustain

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63. *Ibid*., at p.1305.

64. See, *supra*., ns.21, 22, 23 and 24.

the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Art.19(2) so far as the attributes covered by Art.19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Art.19(2) of the Constitution".[65]

Then, in Prabhakar Pandurung,[66] Subba Rao J. speaking for the court, appears to have thrown overboard one of the exclusionary theories laid down in Gopalan. -- the theory that Art.19(1) freedoms postulate a free man.[67] While rejecting the argument of the state that 'as the detenu is no longer a free man in view of his detention, his right to publish his book, which is only an attribute of personal liberty, is lost', the Court referred to 'five distinct lines of thought in the matter of reconciling

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65. AIR 1963 SC 1295, p.1305.

66. State of Maharashtra V. Prabhakar Pandurung, AIR 1966 SC 424. In this case the Court held that the right of a detenu to send the manuscript of a book written by him while he was in prison for publication was part of his right to "personal liberty" ibid., at p.426.

67. See supra, n.24. See, D.D.Basu, op.cit., p.237.

Art.21 with Art.19'.[68] But the Court did not express any final opinion one way or the other on this matter.[69]

In Satwant Singh's Case,[70] the right to go abroad was held to be a fundamental right forming part of personal liberty in Art.21.[71] Of course, this case did not raise any controversy as to the applicability of Art.19 to the validity of 'law' in Art.21, obviously, for two reasons: on the one hand, admittedly there was no 'law' as required by Art.21;[72] and on the other, right to go abroad is not explicitly guaranteed by any of the sub.cls of Art.19(1).[73] But what makes this case relevant to the topic under discussion is the observation made by Subba Rao J., for the Court, on the interrelation between Arts. 19 and 21 in terms of their respective contents. While discussing the scope of personal liberty in Art.21, Subba Rao J. has made a thorough review of the previous decisions of the Court on the subject in Gopalan, Kochunni and Kharak Singh.[74] Thus, referring to Kharak Singh, His Lordship said: "This Court, adverting to

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68. AIR 1966 SC 424, p.427.

69. Ibid.

70. Satwant Singh Sawhney V. Assistant Passport Officer, AIR 1967 SC 1836.

71. Ibid., at p.1845.

72. Ibid., at p.1842.

73. Ibid., at p.1843.

74. Ibid., at pp.1843, 1844;

the expression "personal liberty", accepted the meaning put upon the expression 'liberty' in the 5th and 14th Amendments to the U.S. Constitution by Field, J. in Munn V. Illinois (1879) 94 US. 113, but pointed out that the ingredients of the said expression were placed in two Articles, viz., Arts.21 and 19 of the Indian Constitution".[75] Then he declared:

> "This decision (in Kharak Singh) is a clear authority for the position that "liberty" in our Constitution bears the same comprehensive meaning as is given to the expression "liberty" by the 5th and 14th Amendments to the U.S. Constitution and the expression "personal liberty" in Art.21 only excludes the ingredients of "liberty" enshrined in Art.19 of the Constitution. In other words, the expression "personal liberty" in Art.21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is not covered by it in as much as it is specifically provided in Art.19".[76]

Thus, it may be noticed that in Satwant Singh too Subba Rao J. appears to have righly maintained the theme of

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75. Ibid., at p.1844.

76. Ibid.

non-inclusion of Art.19(1) freedoms into the concept of personal liberty in Art.21, even while giving the most liberal and comprehensive meaning and scope to that concept.

R.C. Cooper's Case And the Emergence of The 'Alternate Strategy':

In R.C. Cooper v. Union of India,[77] the Supreme Court appears to have completely demolished the exclusionary theories propounded by the majority in Gopalan. It was argued in this case that Art.31(2) and Art.19(1) (f), while operating on the same field of the right to property, were mutually exclusive, and therefore a law directly providing for acquisition of property for a public purpose could not be subjected to the test of reasonableness for its validity on the plea that it imposed restrictions on the right to acquire, hold and dispose of property as guaranteed by Art.19(1) (f).[78] Thus the Court was obliged to consider the question of inter-relation between Arts.19 and 31, once again.

Shah J., speaking for the Court, rejected the above argument and held that Art.19(1) (f) enunciated the right to acquire, hold and dispose of property, and

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77. AIR 1970 SC 564 or the Bank Nationalisation Case.

78. Ibid., at p.592.

Art.19(5) as well as cls.(1) and (2) of Art.31 prescribed restrictions upon State action, subject to which the right to property might be exercised; and that 'the true character of the limitations under the two provisions was not different'.[79] Therefore, according to the Court a 'law' providing for acquisition of property, to be valid, should comply not only with the requirements of Art.31(2), but also with the requirements of reasonableness under Art.19(5);[80] and, hence, Arts.19(1) (f) and 31(2) could not be held to be mutually exclusive.[81]

While laying down the above proposition, the Court had to reverse a large number of previous decisions[82] where it had ruled that Art.19(1) (f) and Art.31(2) were mutually exclusive. And in that process, it appears to have been necessary and inevitable for the Court to shatter the very foundation of those previous decisions, namely, the Gopalan dictum on the exclusion of Art.19 in testing the validity of a law made under an Article outside Art.19.[83] The Court has

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79. Ibid., at p.596.

80. Ibid., at 596-597.

81. Ibid., at p.597.

82. Chiranjit Lal V. Union of India, AIR 1951 SC 41; State of West Bengal V. Subodh Gopal, AIR 1954 SC 92; State of Bombay V. Bhanji Munji, AIR 1955 SC 41; Babu Barkye V. State of Bombay AIR 1960 SC 1203; and Sitabati Debi V. State of West Bengal. (1967) 2 SCR 949.

83. Ibid., at p.593; see, D.D. Basu, op.cit., p.240.

rightly perceived the theoretical obstacle posed by <u>Gopalan</u> and observed thus:

> "This case (<u>Gopalan</u>) has formed the nucleus of the theory that the protection of the guarantee of a fundamental freedom must be adjudged in the light of the object of State action in relation to the individual's right and not upon its influence upon the guarantee of the fundamental freedom, and as a corrollary thereto, that the freedoms under Articles 19,21,22 and 31 are exclusive - each article enacting a code relating to protection of distinct rights".[84]

Faced with such a perspective, the Court first referred to each one of those exclusionary theories[85] enunciated by the majority judges in <u>Gopalan</u>;[86] and then showed how those theories had got entrenched into the field of property rights through several cases[87] where the Court was led to the conclusion that Art.19 and 31 were mutually exclusive.[88]

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84. <u>Ibid</u>., at p.593.

85. <u>Supra</u>, f.n.21, 22, 23 and 24.

86. AIR 1970 SC 564, pp.593-94.

87. <u>Supra</u>., n.82.

88. AIR 1970 SC 564, p.595.

Then, the Court seems to have taken note of the process of steady and gradual erosion of those theories, as it began in Kochunni's Case[89] and carried through by several other decisions[90] that followed Kochunni, in the field of property rights.[91]

Having made such an extensive and exhaustive survey of the previous decisions on the issue, the Court held:

> "We have carefully considered the weighty pronouncements of the eminent judges who gave shape to the concept that the extent of protection of important guarantees, such as the liberty of person; and right to property, depends upon the form and object of the state action, and not upon its direct operation upon the individual's freedom. But it is not the object of the authority making the law impairing the right of a citizen, nor the he can claim: it is the effect of the law and of form of action taken that determines the protection

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89. K.K. Kochunni V. State of Madras, AIR 1960 SC 1080.

90. Swami Motor Transport Co. V. S.S. Swamigal Mutt, AIR 1963 SC 864; Maharana Shri JayavantSinghji V. State of Gujarat, AIR 1962 SC 821. These cases followed Kochunni's ruling that Art.19(1)(f) and Art.31(1) are not mutually exclusive, and that 'law' in Art.31(1) should stand the test of reasonableness under Art.19(5). Then State of Madhya Pradesh V. Ranjojirao Shinde, AIR 1968 SC 1053, where the Court ruled that Arts.31(2) and 19(1)(f) are not mutually exclusive.

91. AIR 1970 SC 564, pp.592, 596.

the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined neither by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual rights".[92]

Based on the above reasoning, the Court finally declared thus:

"Limitations prescribed for ensuring due exercise of the authority of the state to deprive a person of his property are, therefore, specific classes of limitation on the right to property falling within Art.19 (1) (f).... If the acquisition is for a public purpose, substantive reasonableness of the restiction which includes deprivation may, unless otherwise established, be presumed, but enquiry into reasonableness of the procedural provisions will not be excluded[93]... we are unable, therefore, to agree that Article 19(1) (f) and 31(2) are mutually exclusive."[94]

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92. Ibid., at pp.596-97.

93. Ibid., at p.596.

94. Ibid., at p.597.

Thus, by the above ruling the Court appears to have redeemed the protection of property rights from the grips of the exclusionary therories and re-stated authoritatively the inter-relation between Arts.19(1) (f) and 31. And in doing so, the Court seems to have completely extinguished the exclusionary theories, enunciated by the majority judges in *Gopalan*, which had governed the inter-relation between Arts.19 and 21 and had sustained the ruling that Arts.19(1)(d) and 21 were mutually exclusive. Such an exercise was necessary for the Court because, those were precisely the theories that governed the inter-relation between Art.19 and 31 as well, and sustained the ruling that Arts.19(1) (f) and 31 were mutually exclusive.[95] Thus,

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95. It is this aspect of the decision which makes *Cooper* still more significant and relevant to the present discussion. But, unfortunately the eminent jurist H.M. Seervai, while making a scathing attack on *Cooper*, appears to have overlooked this aspect. His criticisms that in *Cooper* the Court "Went out of its way" to consider the correlation of Art.19(1) (f) to Art.31(2), and overruled a long line of decisions which had "settled the law"; and that there was absolutely no justification for "purporting to overrule *Gopalan*" seem to have totally disregarded the context of the arguments as well as the theoretical compulsions in *Cooper* which made the Court to consider those issues. See Seervai, *Constitutional Law of India*, *op.cit*, p.717; and Seervai, *The Bank Nationalisation Case*, (Lecture Delivered at Uni rsity of Bombay, April, 1970), pp.5-6. On the c ary, D.D. Basu, rightly maintains that was necessary for the Court to consider those issues in *Cooper*, and he also agrees with the views taken by the Court on these issues. See Basu, *op.cit*., p.240-241.

inflicting the direct and decisive death-blow to the exclusioinary theory in Gopalan, the Court declared:

> "In our judgement, the assumption in A.K.Gopalan's Case... that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the state action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct".[96]

Thus, the basic 'assumption'[97] on which the inter-relation between Arts.19 and 21 had been founded by the

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96. AIR 1970 SC 564, p.597.

97. Here again, despite the fact that the Court has explicitly stated the proposition which it regarded as "the assumption in A.K.Gopalan's Case", and has specifically unsettled that assumption by laying down a new theory, Seervai has criticised the Court by alleging that the Court has wrongly attributed to the majority in Gopalan the proposition that Art.22 is a complete self-contained code relating to preventive detention' as its major premise of basic assumption. It is true that at one place in his judgement, Shah J. said that the majority in Gopalan held Art.22 as a complete self-contained code relating to preventive detention. It may also be true, from a legalistic angle, that the statement is factually inaccurate, for, admittedly, the majority judges in Gopalan, except Mahajan J., seem to have allowed Art.21 also to be in company with Art.22. But there is nothing in the judgement of Shah J. to suggest that he treated the above statement as major premise or the basic

majority judges in Gopalan appears to have been clearly and categorically diapproved by a larger Bench of the Court in Cooper.[98] Having disapproved the exclusionary theories of Gopalan, the Court appears to have enunciated a new, liberal and comprehensive constitutional theory, which, it is submitted, can appropriately be called as the 'integral theory', in order to govern the inter-relationship of the

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Contd.,
assumption of the majority opinion in Gopalan. Seervai appears to have attempted to project a theory, based on the above statement of Shah J., that there occured "fundamental error" in Cooper and the entire decision is based on that fundamental error and therefore the entire decision in Cooper is erroneous. It is respectfully submitted that the attempt of Seervai to project such a theory seems to be misconceived and misleading. See, Seervai, Constitutional Law, op.cit., pp.718-19. Morever, though Shah J.'s statement suffers from a formal inaccuracy, on merits and in substance his statement appears to be correct. In the context of the challenge to the validity of Preventive Detention Act in Gopalan, as Seervai himself admits (see id. at p.724), Art.14 was not invoked; and Arts.19 21 and 22 were invokved. Admittedly, the majority judges, including Mahajan. J., completely excluded Art.19 from the purview of the scrutiny. Even Art.21 was excluded by Mahajan.J., whereas the other majority judges did not do so. But it is to be noted that in view of the positivist interpretation of the expression "procedure established by law" in Art.21 as 'procedure prescribed by a state-made law; Art.21 cannot be a limitation on the power of the State to make any law, including a preventive detention law. That being the case, a preventive detention law, being a 'State-made law' becomes a law unto itself, provided it complies with the requirements of Art.22; and the applicablity of Art.21 to that law is of little consequence in the context of the majority decision in Gopalan. Therefore in substance, if not in form, the statement of Shah J. in Cooper appears to be correct.

98. A Bench of eleven Judges, with the lone dissent of A.N.Ray J.

fundamental rights in Part III of the Constitution. The new theory seems to suggest that the validity of laws infringing fundamental rights should be adjudged with reference to the particular right that is being infringed and with reference to the effect of the direct operation of the law upon the right; and not with reference to the object of the legislator or the form of State action.[99] And it is based on this new 'integral theory' that the Court has construed harmoniously Arts.19(1) (f) and 31, so as to make any law providing for deprivation or acquisition of property in Art.31 answerable to the test of reasonableness under Art.19.[100] And, it is submitted that in no way the interrelation between Arts.19 and 21 can escape from the reach of this new 'integral theory' which has, as shown above, displaced the exclusionary theory from the realm of Part III of the Constitution.[101] Whether the Court has succeeded in employing properly and fully this new theory in subsequent cases,[102] involving deprivation of personal liberty in Art.21 is a different question altogether. But, it is submitted, Cooper can reasonably be said to have paved

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99. AIR 1970 SC 564, p.596.

100. Ibid.

101. Ibid.

102. For instance, S.N.Sarkar V. State of West Bengal, AIR 1973 SC 1425; Haradhan Saha V. West Bengal, AIR 1974 SC 2154; Fagu Shah V. West Bengal, AIR 1974 SC 613; Khudiram V. West Bengal, AIR 1975 SC 550 etc.

the way for the smooth importation of the requirements of reasonableness from Art.19(1) (d) read with Art.19(5) as a protection for personal liberty in Art.21.[103] Thus, the 'alternate strategy' adopted by Fazl Ali J.[104] in Gopalan and by Subba Rao J. in Kharak Singh[105] to secure the standard of reasonableness as a protection for personal liberty in Art.21 through an integral approach towards the inter-relation between Art.19 and 21 appears to have been made possible by the Supreme Court in Cooper's Case.

The 'Alternate Strategy' and the Protection of Personal Liberty:

The impact of Cooper on the inter-relation between Arts.19 and 21 came to be considered by the Court in S.N.Sarkar V. State of West Bengal.[106] In this case, the petitioner, who was preventively detained under the Maintenance of Internal Security Act, 1971, (MISA) challenged the validity of his detention on the ground that

103. Errabi, op.cit., pp.304-305; Mohammed Ghouse, A.S.I.L., Vol.XIV; 1978, p.415; Praveen Pavani, "Article 21- Induction of Due Process", Indian Bar Review, Vol.XV(142) 1988, p.167;

104. AIR 1950 SC 27, p.52, see, supra., f.n.30.

105. AIR 1963 SC 1295.

106. AIR 1973 SC 1425.

Sec.17A of the 'Act' did not prescribe both the circumstances under which, and the class or classes of cases in which a person might be detained for a longer period than three months without obtaining the opinion of an Advisory Board, as required by Art.22(7)(a). A larger Bench of seven judges overruled Gopalan on the interpretation of Art.22(7)(a), and held Sec.17A invalid on the ground that it did not comply with requirements of Art.22(7) (a).[107]

Referring to the argument of the Attorney -General that the majority decision in Gopalan has stood for such a long time that it should not be disturbed, the Court observed: "since the matter involves the right of personal liberty, the fact that the decision has held the field should not by itself be a deterrent against its reconsideration".[108] In this context the Court referred to Cooper and said: "Further, the major premise in the majority decision (in Gopalan) that Art.22 was a self-contained code and that therefore the provisions of a law permitted by that Article would not have to be considered in the light of the provisions of Art.19 was disapproved in R.C.Cooper V. The Union of India...."[109]

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107. Ibid., at p.1441.

108. Ibid., at p.1435.

109. Ibid.

Again, faced with another argument of the petitioner, challenging the validity of the Act with reference to Art.14, Shelat A.C.J., speaking for the Court, held:

> "In Gopalan... the majority Court had held that Art.22 was a self-contained code and therefore a law of preventive detention did not have to satisfy the requirement of Arts.19,14 and 21 ... the aforesaid premise of the majority in Gopalan... was disapproved and therefore it no longer holds the field. Though Cooper's Case... dealt with the inter-relationship of Art.19 and Art.31, the basic approach to construing the fundamental rights guaranteed in the different provisions of the Constitution adopted in this case held the major premise of the majority in Gopalan... to be incorrect".[110]

Thus, the Court appears to have held the view the Cooper disapproved the Gopalan premise that Art.22 was a self-contained code relating to preventive detnetion to the total exclusion of Arts.14,19 and 21. And by necessary implication the Court in S.N.Sarkar can be said to have held that a preventive detention law should stand the test not

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110. Ibid., at p.1441.

only of Art.22, but also of Arts.14, 19 and 21 in view of the 'basic approach' in Cooper.

However, it is respectfully submitted that the judgement of Shelat A.C.J. appears to suffer from certain infirmities, which he could have avoided without any fear of contradiction with his unqualified approval of the authority of Cooper. For instance, the reference to Art.14, in his statement that the majority in Gopalan held that 'Art.22 was a self-contained code and a law of preventive detention did not have to satisfy the requirements of Arts.19, 14 and 21' is plainly incorrect and misleading. For, the applicability of Art.14 to the scrutiny of the Preventive Detention Act was not at all in question in Gopalan and so was not dealt with by any of the judges in that case.[111] Similarly, in the course of his judgement, Shelat A.C.J. seems to have created an impression that the court in Cooper has treated the above statement as the 'major premise in the majority opinion'[111a] in Gopalan. This imputation also does not seem to be correct. The judgement of the Court in Cooper does not contain any statement to that effect. On the contrary, Shah J. has explicitly stated what he considered as the basic assumption in Gopalan. According to him the

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111. Seervai also points out this error and criticies it. See, H.M. Seervai, Constitutional Law of India, op.cit., p.724-25.

111a.AIR 1973 SC 1425, p.1435.

assumption was that certain Articles in the Constitution deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored".[112] It was that assumption which Shah J. held as incorrect in Cooper. And it was the disapproval of that assumption that led to the negation of the exclusionary theories enunciated by the majority judges in Gopalan; including the theory that Art.22 is a self-containted code. But, unfortunately this aspect of Cooper appears to have been completely missed by the Court not only in S.N. Sarkar but also in the subsequent cases[112a] as well.

Besides, it is submitted, the Court does not seem to have fully appreciated the sweep and depth of the theory that the validity of laws affecting fundamental rights should be judged with reference to the effect of the direct operation of the law upon right and not with reference to the object of the legislator,[113] as laid down in Cooper. This theory seems to be larger and broader than the mere

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112. R.C. Cooper V. Union of India AIR 1970 SC 564, p.597.

112a. Haradhan Saha V. West Bengal, AIR 1974 SC 2154; Khudiram V. West Bengal, AIR 1975 SC 550.

113. Cooper, op.cit., p.596.

disapproval of the so called 'major premise of the majority in Gopalan' that Art.22 was a self-contained Code.

Further, in S.N.Sarkar's Case the Court could have reconsidered Gopalan on the correlation of Art.19 to Arts.21 and 22 and rê-stated the inter-relationship of those Articles in the light of the above said integral theory propunded in Cooper. The Court could have done so especially in view of the fact that, unlike in Cooper, the fact situation that obtained in this case which involved deprivation of personal liberty, provided an appropriate opportunity and context to reconsider Gopalan on the inter-relation between Arts.19 and 21; and that, this case was heard by a larger Bench of seven judges. But unfortunately the Court appears to have failed to take advantage of the opportunity in S.N.Sarkar to reconsider Gopalan and to re-state the interrelation between Arts.19 and 21 based on the new theory in Cooper.

In Haradhan Saha V. West Bengal,[114] the constitutional validity of the MISA[115] was challenged as violative of Arts.14,19, 21 and 22(5). The petitioners argued, obviously taking the cue from Cooper, that the Act was reasonable and so was violative of Art.19 in as much as

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114. AIR 1974 SC 2154.

115. The Maintenance of Internal Security Act, 1971.

the Act did not make any provision for objective determination of the facts on which the order of detention could be based; that the Act violated Art.21 because the guarantee of a right to be heard was infringed; that Art.22(5) was violated because the Act did not provide for a just procedure ensuring an impartial consideration of the detenu's representation by the government; and finally that the Act violated Art.14 because it permitted discrimination.[116] The Court, led by Ray C.J., upheld the validity of the Act on the ground that it did not suffer from any constitutional infirmity.[117] Irrespective of the correctness or otherwise of the decision as to the validity of the Act on merits, it is respectfully submitted that the judgement of Ray C.J. seems to unfold a disturbing tendency to relapse into the Gopalan syndrome on the question of the interrelationship of Arts.19 and 21, Cooper and S.N.Sarkar notwithstanding.[118]

Considering the arguments with reference to Art.19, Ray C.J. said:

> "It is not possible to think that a person who is detained will yet be free to move or assemble or

116. Supra, n.114.

117. Ibid., at p.2160.

118. See, Mohammed Ghouse, A.S.I.L. Vol.X: 1974, p.397.

form association or unions or have the right to reside in any part of India or have the freedom of speech or expression... A law which attracts Art.19 therefore must be such as is capable of being tested to be reasonable under clauses (2) to (5) of Art.19"[119]

Evidently, the above statement of the Court seems to echo only the exclusionary theory held by Das J. in Gopalan that 'Art.19(1) freedoms postulate a free man'[120]; and not the disapproval of that theory in Cooper.

Perhaps, having realised the binding nature of the decision in Cooper, Ray C.J. (who, significantly enough, was the lone dissenter in that case) observed: "This Court in A.K. Gopalan V. State of Madras... held that Article 22 is a complete code and Article 19 is not invoked in those cases. It is now said that the view in Gopalan's case... no longer holds the field after the decision in the Bank Nationalisation case...."[121] Having, thus, acknowledged, though half-heartedly, the authority of Cooper, he added: "We may proceed on the assumption that the Act which is for

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119. AIR 1974 SC 2154, p.2157.

120. Supra., f.n.24.

121. AIR 1974 SC 2154, p.2158.

preventive detention may be tested with regard to its reasonableness with reference to Article 19".[122]

On the face of the challenges to the validity of preventive detention based on Art.19, the Court could have considered and declared the true inter-relationship of Arts.19, 21 and 22 on the basis of the principles laid down in Cooper. But the Court appears to have preferred only to proceed on an 'assumption' as to the applicability of Art.19 to test the validity of the Act. Even to this 'assumption', it is submitted, the Court appears to have given only a lip-service. Instead of scrutinising the validity of the impugned Act for preventive detention on the touchstone of reasonableness under Art.19, as Cooper or at least the 'assumption' as to Cooper would require, Ray C.J. seems to have attempted only to establish that the impugned Act incorporated all the procedural safeguards enshrined in Art.22.[123] Reverberating the tone of the legal positivism of Gopalan,[124] Ray C.J. said:

> "Principles of natural justice are an element in considering the reasonableness of a restriction where Article 19 is applicable.... Elaborate rules

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122. Ibid.

123. Ibid., at pp.2058-59.

124. See supra., Ch.IV.

> of natural justice are excluded either expressly or by necessary implication where procedural provisions are made in the statute.... If a statutory provision excludes justice then the Court does not completely ignore the mandate of the legislature".[125]

Ironically enough, the nations of justice and reasonableness seem to have been made subservient to positive law, thereby completely reversing the equation between justice and positive law.[126]

Finally, disclosing his subjective mind, Ray C.J. said:

> "Art.22 which provies for preventive detnetion lays down substantive limitations as well as procedural safeguards. The principles of natural justice in so far as they are compatible with detention laws find place in Art.22 itself and also in the Act. Even if Article 19 be examined in relation to preventive detention, it does not increase the

125. AIR 1974 SC 2154, p.2159.

126. For a detailed discussion about the implications of liberty as a constitutional guarantee and of judicial review and 'due process', see Part I of this study.

content of reasonableness required to be observed in respect of orders of preventive detention".[127]

It appears from the above conclusion that to Ray C.J. Art.22 still remains to be a self-contained code relating to preventive detention, a thesis which 'no longer holds the field after the decision in the Bank Nationalisation Case', as he himself has acknowledged at the beginning of his judgement.[128] It is respectfully submitted that the opinion of Ray C.J. in Saha's Case appears to denigrate not only Cooper, but also the very concept of reasonableness as a protection against the legislative vagaries.[129] As Prof. Ghouse[130] has observed, 'it was expected that with the help of Cooper the Court would release the right to life and liberty from the shackles of Gopalan and extend the protection due to it. The opinion of Ray C.J. in Saha's Case has reduced this promise of Cooper to the vanishing point'.

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127. Supra n.125, pp.2159-60.

128. Ibid., at p.2158.

129. For, according to Ray C.J. even if Art.19 is applicable to a preventive detention law, the criteria of reasonableness in Art.19 becomes inert and is of no consequence, for, it 'does not increase the content of reasonableness' of such a law provided it complies with the requirements of Art.22.

130. Mohammed Ghouse, A.S.I.L., Vol.X: 1974, pp.396-97.

But in Khudiram V. West Bengal,[131] Bhagwati J. appears to have retrieved to some extent the promise of Cooper from 'the vanishing point' to the point of visibility. In this case the petitioner who was detained under the MISA challenged the constitutional validity of the Act as well as the order of detention thereunder on the ground, inter alia, that Sec.3 of the Act, in so far as it empowered the detaining authority to exercise the power of detention on the basis of its subjective satisfaction, imposed unreasonable restrictions on the fundamental rights of the petitioner under Art.19(1) and therefore was void.[132]

Dealing with the above challenge under Art.19 to the validity of preventive detention, Bhagwati J. held:

> "The view taken by the majority in A.K.Gopalan V. State of Madras... was that Article 22 is a self-contained code, and therefore, a law of preventive detention does not have to satisfy the requirements of Articles 14, 19 and 21 .... In Rustum Cavasjee Cooper V. Union of India... it was held by a majority of judges... that though a law of preventive detention may pass the test of Article 22, it is yet to satisfy the requirements of other

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131. AIR 1975 SC 550.

132. Ibid., at p.558.

fundamental rights such as Article 19. The ratio of the majority judgement in R.C.Cooper's Case... was explained in clear and categorical terms by Shelat, J... in Sambhu Nath Sarkar V. State of West Bengal... subsequently in Haradhan Saha V. State of West Bengal... a Bench of five judges... proceeded on the assumption that the Act which is for preventive detention has to be tested in regard to its reasonableness with reference to Article 19. That decision accepted and applied the ratio in Sambu Nath Sarkar's Case... as well as R.C.Cooper's Case... This question, thus, stands concluded and a final seal is put on this controversy and in view of these decisions, it is not open to any one now to contend that a law of preventive detention, which falls within Art.22, does not have to meet the requirement of Art.14 or Art.19".[133]

Thus, unlike in Saha's case where Ray C.J. was prepared to proceed only on an "assumption" as to the authority of Cooper, in Khudiram, Bhagwati J. appears to have asserted unequivocally on the authority of Cooper, that a law of preventive detention which falls within Art.22 must have to meet the requirements of Arts.14 and 19 as well.

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133. Ibid., at pp.558-59.

Nevertheless, it is respectfully submitted that the above assertion of Bhagwati J. in this case, though desirable, does not seem to have been based on sound reasoning, for, the reasoning appears to have proceeded on a series of presumptions rendering His Lordship's review of the previous decisions of the Court far from satisfactory.

For instance, while referring to Gopalan,[134] Bhagawati J. seems to have repeated the error contained in the judgement of Shelat A.C.J. in S.N.Sarkar's Case in so far as the referrence to Art.14 was concerned. As has been shown earlier,[135] the applicability of Art.14 to preventive detention was an a non-issue in Gopalan's Case. Then, while referring to Cooper, Bhagwati J. appears to have presumed that the Court in that case had overruled Gopalan on the precise question of inter-relationship of Arts.19, 21 and 22 and had "held" that 'though a law of preventive detention may pass the test of Art.22, it is yet to satisfy the requirements of Art.19'. And it is presumed, further, by His Lordship that this ratio of R.C.Cooper's Case was "explained in clear and categorical terms" by Shelat, J. in S.N. Sarkar's Case. But these presumptions, it is submitted, do not seem to be well founded. As it has already been shown,[136] in Cooper the Court enunciated a new

134. AIR 1950 SC 27.

135. See supra., p.370.

136. See supra., p.367.

integral theory' after disapproving the theoretical 'assumption' which sustained the exclusionary theories that were laid down in Gopalan. And on the basis that new theory the Court harmonisouly construed Arts.19(1) (f) and 31 and held that any law providing for deprivation or acquisition of property in Art.31 must be answerable to the test of reasonableness under Art.19.[137] And the extension of this new theory to the interlationship of Arts.19,21 and 22 was wisely left to be accomplished by a future Bench in an appropriate case involving deprivation of personal liberty. And in S.N. Sarkar's Case, though such an appropriate opportunity was available, the Court, unfortunately, failed to undertake a systematic extention of the thoery in Cooper to the realm of personal liberty in Art.21 and to its inter-relation with Art.19. Instead of overruling Gopalan on the inter-relationship of Arts.19, 21 and 22 on the basis of Cooper, Shelat A.C.J. appears to have assumed without any explanation that Cooper had overruled Gopalan.[138] This unexpalined assumption of Shelat A.C.J. as to the overruling of Gopalan can hardly be said to have 'explained' the "ratio" of Cooper in "clear and categorical terms".

Further, in the light of the earlier analysis[139] of the judgement of Ray C.J. in Haradhan Saha's Case, it is

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137. Cooper, op.cit., p.596.

138. See supra, p.372.

139. See supra. p.377.

submitted that Bhagwati J.'s reliance on Saha's Case as "having finally laid at rest" all questions regarding the applicability of Art.19 to test the validity of a preventive detention law seems to be incredible. As a natural consequence of these presumptions on which Bhagwati J. seems have proceeded in Khudiram's Case, the Court has once again failed to undertake complete re-appraisal of Gopalan on the specific question of the inter-relation between Arts.21 and 19 in the light of the integral theory enunciated in Cooper. Thus, it is submitted that in spite of the repeated assertions of the Court in Sarkar, Saha and Khudiram as to the applicability of Art.19 to test the validity of a law of preventive detention which falls within Art.22, a systematic reconsideration of Gopalan and a restatement of the inter-relation between Arts.21 and 19 on the basis of a reasoned and principled extention of the Cooper thesis to the realm of personal liberty seems to have eluded the Court throughout the period under survey. And such a reasoned and principled extention of the theory in Cooper to the field of personal liberty would have led the Court to consider and adopt the dissenting opinion of Fazl Ali J.[140] in Gopalan and the minority opinion of Subba Rao J.[141] in Kharak Singh on the question of the inter-relation between Arts.21 and

140. AIR 1950 SC 27, pp.52-53.

141. AIR 1963 SC 1295, p.1305.

19.[142] And such a course would have further led the Court to consider comprehensively the two specific issues pertaining to the problem of the inter-relation between those two Articles, i.e., the issue whether the distinct freedoms separately dealt with in Art.19(1) could be read into the concept of 'personal liberty' in Art.21; and whether the criterion of reasonableness in Art.19 would be applicable to test the validity of a law providing for the deprivation of personal liberty in Art.21. But, unfortunately that was not to be; the Court seems to have adopted a course of limited[143] extention of the Cooper thesis through an over-simplified[144] assertion as to the applicability of Art.19 to a law relating to preventive detention which falls within Art.22.

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142. Curiously enough, in Sarkar, Saha and Khudiram the Court has not even referred to these memorable dissenting opinions of Fazl Ali and Subba Rao JJ. This omission on the part of the Court in the wake of Cooper, especially while dealing with the inter-relation between Arts.21 and 19 seems to be surprising.

143. For, the Court, in dealing with this issue, seems to have looked at it from the narrow and limited perspective of the applicability of Art.19 to a preventive detention law under Art.22, instead of adopting a broader perspective of the applicability of Art.19 to any law providing for the deprivation of personal liberty in Art.21, including, of course, a law of preventive detention.

144. For, the assertions have not been supported and substantiated by any reasoned arguments, explaining the theoretical principles on which they are founded.

Thus the above survey of the Supreme Court decisions form Gopalan to Khudiram on the inter-relation between Arts.21 and 19 leads to a few important inferences. As regards the inter-relationship of these two Articles in terms of their respective contents, the view that has emerged through judicial process during this period seems to be this: The concept of personal liberty in Art.21 does not include the distinct freedoms separately dealt with in Art.19(1), though there may be factual overlapping to some extent between some of the independent rights in Art.19(1) and the right to personal liberty in Art.21. And on the question whether and to what extent and on what principles the standard of reasonableness in Art.19 is applicable to test the validity of a law providing for the deprivation of personal liberty in Art.21, the most satisfactory answer seems to have been provided by the dissenting opinion of Fazl Ali J.[145] who appears to have viewed the invocation of Art.19 as an 'alternate strategy' to secure a meaningful protection to personal liberty in Art.21. Though the opinion of Fazl Ali.J., found favour with Subba Rao J.[146] in later cases, it could not be construed to be the opinion of the Court due to the formidable obstacle posed by the exclusionary theories enunciated by the majority judges in

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145. A.K.Gopalan V. State of Madras, AIR 1950 SC 27, at pp.52,55.

146. In Kharak Singh, op.cit.

Gopalan,[147] which, by that time, had come to be a "hardened precedent"[148] on the issue. But the liberlism evinced by the Court in Kochunni[149] in the field of property rights has eventually led in Cooper to the total and categorical disapproval of the exclusionary theories by the Court. The disapproval of the exclusionary thories by the Court in Cooper has removed the theoretical obstacles to re-state the inter-relation between Arts. 21 and 19 so as to make any law providing for the deprivation of personal liberty in Art.21 answerable to the test of reasonableness under Art.19 in so far as that law infringes any of the freedoms in Art.19(1). That is to say, Cooper has promised the resurgence of the liberal views of Fazl Ali.J and Subba Rao J. on the inter-relation between Arts.19 and 21. But in the post-Cooper decisions[150] during the period under survey the Court has failed to realise fully and properly the promise of Cooper, though the promise as such has been kept alive by the Court by virtue of its repeated assertions as to the authority of Cooper.

Thus during the period that separates Maneka from Gopalan though the Court has given the most comprehensive

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147. See, supra., ns.21,22,23 and 24.

148. Mohammed Ghouse, A.S.I.L. Vol.XIV: 1978, p.395.

149. AIR 1960 SC 1080.

150. S.N. Sarkar, op.cit.,; Haradhan Saha, op.cit.,; and Khudiram, op.cit.

meaning and expansive scope for the concept of personal liberty in Art.21,[151] the nature and extent of protection secured to that concept has continued to be grossly inadequate or even illusory. The positivist interpretation of the expression "procedure established by law" has rendered the standard of protection for personal liberty in Art.21 as inert and illusory.[152] Even the 'alternate strategy', envisioned by Fazl Ali and Subba Rao JJ., to secure the requirements of reasonableness as a protection for personal liberty in Art.21 through the invocation of Art.19 has not come to be fully realised. This apparent asymmetry between the liberal meaning given to 'personal liberty' and the minimal and restrictive protections secured to that right has been a characterstic feature of the judicial process *vis-a-vis* the right to personal liberty in Art.21 ever since *Gopalan*. A departure from this course of asymmetric development of the right to personal liberty appears to have taken place for the first time in *Maneka Gandhi's Case*[153] where the Court has adopted an integral approach towards the interpretation of Art.21, ushering into a new era in the history of liberty jurisprudece in India, which is dealt with in the ensuing chapter.

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151. *See, supra*, Ch.III.

152. See *supra*, Ch.IV.

153. *Maneka Gandhi* V. *Union of India*, AIR 1978 SC 597.

PART III

PERSONAL LIBERTY AND JUDICIAL PROCESS: THE MANEKA ERA

CHAPTER VI

PERSONAL LIBERTY AND THE TWILIGHT OF 'DUE PROCESS' - THE MANEKA DECISION

The Background of Maneka:

The aftermath of emergency[1] has witnessed a new constitutional renaissance in India both politically and judicially. The massive popular wrath and resentment against the eclipse of the rights and personal liberties of the people during the emergency regime was reflected in the outcome of the sixth General Election of 1977 and in the Forty-Fourth Constitutional Amendment of 1978.[2] The

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1. For a detailed discussion about the emergency and post-emergency scenario, see H.M. Seervai, Constitutional Law of India, pp.979 et seq; Seervai, The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism; U. Baxi, The Indian Supreme Court and Politics, pp.121-126.

2. In the 1977 Election, the Party which was responsible for the emergency and the denial of the rights and liberties of the people was thrown out of power and the coalition of opposition groups was given a massive mandate to restore democracy, rule of law and the liberties of the people. The 44th Amendment, among other things, ensured that the fundamental right would not be restricted or taken away by a transient marjority in Parliament; that the power to proclaim an emergency would not be misused for personal or partisan ends; that the right to life and personal liberty in Art.21 and the safeguards in Art.20 would not be suspended by the President even during the emergency; and that the basic features of the Constitution would not be lightly interfered with by Parliament in exercise of its amending power under Art.368.

judicial acquiscence in the negation of the rights to life and liberty during the emergency, as manifested by the Supreme Court's decisions in Shivakant[3] and Bhanudas,[4] by taking refuge under the Presidential Proclamation under Art.359 has made the new Parliament to amend Art.359 itself. Thus, after the 44th Amendment even during the proclamation of a national emergency the enforcement of the right to personal liberty guaranteed by Art.21 cannot be suspended by the Presidential Proclamation under Art.359. This resurgence of liberalism as regards the right to personal liberty has been reflected in the judicial process as well by the Supreme Court which appears to have been anxiously waiting for an opportunity to "bury its emergency past by an astonishing range of judicial activism"[5] and thereby to revive its image, as the protector and guarantor of the liberty of the individuals, from the dark shadows of Shivkant and Bhanudas. Such an opportunity seems to have been provided to the Court by Maneka Gandhi's Case[6] - a case, which, by any account, has signalled the beginning of a new era in the liberty jurisprudence in India. What follows in this part is a close scrutiny and analysis of this - new era.

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3. A.D.M. Jabalpur V. Shivkant Shukla, (1976)2 SCC 521.
4. Union of India V. Bhanudas, (1977) 1 SCC 834.
5. U.Baxi, The Indian Supreme Court and Politics, p.123.
6. Maneka Gandhi V. Union of India, A.I.R. 1978 SC 597.

In Maneka[7] the Supreme Court has for the first time openly and directly reconsidered Gopalan[8] on the interpretation of Art.21 in all its comprehensiveness. Maneka has also made a clear departure from the Gopalan era which had been marked by an asymmetry between the liberal approach towards the interpretation of the expression "personal liberty" and the restrictive approach towards the protection of personal liberty.[9] Besides, Maneka has signified a grand shift in judicial activism from the field of property rights to that of personal liberty, conferring, in effect, a position of 'preferred freedom'[10] on the right to personal liberty in Art.21, through a new mode of constitutional interpretation. Perhaps, the most significant aspect of Maneka seems to lie in the changed attitude and approach of the Court towards the interpretation of the right to personal liberty rather than in what the Court has actually held in the case. And what really makes Maneka a landmark seems to be the historic setting of Maneka - a setting which appears to have had the effect of magnifying the glimmer of hope raised by the

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7. Maneka Gandhi V. Union of India, A.I.R. 1978 SC 597.

8. A.K. Gopalan V. State of Madras, A.I.R. 1950 SC 27.

9. See supra, Part II.

10. For this notion, see the opinion of Justice Stone in United States V. Carolene Products Co., 304 U.S.144, 152 (1938).

decision into a beam of light - as well as the vigourous and skilful use of the Maneka framework in a series of cases that immediately followed Maneka by a group of 'activist' judges, treating Maneka as a source radiating the rays of 'due process'.

The Case:

The petitioner, Mrs. Maneka Gandhi's passport was impounded 'in public interest' by an order dated July 2, 1977 under Sec.10(3)(C) of the Indian Passport Act, 1967.[11] The Government of India declined 'in the interest of the general public' to furnish the reasons for its decision. Thereupon the petitioner filed a writ petition under Art.32 of the Constitution, challenging the validity of the order as well as See.10 (3) (C) of the Act under which the order was passed. The challenge was founded inter alia on the ground that the governmental action was mala fide (not pressed before the Court during the hearing of the arguments); that Sec.10(3) (C) of the Act, in so far as it empowered the Passport Authority to impound a passport "in the interest of the general public" was violative of Art.14

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11. This Act itself was enacted by Parliament as a result of Satwant Singh's Case A.I.R. 1967 SC 1836 wherein the Court held that the right to travel abroad was an aspect of "personal liberty" and that it can only be regulated by a law establishing procedure and not by executive fiat or discretion.

of the Constitution since it confered vague and undefined power on the Passport Authority; and that Sec.10(3)(C) of the Act was void as conferring an arbitrary power since it did not provide for a hearing of the holder of the passport before the passport was impounded. Then five weeks later the petitioner urged, with the permission of the Court, two further grounds. One ground was that Sec. 10(3) (C) was ultra vires Art.21 since it provided for impounding of passport without any procedure as required by that Article, or, even if it could be said that there was some procedure prescribed under the Passport Act, it was wholly arbitrary and unreasonable and, therefore, not in compliance with the requirements of that Article. The other ground urged was that Sec. 10(3) (C) offended against Art. 19(1)(a) and (g), since it permited restrictions to be imposed on the rights guaranteed by those provisions even though the restrictions were such as could not be imposed under Art. 19(2) or (6).[12]

Perhaps, in the absence of these additional grounds, raised later by the petitioner, on second thoughts, Maneka would have remained only as yet another passport case, without much constitutional significance. For, as Prof.Baxi rightly observes, 'the petitioner's additional pleas served high constitutional purposes by giving the

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12. Maneka, op.cit., pp.616-17.

Court the opportunity to pronounce firmly on the ambit of Art.21 and its relations with the rights in Arts.14 and 19.[13]

In view of the great importance of the issues raised in the case it was heard by a Bench of seven judges who delivered five separate opinions. The leading judgement in the case was delivered by Bhagwati J. on behalf of himself, Untwalia and Fazl Ali JJ. Beg C.J. and Chandrachud and Krishna Iyer JJ. in separate opinions concurred with Bhagwati J., and Kailasam J. dissented. Hence a detailed and critical appraisal of the elaborate and comprehensive judgement of Bhagwati J.[14] appears to be essential in order to expound the meaning and message of Maneka.

The argument of the petitioner that the right to go abroad was part of 'personal liberty' in Art.21 and that no procedure was prescribed by the Passport Act for impounding the passport and even if some procedure could be traced in the Act it was unreasonable and arbitary, straightaway led the Court to the interpretation of Art.21.[15] And Bhagwati J., for the first time ever since

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13. U. Baxi, op.cit., p.152.

14. Of course, the other concurring as well as the dissenting judgements will also be referred to and discussed in appropriate places.

15. Maneka, op.cit., p.619.

Gopalan, raised all the relevant questions pertaining to the 'true interpretation' of Art.21 such as 'what is the meaning and content of 'personal liberty', what is the inter-relation between that Article and Arts.14 and 19?; and most importantly, does Art.21 merely require that there must be some semblance of procedure, however arbitary or fanciful, prescribed by law before a person can be deprived of his personal liberty or that the procedure must satisfy certain requisites in the sense that it must be fair and reasonable?[16]

In seeking the answers to the above questions, Bhagwati J. rightly referred to, and acknowledged the relevance of, the historical, philosophical and human rights perspectives of the fundamental rights in Part III where Art.21 finds a prominent place. Thus His Lordship said:

> "Article 21 occurs in Part III of the Constitution which confers certain fundamental rights. These fundamental rights had their roots deep in the struggle for independence.... They were indelibly written in the subconscious memory of the race which fought for well-nigh thirty years for securing freedom from British rule and they found expression in the form of fundamental rights when the Constitution was enacted. These fundamental

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16. Ibid.

rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a 'pattern of guarantees on the basic structure of human rights' and impose negative obligations on the State not to encroach on individual liberty in its various dimensions...."[17]

Having thus set out the relevant questions as well as the parameters within which those questions are to answered, the learned Judge proceeded, first, to deal with the meaning and content of 'personal liberty' in Art.21. But, before going into the detailed analysis of the decision, it is worthwhile to remember that while appreciating the humanist buoyancy and the futuristic impacts of Maneka, one should not be oblivious of the fact that the actual decision in Maneka is not free from certain apparent conceptual obscurities and inner contraditions.[18]

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17. Ibid., at pp. 619-20. It may be noted that all these aspects have been elaborately discussed in Part I of this study. The relevance of that discussion stands fortified further by its judicial approval in this case.

18. Prof. Baxi tries to gloss over this aspect of Maneka by saying thus: "As happens to all seminal decisions, the decision in Maneka is not without its meanderings and miseries". U.Baxi, op.cit., p.151.

Maneka on the Meaning of 'Personal Liberty'

After making a brief survey of the leading cases[19] on personal liberty, Bhagwati J. held:

> "It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression 'personal liberty' as used in Art.21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Art.19.... The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction".[20]

Referring to R.C. Cooper's Case, the learned Judge held the view that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression 'personal liberty' in Art.21 must be so interpreted as to avoid overlapping between that Article and

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19. Gopalan, AIR 1950 SC 27; Kharak Singh, AIR 1963 SC 1295; Satwant Singh, AIR 1967 SC 1836; Cooper, AIR 1970 SC 564; S.N.Sarkar, AIR 1973 SC 1425; Haradhan Saha, AIR 1974 SC 2154.

20. AIR 1978 SC 597, pp.621-22.

Art.19(1).[21] And then he held: "The expression 'personal liberty in Art.21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Art.19".[22]

Bhagwati J. also approvingly referred to Satwant Singh[23] and accepted the claim that the right to go abroad was a part of the right to personal liberty in Art.21.[24]

Beg C.J., in his concurring opinion, seems to have added further dimensions to the concept of 'personal liberty' in Art.21 by resorting to the theory of natural law as propounded by Blackstone. According to the learned Judge the idea of natural law is a morally inescapable postulate of a just order, recognizing the inalienable and inherent rights of all men and that idea is very much embodied in our Constitution.[25] He referred to the Blackstonian notion of "personal security" which meant ' a person's legal and

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21. Ibid., at p.622.

22. Ibid.

23. Supra, no.19.

24. Menaka, p.622. Chandrachud J. also held the same view, see at p.613. For the concurrence of Krishna Iyer J with this view, see at p.657.

25. Ibid., at p.606.

uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation'; and "personal liberty" which meant a person's 'power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct without imprisonment or restraint, unless by due course of law'.[26] He then held: "I think that both the rights of "personal security" and of "personal liberty", recognized by what Blackstone termed "natural law", are embodied in Article 21 of the Constitution".[27] In order to derive further support for his view, Beg C.J. referred to the decisions in Golak Nath[28] and Shivakant[29] where the Supreme Court declared that 'fundamental rights were natural rights embodied in the Constitution'.[30] And he said: "To take a contrary view would involve a conflict between natural law and our Constitutional law. I am emphatically of the opinion that a divorce between natural law and our Constitutional law will be disastrous. It will defeat one of the basic purposes of our Constitution".[31]

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26. Ibid., at p.608.

27. Ibid.

28. Golak Nath V. State of Punjab, AIR 1967 SC 1643.

29. A.D.M. Jabalpur V. Shivkant Shukla, AIR 1976 SC 1207.

30. Maneka, pp.608-609.

31. Ibid., at p.609.

Thus in construing the expression 'personal liberty', Court appears to have adopted a purposive and policy - making kind of constitutional interpretation. Bhagwati J. gave to that expression the 'widest amplitude', covering 'a variety of rights which go to constitute the personal liberty of man'. The concept has come to acquire an added lustre through the natural law dimensions attributed to it by Beg C.J. Such a liberal interpretation of 'personal liberty' in Art.21 is not only desirable but also is consistent with the scheme and spirit of the Constitution[32] as well as with the previous decisions[33] of the Court on this issue.

But, the crucial question in this context is that whether such a liberal conceptualisation of 'personal liberty' should necessarily lead to the conclusion that the expression 'personal liberty' in Art.21 subsumes all other fundamental rights in Part III of the constitution, including the distinct rights that are separately dealt with in Art.19(1). As the discussion on the issue made earlier in this study[34] would indicate, the answer to the above question must have been in the negative. But unfortunately the Court in Maneka appears to have ruled the other way.

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32. See supra, Chs.II and III.

33. Kharak Singh, AIR 1963 SC 1295; Satwant Singh, AIR 1967 SC 1836; Govind, AIR 1975 SC 1378 etc.

34. See, supra, Chs.III and V

According to Bhagwati J. there was no justification for giving a restrictive interpretation to the expression "personal liberty" so as to exclude from its scope "all those attributes of personal liberty which are specifically dealt with in Art.19".[35] The learned Judge seems to have arrived at this conclusion on the basis of his review of the previous decisions of the Court.[36] But it is respectfully submitted that his review of the previous cases appears to have been afflicted with two apparant infirmities. Firstly, the inference which Bhagwati J. seems to have drawn from the cases that are relevant to the issue is plainly incorrect. While referring to Gopalan[37] the learned Judge claimed that 'the observations made by Sastri, Mukherjee and Das, JJ. seemed to place a narrow interpretation on the words 'personal liberty' so as to confine the protection of Art.21 to freedom of the person against unlawful detention'. But a close scrutiny of the individual judgements in Gopalan, as has been made earlier in this study, does not seem to support this claim.[38] Similarly, Bhagwati J.'s reading of the majority and the minority opinions in Kharak Singh,[39] and his attempt to

35. Maneka, p.621.

36. Ibid., at pp.620-21.

37. AIR 1950 SC 27.

38. See supra, Ch.III. See, also P.K.Tripathi, "The Fiasco of Overruling A.K. Gopalan", AIR 1990 Jour.1, p.1.

39. AIR 1963 SC 1295.

derive support for his conclusion from the minority opinion of Subba Rao J. in that case are difficult to be accepted without reservation.[40] For, the majority in Kharak Singh, while construing the words 'personal liberty' as "a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Art. 19(1)",[41] did not rule that Arts. 19(1) and 21 are mutually exclusive in the sense that Art.19 is totally inapplicable to test the validity of a law which deprives a person of his personal liberty within the meaning of Art.21, even if such law infringes any of the distinct freedoms conferred by Art.19. Likewise, Subba Rao J., in his minority opinion, while emphasising the fact that a law which deprives a person of his personal liberty, to be valid, should stand the test not only of Art.21 but also of Art.19 in so far as such law infringes the attributes covered by Art.19 (1),[42] he did not rule that all the distinct freedoms that are separately dealt with in Art.19

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40. Maneka, pp.620-21. Bhagwati J.referred to the majority and minority opinions on the meaning of 'personal liberty' and held: "There can be no doubt that in view of the decision of this Court in R.C.Cooper.... the minority view must be regarded as correct and the majority view must be held to have been overruled".

41. Kharak Singh, op.cit., p.1302.

42. Ibid., at p.1305.

(1) should be read into the expression 'personal liberty' in Art.21.[43] Therefore it is wrong to surmise that there is any real contradiction between the majority and the minority opinions in Kharak Singh on the meaning and contents of 'personal liberty' in Art.21.[44] And consequently it is equally wrong to assume, as Bhagwati J. seems to have done,[45] that the acceptance of the minority opinion of Subba Rao J. (that a law which sought to affect more than one fundamental right, in order to be valid, would have to fulfil the requirements of all the rights affected) by the Court in R.C. Cooper's Case tantamounts to the overruling of the majority opinion in Kharak Singh for the simple reason that the majority did not rule what has been allegedly overruled. As a matter of fact, while dealing with the fundamental rights in Arts.19 and 21, Subba Rao J., instead of reading one into the other, has clearly maintained that both are "independent fundamental rights, though there is overlapping.[46] Moreover, it may be noted that Subba Roa J. himself has made the position abundantly clear while

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43. See supra, Ch.6.

44. See supra, Ch.4.

45. Maneka, op.cit., pp.620-21.

46. Kharak Singh, op.cit., p.1305. See, also Errabi, "The Right to Personal Liberty in India: Gopalan Revisited with Difference", Comparative Constitutional Law, ed. by M.P. Singh, p.308.

speaking for the Court in Satwant Singh[47] in this context. Referring to Kharak Singh Subba Rao J. held that decision was a clear authority for the position that "liberty" in our constitution bears the same comprehensive meaning as is given to the expression "liberty" in the U.S. Constitution; and that the expression 'personal liberty' in Art.21 only excludes the ingredients of "liberty" enshrined in Art.19 of the Constitution.[48] Therefore it is submitted that the attempt of Bhagwati J. to derive support from Subba Rao J. for the proposition that 'personal liberty' in Art.21 should be construed so as to include all the distinct freedoms in Art. 19(1) appears to be misconceived.[49]

Secondly, pursuing the avowed goal of expanding the 'reach and ambit of the fundamental rights',[50] Bhagwati J. seems to have slipped into a wrong track. As a result, the learned judge appears to have heavily relied on the decisions of the court in Cooper,[51] Sarkar[52] and Saha[53] in

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47. AIR 1967 SC 1836.

48. Ibid., at p.1844. This aspect has also been discussed in Ch.III, supra.

49. See Errabi, op.cit., p.308.

50. Maneka, op.cit., pp.621-22.

51. R.C.Cooper V. Union of India, AIR 1970 SC 564.

52. S.N.Sarkar V. West Bengal, AIR 1973 SC 1425.

53. H. Saha V. West Bengal, AIR 1974 SC 2154.

order to support his conclusion as regards the contents of 'personal liberty' in Art.21. But it is submitted that the Cooper line of cases do not seem to be relevant to the determination of the meaning and content of 'personal liberty' in Art.21 since the question before the Court in those cases was not so much the interpretation of the words 'personal liberty' as the inter-relation between Arts.19 and 21.[54] It is true that the Court in Cooper, Sarkar and Saha has rightly adopted an integral approach towards construing the different fundamental rights in Part III and has rejected the theory that Arts.19 and 21 are mutually exclusive and held that Art.19 is applicable to test the validity of a law in Art.21 if such law is violative of any of the freedoms in Art.19(1).[55] But such a liberal approach and the rejection of the theory of exclusiveness do not seem to afford any justification for the conclusion that the expression 'personal liberty' in Art.21 absorbs into itself all the rights guaranteed in Art.19(1) or any other right in Part III of the Constitution.[56] For, it is one thing to say that the law which sought to affect more than one fundamental right, in order to be valid, would have to satisfy the requirements all the rights that are violated,

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54. This aspect has been fully discussed in Ch.V, supra.

55. See, ibid.

56. See Errabi, op.cit., p.308.

it is entirely a different thing to say that the right to personal liberty is wide enough to comprehend all the other rights in Part III, including the rights in Art.19(1). But Bhagwati J. appears to have failed to appreciate the subtle distinction between these two delicate but different aspects of the inter-relation between Arts.19 and 21.

Thus, it is clear that the total assimilation of all Art.19(1) freedoms into the concept of 'personal liberty' in Art.21, as advocated by Bhagwati J., does not seem to be supported by any of the pre-Maneka decisions of the Court. Besides, such an assimilation can neither be consistent with the schematic framework of the fundamental rights in Part III of the Constitution, nor can it be in conformity with what was contemplated by the Framers of the Constitution.[57] It may be noted that while Art.21 secures to all persons the rights to life and personal liberty, Art.19(1) confers certain fundamental freedoms only on the citizens.[58] The different attributes of liberty covered by Art.19(1) are dealt with separately in consideration of their relative importance, distinct contents and the different implications involved in their exercise by the citizens. They are subjected to differential treatment both

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57. See, supra, Ch.V. Also, Errabi, ibid., at pp.308-309.

58. See the text of Arts. 19 and 21; see also Louis De Roldt V. Union of India, AIR 1991 SC 1886.

in terms of the nature and extent of protection secured to them as well as the purposes for, and the grounds on, which those rights could be restricted or curtailed.[59] Therefore, in view of the wide range and variety of rights that are elevated to the status of fundamental rights in Part III, and the differential treatments given to them by the separate provisions on the basis of sound practical considerations, any attempt to subsume all the other rights and freedoms under the single rubric of 'personal liberty' in Art.21 appears to be unrealistic and unwise. Moreover, the inclusion of Art.19 freedoms into Art.21 does not and cannot in any way confer a better protection to those freedoms which are already well articulated and protected.[60] And such an inclusion can only have the effect of rendering Art.19 redundant - a consequence which obviously appears to be unjustifiable. As a matter of fact, it was precisely for the purpose of avoiding such an interpretative integration of the distinct attributes of liberty covered by Art.19(1) into Art.21 that the Constitutent Assembly had inserted the word "personal" before the word "liberty" in Art.21.[61] Further, the reading of Art.19(1) freedoms into the concept

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59. Note the distinct rights enumerated in Sub.cls (a) to (g) of Cl.(1) of Art.19 as well as the permissible restrictions under Cls.(2) to (b) of Art.19. 60.

60. For, Art.19 guarantees the standard of 'reasonableness' as a protection for those freedoms.

61. See, the discussion on the C.A.Deb. in Ch.II, supra.

of 'personal liberty' in Art.21 appears to lead to yet another anamolous consequence during the subsistence of an emergency proclaimed under Art.352, especially in view of the Constitution (Forty-Fourth Amendment) Act, 1978. According to that Amendment the right to enforce Art.21 cannot be suspended even during the emergency by the Presidential Proclamation under Art.359,[62] whereas Art.19 can still be suspended. Therefore, if the freedoms under Art.19 are read into Art.21, the result would be that those freedoms would still continue to be in force despite the suspension of Art.19 under Arts.358[63] and 359. This is, again, to render Art.358 and 359 as otiose and meaningless.

It is submitted that it is always desirable as well as appropriate to give the 'widest amplitude' to the expression 'personal liberty' in Art.21, and to treat that expression as a 'compendious' concept capable of accommodating into itself the new and emerging rights competing for constitutional recognition as society progresses, so that the Bill of Rights in the Constitution may ever remain as 'the pledge with our own people and the pact with the civilized world'.[64] But there does not seem

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62. The Constitution of India.

63. Ibid.

64. Per Dr. Radhakrishnan, C.A.Deb., Vol.I, p.273.

to be any justification for reading into that concept the rights and freedoms that are enumerated and protected by separate and independent provisions in the Constitution on the basis of certain important constitutional principles and practical considerations.

Further, it may be appreciated that the above critique of Maneka on the meaning of 'personal liberty' is neither to urge for an inflexible judicial adherence to stare decisis and conceptualism nor is it to decry judicial policy-making in constitutional adjudication;[65] but it is only to point out that any constitutional policy-making through judicial process must be guided by reason and principle[66] as well as by practical considerations, rather than by mere emotional urge to 'expand the reach and ambit of the fundamental rights'. Any constitutional policy-making sans reason and principles which are ultimately traceable to the textual scheme and spirit of the constitution[67] is likely to affect the very legitimacy of constitutional policy-making. For, after all, the power of

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65. See, Archibald Cox, The Role of the Supreme Court in American Government, (1976), pp.99 et seq.

66. See, Archibald Cox, The Warren Court - Constitutional Decision as an Instrument of Reform, (1968), p.21. 67. See, John Ely, "The Wages of Crying Wolf", 82 Yale L.J. 920, 949 (1973).

67. See, John Ely, "The Wages of Crying Wolf", 82 Yale L.J. 920, 949 (1973).

legitimacy[68] is the only sceptre which the judiciary weilds and not the power of purse or sword.[69]

Maneka on the Protection of 'Personal Liberty': The Twilight of 'Due Process'.

In dealing with the protection of 'personal liberty', Bhagwati, J. appears to have proceeded on the belief that Art.21 by itself affords only a limited protection as against the executive interference with personal liberty without the authority of law. And as a result, he pursued the course of the 'alternate strategy'[70] of securing the elements of 'due process' as a protection for 'personal liberty' through the linkage of Art.21 with the other fundamental rights in Arts.14 and 19.

Thus, after recognizing the right to go abroad as an integral part of 'personal liberty', following *Satwant Singh*,[71] Bhagwati J. said: "It will be seen at once from the language of Article 21 that the protection it secures is a limited one. If safeguards the right to go abroad against executive interference which is not supported by law; and

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68. See, Cox, *The Role of the Supreme Court*, *op.cit.*, pp.103-118.

69. *Ibid.*, See also generally, Alexander Bickel, *The Least Dangerous Branch*, Indianapolis, New York (1962).

70. This aspect is fully discussed in Ch.V, *supra*.

71. *Supra.*, no.19 of this chapter.

law here means 'enacted law' or 'State-law'. *vide* A.K. Gopalan's case".[72] He pointed out that the Passport Act, 1967 was such a State-law, prescribing a procedure for the deprivation of the right to go abroad.[73] He, then, raised the crucial question whether the prescription of some sort of procedure was enough or the procedure must comply with any particular requirements; and held: "obviously, the procedure cannot be arbitrary, unfair or unreasonable".[74] In support of this claim the learned judge referred to the concession made in this regard by the Attorney - General,[75] and also to certain observations made by some of the judges in *Gopalan's Case*.[76] Then, probably, realising the folly in relying on *Gopalan* for the proposition that 'procedure' in Art.21 must be fair and reasonable, Bhagwati, J. hastened to add thus: "But apart altogether from these observations in A.K.Gopalan's case, which have great weight, we find that even on principle the concept of reasonableness must be

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72. *Maneka*, *op.cit.*, p.622.

73. *Ibid*.

74. *Ibid*.

75. *Ibid*., It seems to be rather incredible that such vital propositions of constitutional law are founded on such 'concessions'.

76. *Ibid*. It is equally incredible that *Gopalan* could be relied upon as a justification for the proposition that 'procedure' within the meaning of Art.21 must be fair and reasonable. See, the analysis of *Gopalan* in Chs.IV of V, *supra*.

projected in the procedure contemplated by Art.21 having regard to the impact of Art.14 on Art.21".[77]

Thus, by recognizing Art.14 as the surer and safer source of the requirements of 'reasonableness' for the 'procedure' in Art.21, the learned judge appears to have cleared his way to the 'alternate strategy' of gathering the requirements of 'due process' as a protection for 'personal liberty' from outside Art.21. And this 'alternate strategy' has mainly been founded on the inter-relationship between Arts.14, 19 and 21.[78] Beg C.J.[79] and Chandrachud J.[80] also in their respective opinions toed the same line as regards the protection of personal liberty.

Inter-relationship between Arts.14, 19 and 21

In considering this issue, Bhagwati J. has first delineated the theoretical basis for the inter-relationship

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77. Ibid.

78. This aspect has been fully discussed with reference to all the pre - Maneka cases decided by the Supreme Court in Ch.V of this study. In Maneka, the Court has added an additional dimension to the alternate strategy by linking the 'procedure' in Art.21 with the requirement of the principles of natural justice.

79. Ibid., at pp.606, 609, 610.

80. Ibid., at pp.613, 614. Only Krishna Iyer J. has adopted a different approach towards Art.21, independently of this 'alternate strategy'; and so his judgement, will be separately dealt with a little later.

of Art.21 with Arts.14 and 19. He referred to the exclusionary theory laid down in Gopalan;[81] to the rejection of that theory by the court in Cooper;[82] and to the approval of Cooper and the reiteration of the rejection of theory of exclusivity by the Court in S.N.Sarkar, Saha and Khudiram.[83] Thus having reviewed briefly all the previous decisions of the Court on this issue, Bhagwati J. held:

> "The law must, therefore, now be taken to be well settled that Art.21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right under Article 19, would have to meet the challenge of that article".[84]

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81. The different exclusionary theories laid down by the majority judges in Gopalan and their implications are fully discussed in Ch.V, supra.

82. For the analysis of Cooper and the rejection of the Gopalan thesis, see Ch.V, supra.

83. Ibid. In these cases the Court extended to Arts.21 and 19 the integral theory of Cooper, according to which the different rights in Part III are to be construed harmoniously.

84. Maneka, op.cit., p.623.

Extending the logic of the above proposition to Art.14, the learned judge further held that if a law within the meaning of Art.21 had to stand the test of one or more of the fundamental rights conferred under Art.19 which might be applicable in a given situation, ex-hypothesi it must also be liable to be tested with reference to Art.14.[85] In support of this view, Bhagwati J. referred to the observation made by Mukherjea J. in Gopalan that Art.21 "presupposes that the law is a valid and binding law" in the sense that law must have been made by a competent legislature and it must not infringe any of the fundamental rights in Part III of the Constitution, including Art.14.[86] He further referred to two earlier decisions of the Court in Anwar Ali Sarkar[87] and Kathi Raning[88] where Art.14 was applied to test the validity of the laws providing for special procedures for the speedier trial of certain offences, though that procedure satisfied the requirements of Art.21. Having noted that in both these cases it was held that the procedure established by the special law must not be violative of the equality clause, Bhagwati J declared

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85. Ibid.

86. Ibid., at pp.623-24.

87. State of West Bengal V. Anwar Ali Sarkar, AIR 1952 SC 75.

88. Kathi Raning Rawat V. State of Saurashtra, AIR 1952 SC 123.

that the "procedure must satisfy the requirement of Article 14".[89]

Now, having established unequivocally the linkage of Art.21 with Arts.14 and 19, through an integral constructional process, Bhagwati J. proceeded to distil out of that linkage the essence of 'due process' as a protection for 'personal liberty'. And it is this strategy to infuse the essence of 'due process' into the procedural requirement of Art.21 from outside that Article that has come to be the most crucial facet of Maneka.

The 'Due Process' Facet of Maneka

In considering the specific question about "the nature and requirement of the procedure under Art.21,"[90] in the context as discussed above, Bhagwati J. appears to have adopted a three-pronged strategy to evolve and to engraft the elements of 'due process' onto the 'procedure' under Art.21. Thus, he referred to and analysed the requirements of Art.14; the requirements of natural justice; and the requirements of Art.19 and their respective as well as cumulative impact on 'the procedure established by law' under Art.21.

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89. Maneka, op.cit, p.624.

90. Ibid., at p.624.

Referring to the requirements of Art.14 and to the content and reach of the equality principle therein, Bhagwati J. held the view that 'equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within. traditional and doctrinaire limits'.[91] Follwoing E.P.Royappa's Case[92] where it was held that both according to political logic and constitutional law inequality was implicit in an arbitrary act. His Lordship held:

> "Art.14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied".[93]

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91. Ibid.

92. E.P.Royappa V. State of Tamil Nadu, AIR 1974 SC 555.

93. Maneka, ibid., at p.624.

Then the learned judge considered the question as to 'how far natural justice was an essential element of procedure established by law',[94] independently of Arts.14 and 19 of the Constitution. Thus he appears to have opened up a new source of support and sustenance for a fair and just standard of protection for personal liberty in Art.21 from the vantage point of the principles of administrative law. Dealing with this new dimension, Bhagwati J. pointed out at the outset the increasing importance of natural justice in the field of administrative law, and said: "Natural justice is a great humanising principle intended to invest law with fairness and to secure justice...."[95] Elaborating on 'the test of applicability of the doctrine of natural justice',[96] the learned judge referred to the orthodox view that the rules of natural justice have application only to quasi-judicial proceeding as distinguished from an administrative proceeding; and to the gradual transformation of that view into the modern conception which recognizes that 'fair play in action required that in administrative proceeding also the doctrine of natural justice must be held to be applicable'.[97] Thus,

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94. Ibid.

95. Ibid., at p.625.

96. Ibid., at p.626.

97. Ibid., at pp.626-27.

after a thorough and scholarly review of the judicial and juristic views on the subject-matter, he said: "The law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable".[98] Then, referring to the relevant provisions of the Passport Act, 1967, Bhagwati J. held that the power conferred on the Passport Authority by the Act to impound a passport was quasi-judicial power and therefore the rules of natural justice would be applicable in the exercise of the power of impounding a passport even on the orthodox view. He proceeded to add further that the 'same result must follow.... even if the power to impound a passport were regarded as administrative in character, because it seriously interfered with the constitutional right of the holder of the passport to go abroad and entailed adverse civil consequences'.[99]

Adverting to the fact, as was contended by the petitioner, that there was no express provision in the Passport Act, 1967 which required that the audi alteram partem rule should be followed before impounding a passport, Bhagwati J. held:

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98. Ibid., at p.628.

99. Ibid., at p.628.

". . . that is not conclusive of the question, if the statute makes itself clear on this point, then no more question arises. But even when the statute is silent, the law may in a given case make an implication and apply the principle stated by Byles, J., in Cooper V. Wandsworth Board of Works, (1863) 14 C.B.N.S. 180: " A long course of decisions, beginning with Dr.Bentley's case (1723) 1 Str 557 and ending with some very recent cases, establish that although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature".[100]

Thus, applying the principles of administrative law it was held that the procedure prescribed by the Act, as required by Art.21, for the impounding of passport and the consequential deprivation of the right to go abroad must comply with the rules of natural justice, particularly the rule of audi alteram partem: no decision shall be given against a party without affording him a reasonable hearing. That is to say, the rule of fair hearing is an essential aspect of the 'procedure established by law' in Art.21; the procedure must be fair and just.

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100. Ibid., at pp.624-25.

And, finally, as regards the requirement of Art.19 and its impact on Art.21, Bhagwati J. already held, while discussing the inter-relation between Arts.19 and 21,[101] thus: "... a law prescribing a procedure for depriving a person of 'personal liberty' ... in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that Article."[102] That is to say, the procedure established by law authorising the deprivation of 'personal liberty' in Art.21 should conform to the standard of reasonableness if and in so far as such law takes away or abridges any of the freedoms conferred by Art.19(1).

Thus as a result of the cumulative impact of the requirements of Art.14, Art.19 and the principles of natural justice on Art.21, the 'procedure established by law' in that Article has come to acquire a new meaning and a new vitality as a standard of projection for 'personal liberty'. The procedure, as declared by Bhagwati J., "cannot be arbitrary, unfair or unreasonable".[103] It must be just, fair and reasonable. And a just, fair and reasonable procedure established by law is the quintessence of 'due

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101. Ibid., at p.623.

102. Ibid.

103. Ibid., at p.622.

process of law'.[104] Thus emerges in Maneka the twilight of 'due process'. It is this facet of Maneka decision that has been hailed in many quarters as the advent of 'due process' as a protection for 'personal liberty' in the Indian Constitution.[105]

To transform the 'procedure established by law' into 'just, fair and reasonable procedure established by law' is apparently to import the requirements of 'due process' into Art.21.[106] And this transformation has undoubtedly been the outcome of the activist concern of

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104. The standard of 'reasonableness' begets the concept of 'due process', see Kesavananda V. State of Kerala, AIR 1973 SC 1461, at p.1946, per Mathew, J.; D.D.Basu, Limited Government and Judicial Review: Lecture V - 'Due Process under the Indian Constitution'. And Magarry, J. describes natural justice as "a distillate of due process of law", as cited by Bhagwati J. in Maneka, op.cit., p.625.

105. Prof. Baxi says, "If due process had died three early deaths - in the Constituent Assembly, in Gopalan and in Shivakant during the emergency - it was to be reborn in Maneka". See, U. Baxi, The Indian Supreme Court and Politics, p.123; S.P.Sathe, "Legal Activism, Social Action and Government Lawlessness", New Horizons of Law, ed. by P.Leelakrishnan and Sadasivan Nair, (1987), p.145 Prof.Sathe says: "For all practical purposes today Article 21 has become the 'due process clause' of the Indian Constitution"; B.Errabi, "Right to Personal Liberty in India: Gopalan Revisited with a Difference", Comparative Constitutional Law, ed. by M.P.Singh, (1989), p.309; P. Pavani, "Art.21 - Induction of Due Process", 15 I.B.R., (1988) 166; S.Paul, "Was Due Process Due - A critical study of the Projection of 'Reasonableness' in Art.21 Since maneka Gandhi", (1983) 1 S.C.C., Jnl.1.

106. See supra, n.104.

the post-emergency Supreme Court for human rights and personal liberty, as has unmistakably been evinced by Bhagwati J. and his brother judges in Maneka. So far so good - good for the human rights and 'personal liberty' in India, where the standard of 'due process' protection for those human freedoms under the leadership of a 'dynamic human rights oriented Supreme Court' seems only to be pre-eminently, desirable.[107] But that is not the journey's end. To have a correct assessment of the meaing and message of Maneka, a few more crucial questions are to be asked and answered. And that can be accomplished, it is submitted, only through a close and critical scrutiny of Maneka; and not through any attempt to romanticise Maneka and the judicial craft and activism of Bhagwati J. therein.[108] Hence a constructive criticism of Maneka seems to be imperative.

A Critique of Maneka:

The questions that loom large in the constitutional horizon in the light of what has been said and done by the judges in Maneka are many and complex. A

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107. Prof.T.S.Rama Rao, "Supreme Court and the "Higher" Logic of Fundamental Rights", 25 J.I.L.I (1983), pp. 186-194, at p.190.; See also Maneka, op.cit., pp.658-59, per Krishna Iyer, J.

108. As is evident from the exaggerated claims made about Maneka in different quarters.

few of them are: Does Maneka establish unequivocally the doctrine of 'due process of law' as a protection for 'personal liberty' in Art.21? Is the "fortress" of 'due process' claimed to have been erected around Art.21 strong and stable? How far Maneka liberates Art.21 from Gopalan? Does Maneka render Art.21 as a limitation on the legislature? An objective analysis of Maneka from the standpoint of these questions would bring to surface certain disturbing features which are of grave implications and far-reaching consequences.

At the outset, it may be noticed that while considering the extent of protection for 'personal liberty' in Art.21, Bhagwati, J. appears to have evaded a fresh and forthright interpretation of the expression "procedure established by law" which Art.21 itself secures as the standard of protection for personal liberty.[109] Instead, he has attempted to secure the protection of a 'just, fair and reasonable' procedure from outside Art.21.[110] This has been so, it is submitted, evidently because of his obsession with Gopalan on the interpretation of the standard of protection in Art.21: "the procedure established by law". The inner tension between the activist urge of Bhagwati, J. to 'expand the reach and ambit' of the right to personal liberty and

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109. Maneka, op.cit., p.622.

110. Supra, n. 78 of this Chapter.

his obsession with Gopalan on the interpretation of Art.21 seems to be apparent in his judgement. On the one hand, though incredible it may seem, he has adopted the positivist interpretation of the expression "procedure established by law" as laid down by the Court in Gopalan;[111] and, on the other, he ventures to declare that the 'procedure' in Art.21 must be "just, fair and reasonable". Why the 'procedure' must be so? Here again the learned judge appears to be ambivalent. He does not seem to have made any attempt to gather those requirements of fairness and reasonableness from within Art.21 itself through a liberal and purposive interpretation of the expression "procedure established by law". Instead, he has, first, tried to draw support for those requirements from the "observations in A.K.Gopalan's Case, which have great weight".[112] And, in the next moment he appears to disown those 'observations' in Gopalan, and seeks to project the 'concept of reasonableness' in the procedure contemplated by Art.21 "having regard to the impact of Art.14 on Art.21".[113] Thus, haunted by the ghost of Gopalan, Bhagwati, J. appears to have assumed Art.21 to be infertile to bear the child of 'due process' and, then, resorted to the technique of 'surrogate motherhood' for

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111. See, supra, Ch.IV.

112. Maneka, op.cit., p.622.

113. Ibid.

fabricating 'due process' through Arts.14, 19 and the rules of natural justice. Thus, it is submitted that even after Maneka, Art.21, by itself, appears to be bereft of 'due process of law' as a standard of protection for 'personal liberty'. The "creative exuberence"[114] of Bhagwati, J. appears to have failed to penetrate the 'iron curtain' of Gopalan in this regard. Further, it may be amazing to note that Bhagwati, J. appears to have scrupulously avoided even the very use of the expression "due process of law" in his lengthy and leading judgement,[115] though the concept of 'just, fair and reasonable procedure' which he has forged through the alternate strategy unwittingly begets 'due process'.[116]

Now, even the "just, fair and reasonable procedure" formula evolved by Bhagwati J. through the alternate strategy seems to suffer from certain serious drawbacks and limitations. And those limitations in turn

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114. U. Baxi, The Indian Supreme Court and Politics, op.cit., p.153.

115. Chandrachud, J. while agreeing with Bhagwati, J.'s formulation of 'just, fair and reasonable procedure' specifically cautions thus: "Our constitution too strides in its majesty but, may it be remembered, without a due process clause". Maneka, op.cit., p.613. But Beg C.J. appears to have acknowledged the 'just, fair and reasonable procedure' formula as equivalent to 'due process' requirements; and he has openly and freely used the expression 'due process' in his judgement, Maneka, at pp.605-606.

116. Supra, n.104 of this Chapter.

seem to be inherent in the very alternate strategy and the argumentations adopted by him with reference to Arts.14, 19 and the rules of natural justice in order to sustain that formula.

First as regards the arguments with reference to Art.14, it is submitted that there can hardly be any objection to the view held by Bhagwati, J. that a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Art.21 has to stand the test of Arts.14 and 19 _in so far as such law abridges or takes away any of the fundamental rights conferred under those Articles_.[117] In fact, there is nothing new or revolutionary in involving Art.14 to test the validity of the procedure established by law within the meaning of Art.21.[118] But, Bhagwati, J. appears to have gone a step further by holding that 'the concept of reasonableness must be projected in the procedure contemplated by Art.21 having regard to the impact of Art.14 on Art.21'.[119] And according to His Lordship, "The principle of reasonableness, which legally as well as

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117. _Maneka_, _op.cit._, p.623.

118. The Supreme Court applied Art.14 to test the validity the special procedures established by law for the trial of certain special offences in _Anwar Ali's Case_ and _Kathi Raning's Case_, See _supra_, ns. 87 and 88.

119. _Maneka_, _op.cit._, p.622.

philosophically, is an essential element of equality or non-arbitariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14".[120]

It is respectfully submitted that the above argument of Bhagwati, J. does not seem to be tenable for more than one reason. The argument seems to proceed on the assumption (or it atleast creates an impression to the effect) that in all cases of deprivation of personal liberty under Art.21, Art.14 would be applicable automatically to test the validity of the law authorising of such deprivation irrespective of the fact whether such law infringes any right conferred by Art.14 or not. And this assumption does not seem to have any justification.[121] Further, the argument that the 'procedure' in Art.21 must be reasonable "in order to be in conformity with Article 14" leads to an anomalous inference that the requirment of a reasonable procedure for the deprivation of 'personal liberty' comes not from Art.21; but it comes from Art.14. Thus Art.21 has been made dependent upon Art.14, so far as the requirement of a reasonable procedure is concerned, with the possible

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120. Ibid., at p.624.

121. For a similar view, see, P.K.Tripathi, "The Fiasco of Overruling A.K.Gopalan", A.I.R. 1990, Jnl.1, p.6.

consequence that if, for some reason, Art.14 is not available in a given case of deprivation of personal liberty, Art.21 would not require a 'reasonable' procedure.[122] Moreover, the above argument indicates that even in cases where Art.14 is applicable, the availability of a 'reasonable' procedure or 'due procêss' as a protection for 'personal liberty' in Art.21 would depend on the meaning and interpretation of the requirements of Art.14. So, in this respect also the 'due process' projected into Art.21 through Art.14 appears to be conditional and unstable. Perhaps, the most perplexing aspect of Bhagwati J.'s argument with reference to Art.14 appears to be his interpretation of Art.14 itself. According to him 'Art.14 strikes at arbitrariness in State action'; and the 'principle of reasonableness is an essential element of equality'.[123] His Lordship appears to have failed to appreciate the fact that the arbitrariness arising out of discriminatory treatment in State action -- i.e. treating equals as unequals or unequals as equals -- is not the same as arbitrariness or unreasonableness _per se_ in State action, and that Art.14 embodies the guarantee only against the former and not the latter. As one eminent Professor has rightly remarked, "As read by the Court, the Article incorporates not the equal protection guarantee but

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122. _Ibid_.

123. _Maneka_, p.624.

the guarantee of due process for which there seems to be no warrant".[124] Prof.Tripathi also questions the tenability of the view taken by Bhagwati, J. He says:

> ".... the arbitrariness which Article 14 inhibits is not the same as the arbitrariness that Article 19 inhibits. The arbitrariness inhibited by Article 14 is the arbitrariness or unreasonableness in discriminating between one person and another: if there is no discrimination there is no arbitrariness in the sense of Article 14, although there may still be arbitrariness in the sense in which it is prohibited by Article 19. To put it differently, the arbitrariness prohibited by Article 19 concerns the intrinsic quality of the action taken by the State, wheareas that prohibited by Article 14 concerns the distributive aspect of that action".[125]

Thus, it is reasonably clear that the interpretation of Art.14 and the invention of a 'due process' clause in the equality provisions in that Article seem to stand on a shaky foundation, supported only by incorrect assumptions. If that is so, it is submitted, it

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124. Prof. Rama Rao, op.cit., p.191.

125. P.K.Tripathi, "The Fiasco of Overruling A.K. Gopapalan", op.cit., pp.6-7.

would be naive to expect Art.14 to furnish an uninterrupted supply of 'due process' to Art.21 in order to project 'personal liberty'. For, even admitting that there is a symbiotic inter-relation between Arts.14 and 21, Art.14 can give only what it possesses.

Further, Bhagwati, J.'s resort to 'political logic' and 'constitutional law'[126] as a justification for his invention of 'due process' also seems to be unconvincing. If a 'due process' clause could be discovered and located in the 'equality' clause, then the framers of our Constitution had only vainly attempted to exclude 'due process of law' in Art.21, without realising that 'due process' was, without their knowledge, already incorporated in the 'equality' clause in Art.14. And similarly, the authors of the Fourteenth Amendment to the U.S. Constitution had also failed to realise that a 'due process' clause therein was not necessary as they were incorporating the 'equality' clause also in that Amendment.[127] There appears to be yet another amazing constitutional implication, though may not have been intended by Bhagwati. J., which ensues from this new invention of 'due process'. If 'reasonableness' is an "essential element" of 'equality',

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126. Maneka, op.cit., p.624.

127. For a similar view, see Justice A.M. Bhattacharjee, "challenge to Social Justice in the Constitution and the Laws", I.B.R. (1984) II(3) 269, p.280.

pervading Art.14 "like a brooding omnipresence", then all laws which are required to be consistent with Art.14, as mandated by Art.13, must be 'reasonable' by themselves and must conform to the standard of 'due process'.[128]

Finally, while 'projecting the concept of reasonableness into Art.21, having regard to Art.14', Bhagwati, J, without assigning any reason or explanation, appears to have truncated that concept by confining it only to the 'procedure' in Art.21.[129] It is respectfully submitted that once 'reasonableness' is held to be at the core of Art.14 to which Art.21 should conform, it is difficult to understand on what principle the learned judge could maintain that Art.14 requires only procedural reasonableness in Art.21 and not substantive reasonableness. But throughout his judgement His Lordship seems to have been concerned only with the reasonableness of the 'procedure' and not with the reasonablness of the 'law' in Art.21.[130] Further, this view may lead to yet another anomaly, especially in view of the simultaneous applicability of Arts.14 and 19 to test the validity of the deprivation of 'personal liberty' in Art.21. That is to say, whereas the concept of reasonableness projected from Art.14 would

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128. See, ibid., at pp.279-80.

129. See Mohammad Ghouse, A.S.I.L., Vol.XIV: 1978, p.422 et.seq.

130. Maneka, op.cit., p.624.

require only the 'procedure' to be 'reasonable', the concept of reasonableness that proceeds from Art.19 would require both the 'procedure' as well as the 'law' to be reasonable. For, 'reasonableness' in Art.19 knows no such limitations and so cannot be confined to 'procedure' alone as Bhagwati, J. would like to maintain. Here, it is worthwhile to refer, to the views expressed by Beg, C.J. on this aspect. He said:

> "In order to apply the tests contained in Articles 14 and 19 of the Constitution, we have to consider the objects for which the exercise of inherent rights recognised by Article 21 of the Constitution are restricted as well as the procedure by which these restrictions are sought to be imposed. Both substantive and procedural laws and actions taken under them will have to pass tests imposed by Articles 14 and 19 whenever facts justifying the invocation of either of these Articles may be disclosed."[131] (empasis added).

It is submitted that the above view held by Beg. C.J. appears to be more rational and realistic from the conceptual as well as functional standpoints.[132]

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131. Ibid., at p.610.

132. It may be noticed that Beg, C.J.'s opinion is free from some of the serious infirmities which afflict the arguments of Bhagwati J. with reference to Art.14.

Now, the arguments with reference to the rules of natural justice: Of course, there can be no doubt that Bhagwati J.'s strategy to adopt the doctrine of natural justice as an alternate source of 'due process' for protecting 'personal liberty' is novel and remarkable.[133] But it is submitted that this new 'due process' strategy seems to have lost much of its functional efficacy as a standard of protection due to two major limitations that are inherent in the Judgement of His Lordship.

Firstly, as is evident from the judgement of Bhagwati J., the requirement of 'due process' as it emanates from 'natural justice' is confined only to the 'procedure' in Art.21,[134] allowing the substantive aspects of 'law' in that Article to be immune from the test of 'due process' or 'reasonableness'. Thus despite the 'due process' emanations from Art.14 and the doctrine of natural justice, 'law' in Art.21 still continues to be 'State-made' law as laid down in Gopalan, without being required to comply with any standard of reasonableness or fairness.

And secondly, even this truncated version of 'due process' which requires only 'procedural fairness' appears to have been left at the mercy of the legislature. On the

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133. See Maneka, op.cit., p.624 et seq.

134. Ibid., at p.624.

one hand Bhagwati.J seems to have blown up the 'due process' formula by declaring valiently that the procedure prescribed by law for the deprivation of 'personal liberty' in Art.21 must comply with the rule of fair hearing[135] which is "the soul of natural justice"[136] and that even if the statute is silent as to the requirement of 'fair hearing', "the justice of the common law will supply the omission of the legislature".[137] And on the other, the learned judge appears to have deflated the same formula by holding that if the statute itself provides for the exclusion of the audi alteram partem rule, then "no more question arises".[138] This simple-looking but dismal statement of Bhagwati J., it is submitted, clearly indicates that on the protection of 'personal liberty' the last say still remains with the legislature and not with the judiciary. Thus, if the requirement of a 'just, fair and reasonable procedure' is denied by the legislature by expressly providing for the exclusion of those 'due process' requirements in the

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135. Ibid.

136. Ibid., at p.625.

137. Ibid.

138. Ibid., at p.624. For the criticism of this aspect, see Mohammad Ghouse, A.S.I.L, Vol. XIV: 1978, p.424. But Prof. Baxi appears to have tried to save Bhagwati J. by saying while making that observation the learned judge might have referred only to "question" of construction, and not "question" of validity of the statutory exclusion. U.Baxi, supra, n.1, p.159.

procedure which it establishes for the deprivations of personal liberty, the Court will not and cannot do anything but to see that the deprivation of 'personal liberty' is in accordance with the procedure established by law. And, in such an eventuality, Art.21 would still remain devoid of 'due process', without having any safeguard against the legislature. For, with all the rhetorics of activism, the "truly noble sweep of Justice Bhagwati's opinion"[139] reaches only to the extent of 'supplying the omission' of the legislature and not to the extent of correcting the commission of the legislature. It may be recalled that in the year of 1610 the great Chief Justice of England, Sir Edward Coke could assert and declare, in the absence of a written constitution and Bill of Rights and in the teeth of parliamentary supremacy, that "when an Act of Parliament is against common right and reason, . . . the common law will control it, adjudge such Act to be void".[140] (emphasis added).

Further, the view held by Bhagwati J. on the issue of statutory exclusion of 'fair hearing' as well as the relative brevity of his view on the issue have, unfortunately, left unanswered the positivist argument of Kailasam J., in his dissenting opinion, that 'it cannot be

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139. U.Baxi, ibid., at p.153.

140. Dr.Bonham's Case, 1609 8 Co. Rep. 107.

denied that the legislature in making an express provision may deny a person of the right to be heard' <u>because the rules of natural justice 'cannot be equated with the fundamental right'</u>.[141] (emphasis added). It is difficult to understand how Bhagwati J. could have agreed to the statutory exclusion of natural justice consistent with his duty under Art.13(2) and without the fear of self-contradition. For, according to his own views the requirements of fair hearing and reasonableness are integral parts of Arts.14 and 19, pervading those Articles "like a brooding omnipresence"; and it is as a result of the impact of those Articles on Art.21 a "just, fair and reasonable procedure" becomes an essential element of the "procedure" contemplated in Art.21 for the deprivation of 'personal liberty'.[142] Oviously, therefore, any statutory exclusion of those requirements of 'reasonableness' would be inconsistent with Arts.14, 19 and 21, and must result only in the invalidity of that statute under Art.13(2). But unfortunately, it is here Bhagwati J. appears to have faltered and failed and ultimately surrendered his activist credentials to the positivist presentions of Kailasm J.

Lastly, a close look at the argumentative strategy adopted by Bhagwati J. to import the requirements of 'due

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141. Maneka, op.cit., p. 689.

142. Ibid., at p.624.

process' into Art.21 from Art.19 would clearly show that even from Art.19 'personal liberty' in Art.21 cannot receive 'due process' protection all the time with any reasonable degree of certainty or stability. Based on the linkage of Art.21 with Art.19, the learned judge has rightly held that 'a law prescribing a procedure for the deprivation of personal liberty must meet the challenge of Art.19 in so far as such law infringes upon any of the freedoms conferred under that Article'.[143] But it is submitted that it would be incorrect to infer from the above proposition an unqualified induction of 'due process' into Art.21.

As it is evident from that proposition, a law prescribing a procedure for the deprivation of 'personal liberty' would be required to meet the standard of reasonableness only if and in so far as the law takes away or abridges any of the distinct freedoms in 19(1). Perhaps, it may be for the purpose of overcoming this inherent limitation in this 'due process' strategy Bhagwati J. appears to have attempted to include all the distinct freedoms separately dealt with in Art.19(1) into the concept of 'personal liberty' in Art.21.[144] For, in such an event, any act of deprivation of 'personal liberty' would also be construed as an infraction of the freedoms in Art.19(1); and

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143. Ibid., at p.623.

144. Ibid., at pp.621-22.

therefore, a law prescribing a procedure for the deprivation of 'personal liberty' in Art.21 would invariably be required to comply with the standard of reasonableness as provided under cls.(2) to (6) of Art.19. But, as has already been pointed out,[145] to read all Art.19(1) freedoms into Art.21, rendering Art.19 as redundant, is not to interpret the Constitution but to repeal it for which there does not seem to be any warrant. And, as a matter of fact, Bhagwati J. himself appears to have given up his initial attempt to integrate completely Art.19 into Art.21. Here, again, the learned judge appears to have been ambivalent. As noted above, first he has attempted to give the 'widest amplitude" to the expression 'personal liberty' in Art.21 so as to include in it all the freedoms in Art.19 as well. Then, while considering the inter-relation between Arts.19 and 21, His Lordship held that a law authorising deprivation of 'personal liberty' within the meaning of Art.21 would be required to meet the challenge of Art.19 only _so far as that law takes away or abridges any of the freedoms conferred under Art.19_. This condititional clause which has been given emphasis in the above proposition is clearly indicative of the rejection of the theory that 'personal liberty' in Art.21 includes all the freedoms in Art.19, for, otherwise, that conditional clause would only be meaningless

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145. See, _supra_, Ch.IV, also the earlier discussion in this Chapter.

and irrelevant. The inference as to His Lordship's rejection of the above said theory of total inclusion stands further reinforced by his formulation and application of the test of "direct and inevitable effect"[146] for the purpose of determining whether the law providing for the deprivation of 'personal liberty' within the meaning of Art.21 violates any of the distinct freedoms under Art.19(1) as a 'direct and inevitable consequence of that law'. For, if 'personal liberty' in Art.21 includes within its meaning all the distinct freedoms in Art.19, the deprivation of one would automatically be the infringement of the other, there being no necessity for an independent test to determine whether and if what freedom in Art.19 is infringed as a result of the deprivation of 'personal liberty' in Art.21.

Thus, it is reasonably clear from the judgement of Bhagwati J. that a law prescribing a procedure for the deprivation of 'personal liberty' in Art.21 would be required to comply with the standard of reasonableness only to the extent that any of the independent rights in Art 19(1) is taken away or abridged as a 'direct and inevitable consequence' of such law. It implies necessarily that if no right under Art.19(1) is violated as a 'direct and inevitable consequence' of such law, Art.19 would not be

146. Maneka op.cit., pp.635-36.

applicable to test the validity of that law, with the inevitable result that the deprivation of 'personal liberty' in Art.21 would stand denuded of its 'due process' cloak. Thus the 'due process' which is claimed to have been 'inducted' into Art.21 from Art.19 seems to be only conditional and contingent in nature. Also in that process, Art.21 has been rendered completely dependent upon Art.19 so far as the 'due process' requirement is concerned.

Further even in a case of deprivation of personal liberty where Art.19 is applicable and so the 'due process' requirement is available, it is submitted that, the requirement that the law authorising deprivation of 'personal liberty' must conform to the standard of reasonableness is not the outcome of and does not proceeed from Art.21; but that requirement is the outcome of Art.19. It is not with reference to the reasonableness of the deprivation of 'personal liberty' the law would be scrutinised as to its validity; but the law would be tested only with reference to the reasonableness of the restriction imposed on any of the freedoms in Art.19 as a direct and inevitable consequence of that law. And as long as Art.21 by itself does not and cannot require that the law authorising the deprivation of 'personal liberty' must be reasonable, it would continue to be incapable of imposing any limitation on the legislature.

Therefore it is submitted that the 'alternate strategy' adopted by Bhagwati J. with reference to Art.19 does not seem to have succeeded in achieving an unqualified induction of 'due process' into Art.21. Perhaps the only limited sucess of that 'strategy' lies in its rejection of the theory laid down in Gopalan that Art.19 would be totally inaplicable to test the validity of a law providing for the deprivation of 'personal liberty' in Art.21 even if that law violates any of the freedoms conferred by Art.19.

Yet another tragic feature of Maneka which appears to have eroded considerably the foundation of the 'due process' strategy has been the apparent antinomy between what the learned judges have said and what they have really done in Maneka. In the first instance, as noted earlier, the Court has attempted to evolve a new version of 'due process' out of rules of natural justice and Arts.14 and 19 and has said that the 'procedure' contemplated by Art.21 must be "just, fair and reasonable". And the Court has also taken note of the fact that Sec.10(3)(C) of the Passport Act, i.e. the impugned law did not embody the rule of fair hearing;[147] that the expression" in the interest of general public" in the Act covered much more than the restrictions permissible under Art.19(2);[148] that the impugned order had

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147. Ibid., at p.624.

148. Ibid., at p.635 et.seq.

impounded the petitioner's passport for an indefinite period without giving her any reason or any opportunity to state her case;[149] and that the order of the central government was, final, not being subject to any appeal. Nevertheless when it came to the question of actual determination of the validity of the impugned provision in the Passport Act and the order passed thereunder, Bhagwati J. appears to have failed to apply the standard of "just, fair and reasonable procedure" which he had evolved through a liberal and activist interpretation of the fundamental rights provisions. Thus the learned judge seems to have read the rule of fair hearing into Sec.10(3)(C) of the Act to save it from unconstitutionality.[150] Then in order to save the order he appears to have gone a step further and held that a post-decisional hearing would be sufficient to meet the requirement of natural justice.[151] Then, displaying un unbelievable degree of restraintivism, His Lordship also held that if the requirement of audi alteram partem rule was expressly excluded by statute "no more question remains".[152] Further, he seems to have read down the expression "in the interest of general public" in order to sustain Sec.10(3)(C) as intra vires Art.19(2). And to save Sec.11 of the Act,

149. Ibid., at p.618.

150. Ibid., at p.630.

151. Ibid.

152. Ibid., at p.624.

he resorted to the 'high authority'[153] theory. With reference to Art.14 also the learned judge upheld the validity of Sec.10(3)(C). According to him the ground "in the interest of general public" did not confer any unguided discretion on the Passport Authority. And he further held that 'when power was vested in a high authority like the Central Government, abuse of power could not lightly be assumed',[154] despite his own admission at the begining of his judgement that 'it was indeed a matter of regret that the Central Government should have taken up this attitude' towards the request of the petitioner for a copy of the statement of reasons; and that 'that was an instance showing how power conferred on a statutory authority... could sometimes be improperly exercised'.[155] Though His Lordship said in the begining that Art.14 embodied the concept of reasonableness,[156] Sec.(10)(3)(C) had been finally upheld on the ground that 'it could not be regarded as discriminatory'. The Court thus upheld the impugned law as well as the order as constitutional and disposed of the petition without passing any formal order.[157]

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153. Ibid., at pp.631-32. For the criticism of 'high authority' theory, see, Mohammad Ghouse, supra, n.138, pp.424-25; U.Baxi, supra, n.138.

154. Ibid., at pp.631-32.

155. Ibid., at p.618.

156. Ibid., at p.624.

157. Ibid., at p.651.

This patent incongruity between the activist interpretation of the fundamental rights provisions and the restraintivist refusal to apply that interpretation to the facts of the case appears to have further shaken the foundation of the 'due process' strategy in Maneka by exposing that strategy to the vulnerability of being brushed aside as a heap of obiter dicta by a legalist judge. Even while praising Bhagwati J. for his "judicial craftsmanship" and describing the dichotomy between interpretation and application as a splendid example of "juristic activism",[158] Prof. Baxi had to acknowledge that 'legalistic justices can reduce most of Maneka to massive obiter'.[159] Another eminent Professor criticises this "mixture of activism and passivism" in the judgement of Bhagwati J. on the ground that 'it is likely that the passivism may recoil on the activism'. He apprehends that 'a judge may find the ratio only in the latter part of the judgement and dismiss the rest of it as obiter dicta'.[160]

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158. U.Baxi, op.cit., supra, n.1, p.167. To Prof. Baxi "the introduction and elaboration of new ideas and conceptions without at the same time using these in deciding cases at hand" is "juristic activism". But to Prof. Ghouse this dichotomy between interpretation and application is judicial "passivism". See M.Ghouse, supra, n.1, p.425.

159. Ibid.

160. Mohammad Ghouse, supra, n.1, p.425.

The above mentioned apprehension appears to be real and significant particularly in view of the dissenting judgement of Kailasam J. The learned judge appears to have adhered steadfast to the exclusionary theories laid down by the Court in Gopalan and refused to accept as correct the rejection of those theories in Cooper and its progency.[161] This positivistic propensity of Kailasam J. is clearly indicative of the historical continuity and persistence of the tradition of legal positivism in the Supreme Court. The dissenting opinion appears to be a resounding reminder that Gopalan may resurrect along with its mode of constitutional interpretation and judical techniques. And it also seems to be a clear warning for the 'activist' judges to be more careful and cautious, reinforcing the need for principled decision making even while judicial activism and creativity go on.

Thus the detailed analysis of the arguments adopted by Bhagwati J. with reference to Arts.14, 19 and the rules of natural justice brings to surface a series of infirmities, inadequacies and contradictions in those arguments, seriously impairing the very efficacy of the 'alternate strategy' as an appropriate means to induct 'due process' into Art.21 from outside that Article. The "just, fair and reasonable procedure" formula - the Maneka version

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161. Maneka, op.cit., p.675 et seq.

of 'due process' evolved by Bhagwati J. through the 'alternate strategy' does not seem to exist on a sound and stable foundation. This new version of 'due process', appears to be a truncated and conditional concept from the standpoint of its availability for the protection of 'personal liberty' in Art.21. And above all, the "fortress" of 'due process' which Maneka claims to have erected around Art.21 does not seem to be strong enough to safeguard 'personal liberty' against the legislative arm of the State.[162] Though on the meaning of 'personal liberty' and on the inter-relation between Arts.19 and 21 Maneka has liberated Art.21 from the positivist grips of Gopalan, 'law' in that Article still means a 'State-made law', without being required to comply with any standard of reasonableness.[163]

It is submitted that this apparent failure of the alternate strategy to induct the requirements of 'due process' into Art.21 and to transform that Article into a limitation on the legislative powers of the State once again reinforces the view taken in this study that any meaningful attempt to introduce 'due process' into Art.21 should be only through a liberal and activist interpretation of the standard which Art.21 itself provides for the protection of

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162. This aspect is discussed in detail in the next Chapter.

163. See, M.Ghouse, supra, n.1, p.422.

'personal liberty'. In Maneka it is only Krishna Iyer J. who appears to have adopted this line of thought. Hence it may not be out of place here to refer briefly to the judgement of Krishna Iyer J.

On the protection of 'personal liberty' though Krishna Iyer J. has gone "the whole hog" with Bhagwati J.,[164] he appears to have thought prudent to found his 'due process' strategy within Art.21 itself. Reflecting his activist instinct, the learned judge has declared at the outset that 'legal interpretation, in the last analysis, is value judgement'.[165] With this perspective of judicial process, he has set out to interpret the expression 'procedure established by law', the standard which Art.21 provides for the protection of personal liberty. Emphasising the value premises of Art.21, His Lordship has pointed out that 'reverence for life and liberty desiderates law; but law is not any 'capricious command but reasonable mode ordinarily regarded by the cream of scoeity as dharma or law'.[166] According to him 'the compulsion of constitutional humanism and the assumption of full faith in life and liberty cannot be so futile or fragmentary that any transient legislative majority. . . can prescribe any

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164. Maneka, op.cit., p.658.

165. Ibid.

166. Ibid.

unreasonable modality and thereby sterilise the grandiloquent mandate'.[167] Then he said, it is submitted, rightly thus:

> "'procedure established by law' with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not ex-necessitate import into those weighty words an adjectival rule of law, civilized in its soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head. Can the sacred essence of the human right to secure which the struggle for liberation, with 'do or die' partiotism, was lunched be sapped by formalistic and pharisaic prescriptions, regardless of essential standards?"[168]

Integrating those values which he delineated, into the verbal framework of the standard of 'procedure established by law', His Lordship held:

> "Procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Art.21 has to be

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167. Ibid.

168. Ibid.

fair, not foolish, carefully designed to effectuate, not to subvert the substantive right itself. Thus understood, 'procedure' must rule out anything arbitrary, freakish or bizarre... what is fundamental is life and liberty. What is procedural is the manner of its exercise. This quality of fairness in the process is emphasised by the strong word 'established' which means 'settled firmly' not wantonly or whimsically. If it is rooted in the legal consciousness of the community it becomes, 'established' procedure. And 'Law' leaves little doubt that it is normae regarded as just since law is the means, and justice is the end".[169]

Krishna Iyer J. appears to have tacitly acknowledged the inherent limitation in the alternate strategy when he said: "Even as relevant reasonableness informs Arts.14 and 19, the component of fairness is *implicit* in Art.21".[170] (emphasis added).

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169. *Ibid*. Here it may be noticed that his Lordship appears to have approved the views of Fazl Ali J. in *Gopalan*, and the opinion of Subba Rao J. in *Kharak Singh* and *Kochunni* as regards, the interpretation of the expression 'procedure established by law'.

170. *Ibid*.

Elaborating further the rationale behind giving such a purposive and 'due process' oriented interpretation to the expression 'procedure established by law', His Lordship added: "Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of procedural safeguards and right to a hearing has a human-right ring. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights: observance of fundamental rights is not regarded as good politics and their transgression as bad politics".[171] And the learned judge clinched the issue in these words: "To sum up, 'procedure' in Article 21 means fair, not formal procedural. 'Law' is reasonable law, not any enacted piece."[172] And 'due process of law' it is submitted, is all about 'fair procedure' and 'reasonable law'.

It is submitted that through a liberal, purposive and policy-making mode of constitutional interpretation Krishna Iyer J. appears to have integrated the value premises of 'personal liberty' in Art.21 into the verbal framework of that Article and construed 'procedure' as fair procedure and 'law' as reasonable law. He appears to have, founded, thus, the 'due process of law' at the heart of

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171. Ibid.

172. Ibid., at p.659.

Art.21 itself. Unfortunately, the opinion of Krishna Iyer J. did not come to be one of the Court, which pursued only the alternate strategy of gathering the elements of 'due process' from outside Article 21.

Nevertheless, Maneka has emerged as a landmark in the history of personal liberty and judicial process in India. It serves as a great symbol. It signifies the resurgence of an activist judicial concern for personal liberty and human rights. The decision in Maneka displays a new attitude and approach not only towards the protection of personal liberty, but also towards the very mode of constitutional interpretation and judicial techniques. Perhaps, it is here Maneka has demolished Gopalan. Though the Maneka version of 'due process' - the "just, fair and reasonable procedure" formula - has not emerged as a full-fledged 'due process' clause and has failed to get itself integrated into Art.21, that satellitic concept appears to hold out the promise of occasional glitterings of 'due process', of course, subject to the conditions and contingencies which are inherent in the 'alternate strategy'. Thus in the end one can see in Maneka, at least the twilight of due process, if not the very birth of it. And more than any thing else, Maneka, as a symbol, appears to have helped the Indian judicial psyche to liberate itself from the 'due process' phobia from which it has been

suffering eversince _Gopalan_. Though _Maneka_ has not succeeded in inducting unequivocally the 'due process' clause into Art.21, it appears to have succeeded in imparting a 'due process' dynamism to the judicial process in the field of personal liberty. And in a way it is the skilful display of this 'due process' dynamism by the post - _Maneka_ Supreme Court that appears to have made _Maneka_ still more significant and memorable.

Hence a close study of this 'due process' dynamism shown by the Court in dealing with personal liberty becomes imperative in order to conclude whether judicial process has ultimately succeeded in founding the 'due process' clause in Art.21 as a protection for personal liberty.

CHAPTER VII

THE DUE PROCESS DYNAMISM *sans* A 'DUE PROCESS' CLAUSE: THE POST - *MANEKA* PARADOX

The 'Due Process' Dynamism:

The post-*Maneka* period has witnessed a new dynamism in judicial process, particularly in the field of 'personal liberty'. The Court, through a group of activist judges,[1] appears to have exploited skillfully the *Maneka* version of 'due process' and proceeded to assert in a series of cases that no law can deprive a person of his life or personal liberty unless it prescribes a procedure which is just, fair, and reasonable, and that it would be for the Court to determine whether the procedure is just, fair and reasonable. The Court, assuming an activist-reformist role, has directed its due process dynamism towards the most glaring instances of violation of personal liberty of the individuals arising out of police brutality,[2] prison mal-

1. Such as Bhagawati, Krishna Iyer, Desai and Chinnappa Reddy, JJ.

2. For an analysis of this aspect, see Mohammad Ghouse, "State Lawlessness and the Constitution: A study of Lock-up Deaths", *Comparative Constitutional Law*, ed. by M.P.Singh (1989), pp.248-261.

administration,[3] inordinately long delay in trial of criminal cases[4] and other custodial maltreatment of persons; and has, in a large number of cases, tested various aspects of criminal justice and prison administration on the anvil of 'procedural due process'.[5] In the process, displaying a remarkable creativity in judicial process, the Court has opened up new vistas of substantive and procedural rights whereby expanding the horizon of 'personal liberty' and enriching the contents of 'due process' or 'reasonable' procedure in Art.21.

The New Rights in Article 21: And Creativity in Judicial Process:

Right to Human Dignity and Immunity from Torture and Cruel and Inhuman Punishment

The extent to which human conditions are provided and human rights are observed in the context of the criminal justice system and prison management of a society can legitimately be regarded as an important measure of its civilization and its commitment to the worth and dignity of

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3. For an account of the pitiable conditons in Indian prisons, see Kumkum Chadha, The Indian Jail (Vikas Publications)

4. See, the Law Commission's 77th and 78th Reports. The Commission describes the problem as "appalling".

5. See, Justice P.N.Bhagwati, "Human Rights in the Criminal Justice System", 27 J.I.L.I. (1985), 1 at p.7 et.seq.

the individual. Prison reforms has been on the political agenda in India for many years, without producing any tangible results.[6] Even as late as in 1978 the Shah Commission has brought out the appalling conditions of the Indian prisons and urged the Government of India to take special and effective steps to improve the conditions in jails consistent with the modern conceptions of human and reformative aspects of imprisonment.[7] However, the humanisation of the prison system still awaits positive response from political process and legislative action. It was destined to be taken over by judicial process, in the wake of the 'due process' dynamism of the post - Maneka Court.

Thus, in Sunil Batra V. Delhi Administration[8], the Supreme Court has struck the note of the beginning of a new jurisprudence pertaining to 'the province of prison justice, the conceptualization of freedom behind bars and the role of judicial power as constitutional sentinel in a prison setting'.[9] In this case the Court was called upon to determine the validity of solitary confinement imposed on

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6. See, Mohammad Ghouse, "Human Rights and Fundamental Rights", I.B.R., Vol.XI(4) 1984, pp.408-09.

7. Third and Final Report of the Shah Commission (Union of India, 1978), pp.135-36.

8. A.I.R. 1978 S.C. 1675.

9. Ibid, at p.1679.

Sunil Batra who was under a death sentence. And the other petitioner, Charles Sobraj, a French national, who was facing grave charges, challenged the validity of keeping iron fetters on him. According to Sec.30(2) of the Prisons Act, 1894 a death sentencee "shall be confined in a cell apart from all other prisoners and shall be placed by day and by night under the charge of a guard". And under Sec.56 of the same Act the superintendent of prisons could confine a prisoner in irons if it was necessary to do so for ensuring his safe custody, after taking into account the state of prison, character of the prisoner and also the instructions that may be given by the Inspector-General of Prisons with the sanction of the local government.[10]

Desai J., speaking for the majority, declared at the outset:

> "It is no more open to debate that convicts are not wholly denuded of their fundamental rights. No iron curtain can be drawn between the prisoner and the Constitution.... However, a prisoner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial. Conviction for a crime does not

10. Ibid., at pp.1726, 1727, 1732-33.

reduce the person into a non person whose rights are subject to the whim of the prison administration and, therefore, the imposition of any major punishment within the prison system is conditional upon the observance of procedural safeguards".[11]

Assuming a reformist and monitoring role in regard to the problem of prison administration His Lordship further said:

> "Consciously and deliberately we must focus our attention, while examining the challenge, to one fundamental fact that we are required to examine the validity of a pre-constitution statute in the context of the modern reformist theory of punishment, jail being treated as a correctional institution.... The Court need not adopt a "hands off" attitude... in regard to the problem of prison administration. It is all the more so because a convict is in prison under the order and direction of the Court. The Court has, therefore, to strike a just balance between the dehumanising prison atmosphere and the preservation of internal order and discipline, the maintenance of institutional

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11. Ibid., at p.1727.

security against escape, and the rehabilitation of the prisoners".[12]

Dealing with the issue of solitary confinement, the Court conceded that it had a 'degrading and dehumanising effect on prisoners and that if Sec.30(2) of the Prison Act enabled the prison authority to impose solitary confinement on a death sentencee not as a consequence of violation of prison discipline but on the sole ground that the prisoner was a death sentencee, the provision would be invalid as violative of Arts.14, 19, 20 and 21.[13] But the Court read down the scope of Sec.30(2) of the Act instead of invalidating it, apparently accepting the suggestion of the Additional Solicitor -General, to the effect that the impugned provision did not empower the jail authorities to impose cellular or solitary confinement on a prisoner under sentence of death, but it merely permitted statutory segregation for the safety of the prisoner.[14] Circumscribing further the reach of the impugned provision the Court held that the expression "prisoner under sentence of death" in the context of Sec.30(2) of the Act could only mean the prisoner whose sentence of death had become final

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12. Ibid.

13. Ibid., at p.1728.

14. Ibid., at p.1729.

and conclusive.[15] And according to the Court only after the sentence becomes executable without any intervention from any other authority he may be kept in a cell apart from other prisoners with a day and night watch with a view to ensure his safe custody. "But even here", the Court said, "unless special circumstances exist, he must be within the sight and sound of other prisoners and be able to take food in their company".[16]

Then, dealing with the validity of keeping Charles Sobraj in iron fetters, the Court held: "Bar fetters make a serious inroad on the limited personal liberty which a prisoner is left with and, therefore, before such erosion can be justified it must have the authority of law".[17] Considering the fact that 'continuously keeping a prisoner in fetters day and night reduces the prisoner from a human being to an animal, and that this treatment is so cruel and unusual that the use of bar fetters is anathema to the spirit of the Constitution', Desai J. said: "Now, we do not have in our Constitution any provision like the Eighth Amendment to the U.S. Constitution forbidding the State from imposing cruel and unusual punishment .... But we cannot be oblivious to the fact that the treatment of a human being

15. Ibid., at p.1730.

16. Ibid., at p.1731.

17. Ibid., at p.1733.

which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under Art.14".[18]

Considering Sec.56 of the Prison Act, which conferred on the superintendent the power to confine a prisoner in iron if it was necessary to do so for ensuring his safe custody, the Court read down the provision to uphold its validity. Thus it was held that Sec.56 of the Act did not justify or permit putting bar fetters for an unusually long period without due regard for the safety of the prisoner and the security of the prison; and that the provision could not be treated as arbitrary so as to be violative of Art.14 since it contained 'sufficient guidelines and safeguards against misuse of bar fetters by the superintendent'.[19]

Referring to the parameters of the right to personal liberty, Desai J. affirmed the broad conceptualisation of 'personal liberty' as laid down in Kharak Singh and the harmonious inter-relation between Arts.21 and 19 as laid down in Cooper.[20] The learned judge also affirmed the construction of 'procedure' in Art.21 as

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18. Ibid., at p.1735.

19. Ibid.

20. Ibid., at p.1731.

'fair' and 'reasonable' procedure as propounded in Maneka, of course, without examining any further the theoretical basis for that construction. Following, presumably, the views of Krishna Iyer J. in Maneka, Desai J. also held that 'law' in Art.21 "must be right, just and fair, and not arbitrary, fanciful or oppressive".[21]

The lengthy and scholarly concurring judgement of Krishna Iyer J. appears to be more explicit and forthright than the majority opinion. Referring to the textual inadequacy of our Constitution in so far as it does not expressly provide for a 'due process' clause or a prohibition against 'cruel or unusual punishment', His Lordship declared:

> "True, our Constitution has no 'due process' clause or the VIII Amendment; but, in this branch of law, after Cooper... and Maneka... the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter productive, is unarguably unreasonable and arbitrary and is shot down by Arts.14 and 19 and if inflicted with procedural unfairness, falls foul of Art.21. Part III of the Constitution does not part company with the

21. Ibid., at p.1732.

prisoner at the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority".[22]

His Lordship appears to have agreed with the rejection of the 'hands-off' doctrine[23] in the United States and approvingly quoted Mr.Justice Douglas who said: "Prisoners are still 'persons' entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirements of due process".[24] Though the learned judge has agreed with the majority in upholding the validity of Secs.30(2) and 56 of the Prison Act, 'as humanistically read down by interpretation,[25] he has declared in unmistakable terms thus: "I hold that bar fetters are a barbarity generally and, like whipping, must vanish. Civilised consciousness is hostile to torture within the

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22. Ibid., at p.1690.

23. The 'hands-off' doctrine is based on the foundation stated in 1871 in an American case, Ruffin V. Commonwealth (1871)62 Vs. (21 Gratt) 790, 796 thus: "He (the prisoner) has as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being, the slave of the state" as quoted in ibid., at p.1680.

24. Ibid., at p.1681.

25. Ibid., at p.1722.

walled campus. We hold that solitary confinement, cellular segregation and marginally modified editions of the same process are inhuman and irrational".[26]

Thus, in Sunil Batra the Supreme Court has banished the blemish of the cruel and unusual punishments of solitary confinement and bar fetters from the jail jurisprudence of this country, translating the human rights declarations[27] into constitutional commandments.

In Charles Sobraj V. Supdt., Central Jail, Tihar[28] also Krishna Iyer J. declared: "Whenever fundamental rights are flouted or legislative protection ignored, to any prisoner's prejudice, this Court's writ will run, breaking through stone walls and iron bars, to right the wrong and restore the rule of law".[29] Significantly enough, His Lordship also laid down in this case the governing principle of the 'due process' dynamism in the area of prision jurisprudence. He stated the judicial policy thus:

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26. Ibid., at p.1720.

27. See, Art.5 of the U.D.H.R., and Arts.7 and 10(1) of the Covenant on Civil and Political Rights, 1966. For the text of these documents see Annexures VI and VII, infra.

28. AIR, 1978 SC.1514. The Bench which heard this case consisted of Krishna Iyer, Desai and Chinnappa Reddy, JJ.

29. Ibid., at p.1515.

> "Put tersely, both the 'hands off' doctrine and the 'take over' theory have been rebuffed as untenable extremes and a middle ground has been found of intervening when constitutional rights or statutory proscriptions are transgressed to the injury of the prisoner and declining where lesser matters of institutional order and management, though irksome to some, are alone involved".[30]

In Batra II,[31] arising out of a letter written by Sunil Batra to one of the judges of the Supreme Court alleging that a warden in Tihar Jail had caused bleeding injury to a convict by name Prem Chand by forcing a stick into his anus, the Court liberalised the procedural rigidities of the writ of habeas corpus and employed the writ, following the American cases,[32] for the oversight of state penal facilities and for the condemnation of the brutalities and tortures inflicted on the prisoners. Thus the Court treated Batra's letter as a petition for habeas corpus and issued the writ to the Lieutenant Governor of Delhi and the Superintendent of Central jail ordering that Prem chand should not be subjected to torture and the wound on his person should receive proper medical attention.

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30. Ibid.

31. Sunil Batra II V. Delhi Administration, AIR, 1980, SC.1579.

32. Ibid., at p.1583.

Referring to the trend of the American decisional laws on the issue, Krishna Iyer, J., speaking for the Court, held:

> "The content of our constitutional liberties being no less, the dynamics of habeas corpus writ there developed help the judicial process here. Indeed the full potential of Arts.21, 19, 14, after Maneka Gandhi, has been unfolded by this Court in Hoskot... and Batra.... Today, human rights jurisprudence in India has a constitutional status and sweep, thanks to Art.21, so that this magna carta may well toll the knell of human bondage beyond civilized limits".[33]

His Lordship openly acknowledged the activist policy-making role of the judicial process, particularly in view of the legislative laxity, in the humanisation of the prison system and observed thus: "Of course, new legislation is the best solution, but when law-makers take far too long for social patience to suffer, as in this very case of prison-reform, courts have to make-do with interpretation and carve on wood and sculpt on stone ready at hand and not wait for far away marble structure".[34] And

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33. Ibid., at p.1588.

34. Ibid., at p.1594.

the learned judge gave a number of guidelines on the humanist reforms of the penal process and the prison administration.

In Prem Shankar Shukla V Delhi Administration,[35] Krishna Iyer J., speaking for the Court, held handcuffing of under-trials during transit from prison to court for trial of their cases as a degrading and inhuman treatment and so as unconstitutional. Reconciling the conflict between considerations of escape and personhood of a prisoner, the Court held that handcuffing of a prisoner would be violative of Art.21 and so unconstitutional if there was any other reasonable method of preventing escape of the prisoner. Krishna Iyer J. had referred to Art.5 of the Universal Declaration of Human Rights, forbidding torture, cruel, inhuman or degrading treatment or punishment and Art.10 of the Covenant on Civil and Political Rights, protecting the dignity and worth of a person deprived of his liberty and guaranteeing humane treatment for him. Implicitly integrating those human rights into Art.21, the learned judge held that Art.21, now "the sanctuary of human values,

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35. AIR, 1980 SC.1535. Torture of prisoners by jail authorities came for adverse judicial comment in Kishore Singh V. Rajastan, AIR.1981 SC.625 and Reghubir Singh V. Haryana, AIR.1980 SC.1087.

proscribes fair procedure and forbids barbarities, punitive and processual".[36]

In Francis Coralie Mullin V. Administrator[37] the Court held that Art.21 included the right to live with human dignity and therefore a prisoner or detenu would be entitled to socialise with the members of his family and friends subject, of course, to fair and reasonable regulations. And a provision of the Prision Rules, which allowed a detenu under an order of preventive detention to meet his family and friends only once a month was held as unreasonable, and so as violative of the 'personal liberty' of the detenu under Art.21.

Further the Court, in its dynamic drive against torture and degrading treatment of prisoners, has subjected to severe criticism and condemnation the custodial violence to women,[38] sexual exploitation of the juveniles in jail,[39] long incarcerations and maltreatment of the insane prisoners,[40] and the most cruel act of blinding of the suspected prisoners by the police authorities.[41]

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36. Ibid.

37. AIR.1981 SC.746.

38. Sheela Barse V. Maharastra, AIR.1983 SC.379.

39. Munna V. U.P. AIR 1982 SC 806.

40. Veena Sethi V. Bihar, AIR.1983 SC.339. Sant Bir V. Bihar, AIR.1982 SC.1470.

41. Khatri V. Bihar, AIR.1981 SC.1068.

Right to Bail and Speedy Trial

The libertarian activism of the post - Maneka Court has bridged yet another gap between the Constitution and the human rights[42] in the field of criminal justice by recognizing the right to speedy trial and a non-excessive bail as integral parts of the 'due process' protection for 'personal liberty' in Art.21.

In Hussainara - I,[43] despite the absence of a specific fundamental right to speedy trial and a liberal bail system, the due process dynamism of the Court has reached out to the poor and the destitute, languishing in jails as under-trials,[44] demolishing the barrier between poverty and justice. This case, arising out of the petition for habeas corpus filed by Kapila Hingorani, a social worker-cum-lawyer, on behalf of an undertrial, brought before the Court certain shocking disclosures.[45] There were about 22,000 undertrials in Bihar jail accounting for about 80 per cent of the prison population and the duration of

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42. See, Arts.9(3) and 14(3)(c), Covenant on Civil and Political Rights, 1966.

43. Hussainara Khatoon V. State of Bihar, AIR.1979 SC.1360.

44. The 78th Report of the Law Commission (1979) says that on January 1, 1975 out of 2, 20, 146 prisoners, 1,26,772 (or 57.6 per cent) were undertrials.

45. See Upendra Baxi, "The Supreme Court under Trial: Undertrials and the Supreme Court", (1980) I S.C.C. 35 (Journ.).

their incarceration ranged from a few months to ten years. There were cases in which the duration of imprisonment exceeded the maximum period of imprisonment prescribed as punishment for the offences they were charged with. Apart from the accused, there were also in Bihar jails destitute men and women, persons of unsound mind, victims of crime and witnesses required in criminal cases.[46]

Bhagwati J., shocked by these startling revelations, pointed out that the absence of a right to speedy trial, an outmoded bail system and the delays in courts and non-availability of free legal aid to the poor undertrials were the major infirmities in the criminal justice system which had brought about this human tragedy and outrageous injustice. He observed:

> "Law has become an instrument of injustice and they are helpless victims of the legal and judicial system..... It is a crying shame on the judicial system which permits incarceration of men and women for such long periods of time without trial. Are we not denying human rights to these nameless persons who are languishing in jails for offences which perhaps they might ultimately be found not to have committed?"[47]

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46. Hussainara - III, AIR.1979 SC.1369.

47. Supra., n.43, at p.1361.

Bestowing the blessings of judicial process on so many undertrials, His Lordship read into Art.21 the right to speedy trial and attempted to humanize the bail system in view of the problems of the poor and the destitute.[48] Acting on the Maneka version of due process, the learned judge held that speedy trial was a part of the fair and reasonable procedure required by Art.21.[49]

Thus the Court held that the detention of persons in prison beyond the prescribed period of limitation under Sec.468 of the Cr.P.C. would be violative of Art.21 and that they should be released forthwith.[50] Again in Hussainara - III,[51] Bhagwati J. reprimanded the Bihar Government for keeping the under - trials in prisons for periods longer than the period of imprisonment prescribed for the offences they were charged with and ordered the release of such undertrials forthwith.[52] Having found that many undertrials charged with bailable offences were still in jail because they were too poor to engage a lawyer and to furnish the

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48. Ibid., at p.1362. Krishna Iyer J. can be said to have laid down already the foundation for a constitutional right to bail as part of 'personal liberty' under Art.21 in Gudikanti Narasimhulu V. Public Prosecutor, A.P., AIR.1978 SC.429; and Babu Singh V. U.P., AIR.1978 SC.527.

49 Ibid.

50. Hussainara - II, AIR.1979, SC.104.

51. AIR.1979, SC.1369.

52. Ibid., at p.1372.

monetary bail with sureties, His Lordship directed that when such undertrials were produced before the Magistrate, unreasonable monetary terms with sureties should not be insisted upon and the government should provide them with a lawyer at its own cost. He said: "The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State".[53] For, ".... It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him".[54] Bhagwati J. also gave suitable directions to the respondent State for the release and rehabilitation of the women in "protective custody" and the lunatics and persons of unsound mind who were kept in jail.[55]

In Hussainara - V,[56] Bhagwati J., speaking for the Court, ordered the release of undertrials charged with multiple offences and were in jails for the maximum term for which they could be sentenced on conviction even if the sentences awarded to them were consecutive and not

53. Ibid., at p.1376.

54. Ibid., at p.1373.

55. Hussainara-IV, AIR.1979 SC.1377.

56. AIR.1979 SC.1819.

concurrent. And in the case of undertrials charged with multiple offences and detained for periods exceeding the maximum term of the sentences awarded to them were concurrent but not consecutive, he ordered their release on bail on executing a personal bond of Rs.50 without any surety and without verification of financial solvency. Bhagwati J. held that the continuance of their detention in prisons beyond the above set limits would be repugnant to human dignity and Art.21.[57]

Thus Hussainara has given rise to the emergence of the rights to speedy trial and bail as integral parts of the fundamental right to personal liberty in Art.21, with the immediate result that about 22,000 undertrials languishing in the Bihar jails were released.[58] This judicial crusade against the systemic injustice towards the undertrials has been pursued by the Court in subsequent cases[59] as well.

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57. Ibid.

58. See, Arun Shourie, 'undertrials: Once over Progress', The Indian Express, 12 November, 1979, p.6.

59. For instance, see in Mantoo Majumdar V. Bihar, AIR.1980 SC.846, Krishna Iyer J. ordered the release of the two undertrials who spent six years in jail without trial, on their own bond and without sureties. See also, for right to bail, Moti Ram V. M.P., AIR.1978 SC 1594; and Babu Singh V U.P., AIR.1978 SC.527. And in Kadra Pehadiya V. Bihar, AIR.1981 SC.939 the Court dealt with the case of four young boys languishing in jails as undertrials for over 10 years.

Right to Legal Aid and Appeal

In Hoskot V. Maharashtra,[60] arising out of an application for special leave for appeal under Art.136 of the Constitution, Krishna Iyer J., speaking for the Court, condemned the failure of the jail authorities to supply a copy of the judgement to Hoskot[61] to enable him to file an appeal. He held that natural justice was a component of the fair procedure contemplated in Art.21 and that at least a single right of appeal on facts was an essential requirement of that Article where a criminal conviction entailed loss of liberty. Synthesising the principles that spring from the rights in Arts.19 and 21 and the directive on legal aid in Art.39-A, His Lordship also held that a prisoner was entitled to free legal aid if he was unable to secure legal assistance.

Thus, in Hoskot the Court has enriched further the content of the 'fair and reasonable' procedure in Art.21, by reading into it the specific right to free legal aid and right to appeal.

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60. AIR.1978, SC.1548.

61. Hoskot was prosecuted for the offence of forgery and found guilty by the sessions court. But it imposed only a simple imprisonment on him till the rising of the Court. Later, this simple sentence was enhanced by the High Court to three years rigorous imprisonment. Hoskot wanted to appeal against this enhancement of punishment; but he could not do so because of the failure of the jail authorities to supply a copy of the judgement of the High Court till the expiry of the three years period of imprisonment.

In Hussainara[62] the Court further articulated and reinforced the right to legal assistance and appealed for a 'comprehensive legal service programme' in order to humanise the criminal justice system. The Court held:

> "we do not think it possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation-wide legal service programme to provide free legal services to them.... Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable, fair and just".[63]

Right to Liberal Access to Justice

As yet another offshoot of the post - Maneka activism, the Supreme Court has forged a new strategy, apart from that of legal aid, of liberalising the restrictive notion of locus standi and in the process has evolved a new

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62. AIR. 1979 SC.1369.

63. Ibid., at p.1373. See also Batra-I, AIR 1978 SC.1675, per Krishna Iyer J. at p.1724.

concept of litigation, called Public Interest Litigation (PIL).[64]

In the liberalisation of locus standi[65] the Court found a meaningful opportunity to bring before it many matters of public interest, involving either the infliction of 'public injury' or the negation of the basic rights and personal liberties of the people due to 'governmental lawlessness'.

The view expressed by Krishna Iyer J. in Ratlam Municipality's case[66] that "the centre of gravity of justice must be shifted from the traditional individualism of locus standi to the community orientation of public interest litigation" has received positive response from the Court in

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64. For the different aspects and dimensions of this judicial innovation, see, N.R.Madhava Menon, "Public Interest Litigation: A major Breakthrough in the Delivery of Social Justice", Journal of the Bar Council of India, Vol.9(1):1982, 150; S.K.Agrawala, Public Interest Litigation in India - A Critique, K.M.Munshi Memorial Lectures (second series), 1985; Sri.M.Hidayatullah, "Highways and Bye-Lanes of Justice", (Justice B.D.Bal First Memorial Lectures, 1983); Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India", 8 and 9 Delhi Law Preview, (1979 and 1980), 91. P.N.Bhagwati, "Law, Justice and the Under-priviledged", Mainstream, Vol.XXII, No.50 (1984) 10.

65. According to the orthodox view of locus standi, in order to move the court the petitioner must show some injury to himself and the violation of his rights.

66. Ratlam Municipality V. Vardhichand, AIR.1980 SC.1622.

Fertilizer Corporation's[67] Case and then has eventually emerged as an established constitutional principle in S.P.Gupta's Case.[68] In Gupta through an inductive process of analysis,[69] Bhagwati J. held that the Court would recognise the right to a liberal access to justice, by broadening locus standi, in cases where there was a violation of the constitutional or legal rights of a person or a determinate class of persons, who by reasons of some disability or of their socially or economically disadvantaged position were unable to approach the Court for judicial redress. And His Lordship conceptualised such cases as a new catagory of litigation, viz., the 'public interest' or 'social action' litigation, i.e. litigation initiated by means of writ petition or even letters by any public spirited individual or social activist group seeking judicial redress for the legal wrong or injury caused by 'repression, governmental lawlessness or administrative deviance' to any person or determinate class of persons who is by reason of some disability or socially or economically, disadvantaged position unable to approach the Court for relief.[70]

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67. Fertilizer Corporation Kamgar Union V. Union of India, AIR.1981 SC.344.

68. S.P.Gupta V. Union of India, AIR.1982 SC.149.

69. The Court referred to earlier cases where it recognized to a broadened locus standi.

70. Ibid., at p.188.

The judicial recognition of the right to liberal access to justice appears to have brought about a silent revolution in the remedial jurisprudence, especially from the standpoint of the poor, illiterate victims of custodial violence and governmental lawlessness. The fact that Batra[71] and Hussainara;[72] Veena Sethi[73] and Sheela Barse;[74] and Kadra Pehadiya[75] and Khatri[76] are all public interest litigations brought before the Court, as a tangible result of the broadened locus standi and liberal access to justice, speak volumes as to the legitimacy as well as the efficacy of this judicial innovation of liberal access to justice. And these and other related cases[77] have also shown the organic fusion of this liberal access to justice into the 'due process' dynamism of the Court under Art.21 of the Constitution.

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71. A.I.R. 1980 S.C.1579.

72. A.I.R. 1979 S.C.1360.

73. A.I.R. 1983 S.C.339.

74. A.I.R. 1983 S.C.378.

75. A.I.R. 1981 S.C.939.

76. A.I.R. 1981 S.C.1068.

77. For instance, Dr.U.Baxi V. State of U.P., (1981) 3 SCALE 1137; Bandhua Mukti Morcha V. Union of India, AIR.1984 SC.802; Sebastian M. Hongray V. Union of India, AIR.1984 SC 1026, M.C.Mehta V. Union of India, AIR.1987 SC.1086;

Right to Compensation

The Supreme Court in the activist discharge of its duty as the "sentinel on the que vive"[78] as far as the protection and enforcement of the fundamental rights is concerned has brought about a revolutionary breakthrough in recognising and incorporating yet another human right[79] into Art.21.

In Rudul Shah,[80] the petitioner was found to have been "illegally detained" in prison without any statutory justification for a period of fourteen years even after his acquittal of criminal charges at a sessions trial. Shocked by this "flagrant infringement" of the petitioner's fundamental right under Art.21 and by the seriousness of the loss suffered by him, i.e. fourteen precious years lost in jail, due to sheer governmental lawlessness, the Court awarded the petitioner Rs.35,000 as compensation not-with-

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78. Per Patanjali Sastri J. in State of Madras V. V.G.Row, AIR.1952 SC.196.

79. Article 9(5) of the Covenant on Civil and Political Rights entitles a victim of unconstitutional arrest or detention to claim compensation from the State.

80. Rudul Shah V. State of Bihar, AIR.1983 SC.1086. In Khatri V. Bihar, AIR.1983 SC.473, though no formal order for compensation was passed, Bhagwati J. ordered the State to meet the expenses of treatment and housing of those blinded prisoners and urged "to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal liberty". at p.930.

standing the fact that he had already been released after the filing of the writ petition.[81]

Rudul Shah has not only enriched the content of the right to personal liberty in Art.21; it has revolutionalised the remedial jurisprudence of Art.32 as well. For, in normal course the release of the petitioner from detention would render the continuance of the writ proceedings under Art.32 and the issuance of the writ of *habeas corpus* as infructuous. But in the circumstances of the present case the Court, transcending the procedural orthodoxies, awarded compensation in the writ proceedings under Art.32 itself. The Court appears to have appreciated that in the absence of a civil remedy founded directly on the violation of a constitutional right, the only remedy for the petitioner would be to institute a civil suit for damages in tort against the State, which, in turn, may involve all the usual procedural[82] and doctrinal[83] difficulties. Thus, Chandrachud C.J., speaking for the Court, held:

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81. *Ibid*.

82. The long delay, court fees and costs of a civil suit would have subjected to further hardship the petitioner who had already been deprived of 14 years of his life and liberty without due process of law.

83. Also the doctrine of sovereign immunity would have made the remedy of the petitioner uncertain.

"... in these circumstances, the refusal of the Court to pass an order of compensation in favour of the petitioner will be doing mere lip service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of the Court were limited to passing orders of release from illegal detention".[84]

Referring to another equally important consideration, His Lordship added: "One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation".[85]

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84. Supra, n.80, p.1089.

85. Ibid.

For the discussion of the different aspects of this right to compensation as evolved by the Court, see, N.R.Madhava Menon, "A case comment on Rudul Shah V. State of Bihar and another", 8 ALIG. L.J.1983, 198, Krishnan Venugopal, " A new Dimension to the Liablity of the State under Article 32", I.B.R., Vol.XI (4): 1984,369; Mohammad Ghouse, " Human rights and fundamental rights", I.B.R., Vol. XI (4): 1984,396, at pp.413-14; S.N.Jain, " Money Compensation for Administrative Wrongs through Article 32", 25 J.I.L.I. (1983), pp. 118-121.

In Sebastian Hongray V. Union of India,[86] the Court found that two persons, who had been taken into custody by the Indian army in the State of Manipur, had "disappeared" mysteriously. The Court issued a writ of habeas corpus, directing the Government of India to produce the two persons before it. On the ground that the Government had failed to respond to the writ of habeas corpus, the Court awarded Rs.1,00,000 each in the form of "exemplary costs" to the wives of the two persons who had disappeared.[87]

In Bhim Singh V. J. & K.,[88] the petitioner who was a Member of the Legislative Assembly of Jammu and Kashmir had been arrested by the police in a 'highhanded' manner with a 'mischievous and malicious intention'. Though remand was obtained, the arrested person was not produced before the Magistrate within twenty four hours. And the Magistrate

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86. A.I.R 1984 S.C. 1026.

87. In another case also the Court awarded compensation under Art 32 in the form of "exemplary costs", see Deoki Nandan Prasad V. Bihar, AIR.1983 SC.1134. In the same year in B.C.Oraon V. Bihar, decided on 12 Aug.1983, the Court awarded Rs.15000 as conpensation for an undertrial prisoner who was illegally detained for six years in a lunatic asylum.

88. AIR.1986 SC.494. Again in S.Pandey V. W.Bengal, AIR.1989 SC.1109, the Court reiterated that a victim of illegal detention and maltreatment by police is entitled to compensation. See also Mehta V. Union of India, AIR. 1989 SC.1089 and PUDR V. Police Commissioner, Delhi, (1989) 4 SCC 730.

and Sub-judge acted "in a very casual way" in remanding the arrested person into custody even without insisting on the production of the arrested person before them. In these circumstances, though the petitioner had already been freed on bail, the Court awarded compensation for wrongful confinement by way of "exemplary costs".

Thus the human right to monetary compensation for the illegal loss of life and personal liberty due to governmental lawlessness can be said to have emerged as a fundamental right under Art.21.

The post - Maneka judicial activism seems to have spilled over to Art.20 as well. For instance, in Nandini Satpathy[89] the Court, in its quest for humanising the criminal justice system, has breathed a new life and meaning into the privilege against self-incrimination which has been specifically guaranteed under Art.20(3) of the Constitution. And in Kuttan Pillai V. Ramakrishnan[90] the Court appears to

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89. Nandini Satpathy V. P.L.Dani, AIR.1978 SC.1025. The Court held: (i) the sweep of this protection goes back to the stage of police interrogation and is not confined to court proceedings; (ii) the bar of self - accusation and right to silence goes beyond the case in question; (iii) any substaintial pressure, physical or mental, direct or indirect, applied by police in obtaining information suggestive of guilt will become compelled testimony; (iv) compulsion may be presumed in case of custodial interrogation by police; and (v) the police must permit a lawyer to assist the accused if he wants.

90. AIR.1980 SC.185.

have attempted to recognise the human right against illegal search and seizure and to engraft it on the right against self-accusation in Art.20(3). While scrutinising the validity of a magisterial order of search and seizure, Desai J., speaking for the Court, emphasised the need to refine the law on self-incrimination to maintain the constitutional standards in respect of search and seizure. In the absence of a specific fundamental right against search and seizure scizure, His Lordship resorted to Art.20(3) and held that a warrant for search and seizure issued against any specific person or place was violative of that Article. Having taken note of the fact that the magistrates often issue search warrants "either automatically or after the most perfunctory inquiry", Desai J. warned against such mechanical issuance of laconic orders of search and seizure.

As in many other decisions discussed above here too the Court recognised a human right[91] as a fundamental right despite its textual absence in the Constitution. But what is still more significant about this decision is that in this case the Court recognised a right as a fundamental right in spite of the deliberate and specific refusal of the Constitutent Assembly to confer that right as a fundamental

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91. Arts.14(1)(g) and 17 of the Covenant on Civil and Political Rights, 1966, seem to be relevant in this context.

right,[92] making it clear, though implicitly, that in intention of the Constituent Assembly' is no longer a holy cow.

Further, in its crusade against unreasonable deprivation of personal liberty .the Court has extended its due process activism beyond the domain of criminal justice. In Jolly Varghese V. Bank of Cochin,[93] Krishna Iyer J; speaking for the Court, held that the detention or imprisonment of a judgement-debtor for non-payment of debt, as authorised by Civil Procedure Code,[94] 'was too flagrantly violative of Article 21' unless there was proof of his 'willful failure to pay in spite of his sufficient means'.[95]

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92. The draft prepared by the Sub-Committee on Fundamental Rights contained a provsion against unlawful search and seizure, following the American model. But the Advisory Commitee deleted it from the draft Constitution. When the draft Article 14 (now 20) was taken up for debate in the Constituent Assembly, Kazi Syed Karimuddin moved an amendment, proposing to include provision against unlawful search and seizure. Even Dr. Ambedkar felt that such a provision must find a place in our Constitution. C.A.Deb., Vol.VII, 796 . The amendment was put to vote and the Vice-President of the Constitutent Assembly declared that "the Ayes have it". But at Nehru's instance, the Vice-President postponed voting on the amendment, overruling Keskar's objection. Ibid., at 797 . Three days later, sensing the moqd of the members, the Congress Party issued a whip to oppose the amendment ibid., at 841 . Thus it was rejected, though no one spoke against it.

93. AIR.1980 SC.470.

94. See Sec.51(b) and Order 21, Rule 37 of C.P.C., 1908.

95. Supra, n.93, at p.475.

And according to His Lordship, the 'unreasonableness and unfairness in such a procedure was inferable from Art.11 of the Covenant'[96] on Civil and Political Rights which declares that "no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation".

It is amazing to note that, in spite of the doctrinal constraint of 'dualism,'[97] the Court scrutinised the validity of a statutory provision on the touchstone of a human right declared in the Covenant and also read down that provision so as to make it consistent with that human right. Thus, the human right[98] of the poor and indigent judgement debtors not to be imprisoned for their genuine inability to repay has been recognised as a fundamental right under Art.21. For, a legal process which treats poverty as a ground for deprivation of personal liberty can not be treated as a just and reasonable process of law or due process of law under Art.21.

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96. Ibid.

97. According to the doctrine of 'dualism', to which India subscribes, a treaty or covenant can become a part of the law of the land only after its incorporation into that by the legislative process. Though the Covenanton Civil and Political Rights was ratified by India, it was not legislatively incorporated into the corpus juris of India.

98. See, Art.9(5) of the Covenant on Civil and Political Rights, 1966.

The above brief survey of the post - Maneka decisions of the Supreme Court indicates the emergence of a unique trend and pattern of judicial process in the field of personal liberty. The decisions gave birth to a new kind of constitutionalism where conscious policy - making and reform are acknowledged to be legitimate and inevitable aspects of judicial process in constitutional adjudication.[99] The kind of issues dealt with by the Court in those cases and the extent of protection it accorded to individual liberty clearly demonstrate an activist use of constitutional adjudication as an instrument if reform and policy - making. And the humanitarian impulse evident in those decisions, particularly in regard to reforms in prison and criminal justice system manifest an intense concern of the Court for personal liberty against governmental intrusions and lawlessness. The decision covered by the above survey are unmistakably characterised by a dazzling spell of due process dynamism imported by Maneka. And the nature of legal and institutional reforms as well as the kind of rights and privileges embodied in those decisions of the post-Maneka court can appropriately be explained and justified only in terms the 'due process' framework.

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99. For an analysis of policy - making mode of constitutional adjudication, See U.Baxi, "On How not to Judge the Judges: Notes Towards Evaluation of the Judicial Role", 25 J.I.L.I. (1983) 211; B.S.Murthy, "Prescription of Social Policy in Exercise of Judicial Power: Opportunities and Constraints", 25 J.I.L.I. (1983) 173.

It is evident from the above resume of cases that the Supreme Court could secure to the people of India certain fundamental privileges and rights which even the Framers of the Constitution and Parliaments failed or refused to secure. The right to human dignity,[100] the privilege against illegal search and seizure,[101] the right against cruel and inhuman and degrading punishments,[102] the immunity from torture,[103] the right to speedy trial[104] and bail,[105] the right to legal[106] aid and appeal,[107] the right to liberal access to justice,[108] the right to compensation[109] and immunity of an honest indigent debtor from imprisonment[110] are not explicitly guaranteed in the

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100. Francis Coralie Mullin V. Delhi, AIR.1981 SC.746; Bandhua Mukti Morcha V. India, AIR.1984 SC.802.

101. Kuttan Pillai V. Ramakrishnan, AIR.1980 SC.185.

102. Batra-I, AIR.1978 SC.1675; Charles Sobraj V. Supdt., Central Jail, Tihar, AIR.1978 SC 1514; Prem Shankar Shukla V Delhi, AIR.1980 SC.1535 etc. see, supra n.31.

103. Batra-II, AIR. 1980 SC 1579, Khatri V. Bihar, AIR.1981 SC.928 etc.

104. Hussainara, supra, ns.43, and 59.

105. Ibid., Babu Singh, Moti Ram etc., supra, n.59.

106. Hussainara, supra, n.43; Hoskot, supra, n.60.

107. Hoskot, ibid.

108. Supra, ns.71 to 76.

109. Supra, ns.80, 86 and 88.

110. Jolly Vargheese, supra, n.93.

Constitution, but are the products of judicial creativity in constitutional adjudication. Those rights and privileges are recognised and incorporated by the Court into Art.21 obviously on the premise that to deny any of those rights and privileges by any legal process in the course of deprivation of personal liberty would be to deny the protection of a just and reasonable or due process of law for personal liberty as mandated by that Article.[111]

It may be noted here, incidentally, that this phase of due process dynamism and creativity of the post - Maneka Court strikes an interesting parallel to the judicial

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111. The Court, during this spell of dynamism further enriched the content of Art.21 by creatively interpreting the right to "life" in that Article. Thus, in Olga Tellis V. Bombay Municipal Corporation, (1985)3 S.C.C.545 the Court held that arbitrary eviction of the pavement and slum dwellers would result in deprivation of their means of livelihood in violation of Art.21, for, the right to life in Art.21 included the right to means of livelihood. In M.C.Mehta V. Union of India, AIR 1987 SC 965 the Court upheld the right to quality of life, which must mean protection against pollution as being part of the right to life in Art.21. See also R.L. & E. Kendra, Dehradun V. U.P., AIR 1985 SC 652. The Court also considered the claims of adivasis to the use of forest as their habitat and means of livelihood in Banwasi Seva Ashram V. U.P., (1986)4 S.C.C. 735. Similarly right to shelter is recognised as a fundamental right, under Art.21 in Prabhakaran Nair V. State of Tamilnadu, AIR 1987 SC.2117. Recently in one case the Kerala High Court has directed a Panchayat in the State not to dig the proposed huge well, adjoining to the petitioner's land, for providing water-supply to a village on the ground that the proposed project would deprive the petitioner of his right under Art.21, for, the right to life in that Article includes the right to portable water which is essential to sustain life. Reported in 'The Hindu', Dt.4th April, 1992, p.3.

activism and creativity of the Warren Court[112] in the United States, that too in the same field of reforms in criminal justice system and of strengthening of protection of personal liberty.[113] And each of those rights and privileges which the Indian Supreme Court has incorporated into Art.21 as the requirements of the "just, fair and reasonable procedure" has been incorporated into the Fourteenth Amendment to the U.S.[114] Constitution by the American Supreme Court as the requirements of "due process of law" in that Amendment. For instance, in 1961 in Mapp V. Ohio,[115] the U.S. Supreme Court, under Chief Justice Warren, incorporated the Fourth Amendment right against illegal search and seizure into the 'due process' clause of the Fourteenth Amendment. A year later in Robinson V. Cal.,[116]

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112. As Archibold Cox wrote, the appointment of Earl Warren as Chief Justice of the United States in 1953 marked the openning of a new period in the Constitutional development of the U.S. during which many constitutional doctrines were rewritten with profound social and political consequences. See Cox, The Warren Court, op.cit., p.v.

113. See, Archibald Cox, The Warren Court - Constitutional Decision as an Instrument of Reform, (1968). Archibald Cox, The Role of the Supreme Court in American Government, (1977); also see, Leonard W.Levy, Constitutional Opinions - Aspects of the Bill of Rights, (1989).

114. The Fourteenth Amendment of 1868, provides that no state shall deny to any person life, liberty, or property without due process of law nor deny to any person the equal protection of the laws.

115. 367 U.S.643. (1961).

116. 370 U.S. 660 (1962).

the Court incorporated the Eighth Amendment's ban against cruel and unusual punishments into the due process framework. Then in Gideon V. Wainwright,[117] the right to legal assistance came to be included in the list of due process rights. In 1965 the Court held the right to speedy trial[118] as a requirement of the due process clause in the Fourteenth Amendment. Similarly the privileges against double jeopardy[119] and self-incrimination[120] were read into the 'due process' clause. Thus the Warren Court's criminal law revolution'[121] was accomplished by a 'selective incorporation'[122] of all those rights that were considered to be 'fundamental' and essential to ensure the protection of due process of law for the liberty of the individual. As the Court said in Roehin V. Cal.,[123] in the context of administration of criminal justice, due process of law meant a respect for the "decencies of civilized conduct" and an avoidance of "conduct that shocks the conscience" or offends the "sense of justice" or "fair play".[124]

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117. 372 U.S. 335, (1963).

118. Pointer V. Tex., 380 U.S. 400 (1965); Klopfer V. N.Car., 368 U.S. 213 (1967).

119. Duncan V. La., 391 U.S. 145 (1969).

120. Malloy V. Hogan, 378 U.S. 1(1964).

121. Leonard W. Levy, op.cit., p.227.

122. See, COX, supra, n.113, and L.W. Levy, ibid.

123. 342 U.S. 165 (1952).

124. Ibid., at pp.172-73.

Therefore it can be reasonably said that the Indian Supreme Court also has incorporated certain unenumerated privileges and rights into Art.21 because those rights were thought to be fundamental and essential to 'ensure a respect for the "decencies of civilized conduct" and an avoidance of "conduct that shocks the conscience" or offends the "sense of justice" or of "fair play" in the legal process that may be prescribed by the State for the deprivation of personal liberty. And the only rational explanation for the creation and incorporation of the new rights and privileges into Art.21 can be the Court's assumption as to the existence and availability of a 'due process' clause in Art.21.[125]

Another interesting facet of the post - Maneka due process dynamism of the Supreme Court has been a sort of nationalisation of the international human rights through Art.21. While delineating the content of 'due process' in Art.21, the Court has appealed to the human rights, which the collective conscience of the mankind has established as the "common standard"[126] to be achieved by every civilized

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125. In Batra, Krishna Iyer,J. held Art.21 as containing a 'due process' clause. To him both 'procedure' and 'law' in Art.21 must be reasonable. See, Maneka, Batra and Hoskot. Desai.J. also held that 'law' in Art.21 must be a reasonable law, in Batra. A 'due process of law' only implies a reasonable law and reasonable procedure.

126. See the Preamble to the Universal Declaration of Human Rights, 1948.

State, and appears to have adopted them as its 'authoritative precepts'. Through a case by case process the Court appears to have made, in effect, a "selective incorporation" of the human rights into Art.21 on the reasoning that the denial of those rights would be denial of due process of law as required by that Article. In fact the whole family of rights read into Art.21 by the Court are referable to one or other human rights[127] declared in the International Human Rights Documents,[128] creating a fascinating impression that Art.21 guarantees as part of 'personal liberty' the right to human rights.

So far so good - good for the common man and the country, good for 'personal liberty' and the 'human rights'; and good for judicial process and 'due process'. But the crucial question that remains is that whether this due process dynamism is destined to be an enduring principle of constitutional adjudication in the field of personal liberty or it is doomed only to be a passing episode, enacted by a small group of activist judges, in the history of the liberty jurisprudence under the Constitution. It is submitted that a prognostic perspective of the second line

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127. See supra. ns.100 to 110.

128. For instance, the Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political Rights, 1966.

of decisions[129] of the post - Maneka Court, handed down by a different group of judges for whom legal analysis and deductive logic are the only acceptable means of constitutional adjudication, clearly indicates that there can be no cause for complacency either as to the continuance of due process dynamism or as to the continued availability of a 'due process' clause in Art.21.

The Dwindling of 'Due Process':

Of course it is true that certainty in law and consistency in constitutional adjudication cannot be aspired to be the guaranteed virtues. As long as the generalities of the constitutional provisions permit legitimate and genuine differences of opinion among the interpreters; and as long as the Constitution itself does not dictate the meaning of its words or the particular mode of interpretation to be adopted, different generations may read different meanings into the static words of the written constitution; and the different groups of judges may become instrumental in that ongoing organic process of

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129. For instance, See Bachan Singh V. State of Punjab, AIR.1980 SC.898; A.K.Roy V. Union of India, AIR.1982 SC.710; the observation of the Court in Deena V. Union of India, AIR.1983 SC.1155; and in Mithu V. State of Punjab, AIR.1983 SC.473; Usman Bhai V. State of Gujrat, AIR.1988 SC.922; Kehar Singh V. Delhi Administration, AIR.1988 SC 1983 etc.

constitutional development and progress.[130] But the post - Maneka judicial inconsistency towards the due process dimension of Art.21 cannot be explained solely in terms of the above general proposition. Here, in the instant case, the inconsistency is concurrent and contemporaneous. The inconsistency is not between generations, not between different courts under different Chief Justices; and often not between even different judges. It is respectfully submitted that such an inconsistency, especially on such vital constitutional principles, can only serve to damage the institutional character of the Supreme Court as a national institution, as well as the very legitimacy of the power which it wields.[131]

Perhaps, this judicial shift and inconsistency can partly be explained in terms of the institutional problems and structural difficulties in the Supreme Court.[132] Also it may partly be due to the different role perceptions and judicial philosophies of the individual judges in the Court.[133] But the major significant factor that has

130. See, Edward H. Levi, An Introduction to Legal Reasoning, (1949), Reprint, 1972, p.57 et.seq.

131. See ibid., at p.60.

132. For an eminent discussion of this aspect, See, Upendra Baxi, "On the Shame of Not Being an Activist: Thoughts on Judicial Activism", I.B.R., 11(3): 1984, 259; and Prof.Mohammad Ghouse, "Human Rights and Fundamental Rights", I.B.R., 11(4), 1984, 396, at pp.414-15.

133. See, ibid.

contributed towards the dwindling of due process at the hands of the analytical judges appears to be the inherent theoretical weakness of the Maneka doctrine of 'due process' that has been founded on the 'alternate strategy' and the subsequent failure of the activist judges to further articulate and strengthen that doctrine.

It may be recalled that the earlier analysis[134] of the Maneka version of 'due process' and the 'alternate strategy' upon which it has been founded has shown how shaky and unstable is the theoretical foundation of the 'due 'process' doctrine as laid down in Maneka. And in view of the theoretical inadequacy of that doctrine it has also been indicated in the previous chapter that this doctrine is bound to find itself in rough waters at the hands of the legalist judges. For, the way the Court reasons or reaches its result is as important as the result itself; in the long run, perhaps, the Court's reasoning is even more important because a decision based on an unsound rationale is likely to be dislodged with comparative ease by its critics. But unfortunately this aspect of Maneka has completely been ignored by the activist judges who were responsible for and party to the first line of decisions[135] of the post Maneka

134. supra., Ch.VI.

135. The decisions that are covered by the survey and are marked by the spirit of due process and creativity.

Court. It may be noted that in none of those decisions which have been referred to in the above survey, the Court has addressed itself to the theoretical soundness or adequacy of the 'due process' doctrine as laid down in Maneka. Instead, the Court appears to have proceeded on the assumption that Maneka has already accomplished an unqualified induction of 'due process' into Art.21. The activist judges, imbibing the spirit of 'due process' which Maneka has undoubtedly imparted, have gone on to enrich the contents of the 'due process' by a vigorous case by case process of creation and incorporation of new rights and privileges into Art.21, without pausing for a moment to examine the strength and stability of the 'framework' to contain the contents which they have been pouring into it. They have built a marvellous superstructure of 'due process' on the shaky foundation as laid down by Maneka. They have failed to cement and strengthen the foundation of 'due process' any further that as it stood in Maneka and thereby left the 'due process' dynamism as well as the 'due process' framework in Art.21 exposed to the danger of being dwindled by the analytical onslanght of the critcs of 'due process' within the Court.

The Analytical Onslaughts On Maneka And The Absence of A 'Due Process' Clause in Article 21

The first such onslaught on 'due process' came with the decision of the Court in Bachan Singh V. State of Punjab.[136] In this case the petitioner challenged the constitutional validity of Sec.302, Indian Penal Code, which provided for death penalty and Sec.354(3), of the Criminal Procedure Code, which provided that the court, while awarding death penalty, should record in writing the special reasons for doing so. The challenge was made on the ground that those provisions were violative of Arts.14, 19 and 21 of the Constitution and were inconsistent with the human rights declared in the Covenant on Civil and Political Rights, which India had ratified in 1976. The Court by a 4:1 majority[137] upheld the validity of those provisions. A discussion as to the correctness or otherwise of the decision of the Court on death penalty falls outside the scope of this study. But what makes Bachan Singh relevant to the present context is the kind of constitutionalism which it represents, reverberating with analytical positivism and judicial restraint; its analytical scrutiny

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136. A.I.R. 1980 S.C. 898.

137. Sarkaria J. delivered the majority judgement for himself and on behalf of Chandrachud C.J., and A.C. Gupta and N.L.Untwalia JJ; and Bhagwati J. dissented.

of the 'alternate strategy' adopted in Maneka; and the red alert it gives as to the impending danger to the infant doctrine of due process in Art.21 of the Constitution.

Considering the issue whether the impugned provisions, authorising the deprivation of life under Art.21, should stand the the test of Art.19, the Court set out its role perception and judicial philosophy in exercising the power of judicial review. Extolling the virtues of 'presumption of constitutionality' and 'judicial restraint', the Court said:

> "Behind the view that there is a presumption of constitutionality of a statute and the onus to rebut the same lies on those who challenge the legislation, is the rationale of judicial restraint, a recognition of the limits of judicial review, a respect for the boundaries of legislative and judicial functions, and the judicial responsibility to guard the trespass from one side or the other. The primary function of the court is to interpret and apply the laws according to the will of those who made them and not to transgress into the legislative domain of policy-making".[138]

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138. Ibid., at p.916.

Having thus pushed the jurisprudence of the Court to the position where it stood three decades back[139] and held that activism and policy-making are anathema to judicial process, the Court proceeded to determine the question whether Art.19 would be applicable to test the validity of the impugned law within Art.21. The Court, having quoted approvingly the various exclusionary theories laid down by the majority judges in Gopalan,[140] maintained that all those theories "have not been overruled or rendered bad" by the Court in Cooper[141] or in Maneka.[142] According to Sarkaria J. the ruling of the Court in Saha's Case[143] that 'a law which attracts Art.19 must be such as is capable of being tested to be reasonable under clauses (2) to (5) of Art.19' has lent approval to the rule of construction adopted by the majority judges in Gopalan 'whereby they excluded from the purview of Art.19 certain provisions of the Indian Penal Code providing punishment for certain offences which could not be tested on the specific grounds embodied in Cls.(2) to (5) of that Article'.[144]

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139. Gopalan's Case decided by the Court in 1950 projected the same positivist mode of constitutionalism.

140. AIR. 1950 SC.27. For the detailed enumeration of those theories, See III, Supra.

141. AIR. 1970 SC. 1318.

142. AIR. 1978 SC 597.

143. AIR. 1974 SC 2154.

144. Bachan Singh, p.911.

Then the Court considered the criterion of 'directness of legislation' as formulated by Kania C.J. in Gopalan and the test of 'direct and inevitable effect' as laid down in Cooper and Maneka. Having reviewed the previous decisions on this point, the Court observed that 'the criterion of directness, which was the essence of the test of direct and indirect effect, had never been abandoned'.[145] Then, the Court said: "... if the impact of the (impugned) law on any of the rights in clause (1) of Article 19 is merely incidental, indirect, remote or collateral and is dependent upon factors which may or may not come into play, the anvil of Article 19 will not be available for judging its validity".[146] Applying this test to the impugned provisions, the Court held:

> "it cannot, reasonably or rationally, be contended that any of the rights mentioned in Article 19(1) of the Constitution confers the freedom to commit murder or, for the matter of that, the freedom to commit any offence whatsoever. Therefore, penal laws, that is to say, laws which define offences and prescribe punishment for the commission of offences do not attract the application of Art.19(1)".[147]

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145. Ibid., at p. 914.

146. Ibid., at p. 1915.

147. Ibid.

Then, conceding the authority of the 'direct and inevitable impact' test laid down in Cooper, the Court pointed out that 'even if a law did not, in its pith and substance, deal with any of the fundamental rights conferred by Article 19(1), if the direct and inevitable effect of the law was such as to abridge or abrogate any of those rights, Art.19 should have been attracted.'[148] Even by applying this test to the impugned law, the Court held:

> "... we are of the opinion that the deprivation of freedom consequent upon an order of conviction and sentence is not a direct and inevitable consequence of the penal law but is merely incidental to the order of conviction and sentence which may or may not be passed. Considering therefore the test formulated by us in its dual aspect, we are of the opinion that Section 302 of the Penal Code does not have to stand the test of Article 19(1) of the Constitution".[149]

Thus, through a rigourous analytical method the Court appears to have resurrected the exclusionary theories of Gopalan and established that the applicability of Art.19 and the criterion of reasonableness therein to test the

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148. Ibid.

149. Ibid.

validity of a law in Art.21 can not be taken for granted. And in that process, it is submitted, the Court has removed one of the cornerstones of the 'alternate strategy'[150] on which the Maneka version of due process has been founded.

Similarly, the Court does not appear to have treated Art.14 as an unfailing supplier of 'due process' to Art.21, as it was claimed in Maneka. Considering the challenge of Art.14 to the impugned provisions, the Court held the view that Art.14 interdicts only the arbitrariness arising out of discrimination and not otherwise.[151] Thus the Court has jettisoned the other limb of the 'alternate strategy' as well.

It may be recalled that in Maneka the Court gathered the requirements of 'just, fair and reasonable procedure' as a protection for life and liberty not from the words of Art.21, but from the provisions of Arts. 14 and 19 on the assumption that the applicability of Arts.14 and 19 would always be automatic and concurrent to test the validity of any law within the meaning of Art.21. The Court, in Bachan Singh, has certainly exposed the vanity of

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150. For a detailed discussion of this strategy of gathering the elements of due process from Arts.14 and 19, see Ch.V, supra.

151. Bachan Singh, ibid., at p.935.

that assumption and the vulnerability of the 'alternate strategy' as an adequate foundation for the due process doctrine in Art.21.

Having thus stripped Art.21 of its 'due process' garb which it borrowed from Arts.14 and 19, the Court proceeded to consider the vires of the impugned provisions with reference Art.21, which stood naked, bereft of any standard of reasonableness. Though the Court referred[152] to Maneka, it upheld the validity of the challenged provisions as not violative of Art.21 on the ground that the catena of provisions in the Criminal procedure Code along with the impugned ones, and the requirement in the Code as to the pre-sentencing hearing to be be given to the accused, laid down a fair procedure for the award of death sentence.[153] The Court further reasoned that the death penalty as well as execution by hanging were well within the contemplation of the Constitution makers and thereafter were retained by Parliament[154] and so the "judges should not take upon themselves the responsibility of oracles or spokesmen of public opinion".[155] Then, dooming the 'due process' in

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152. Ibid., at p.930.

153. Ibid., at pp.930, 932 et seq.

154. Ibid., at p.930.

155. Ibid., at p.927.

Art.21, the Court declared: "We do not have in our Constitution any provision like the Eighth Amendment (to the U.S. Constitution), nor are we at liberty to apply the test of reasonableness with the freedom with which the judges of the Supreme Court of America are accustomed to apply "the due process" clause.[156]

Even on the challenge to the provisions with reference to the human rights declared in the Covenant on Civil and Political Rights, the Court found that the provisions contained in Arts.20 and 21 substantially complied with the requirements of those human rights and declared that India's commitment to the human rights "does not go beyond what is provided in the Constitution and the Indian Penal Code and the Criminal Procedure Code".[157] Thus, even after the shocking disclosures made by Batras and Hussainaras, of the inhuman aspects of our criminal justice system and of the inadequacies of our penal laws to humanise the system, Sarkaria J. could certify in Bachan Singh that "India's penal laws, including the impugned provisions and their application, are thus entirely in accord with its international commitment"[158] to the human rights.

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156. Ibid., at p.935.

157. Ibid., at p.931.

158. Ibid.

Thus the Court in Bachan Singh has retreated from the realities of judicial process in constitutional adjudication to the myth of mechanical jurisprudence.[159] It would not 'make' law; it would only 'interpret' and 'apply' the law without even the slightest deviation from the "will of those who made them". Policy-making and reform would be unjudicial. It would be blind and insensitive to the competing social, political and economic values[160] and pressures in order to preserve its chastity of 'judicial independence' and the Kelsonian purity of law which it serves. And the measure of its commitment to the human rights would be the limits drawn by the letter of the national positive laws.

And the suggestion made in the previous chapter that the Maneka doctrine of due process, founded on the 'alternate strategy', would have a natural death in a hostile analytical atmosphere appears to have been vindicated by Bachan Singh. The Court found that the anvil of Art.19 was not applicable to the law in question; and

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159. For a criticism of this mechanical jurisprudence and positivism see, Ch.IV, supra. See also. Justice D.A. Desai "Justice According to Law is Myth", I.B.R., 11(3): (1984), 237; U.Baxi, "On the Shame of Not Being an Activist: Thoughts on Judicial Activism", I.B.R., 11(3): 1984, 259; U.Baxi, Th Indian Supreme Court and Politics (1980).

160. Bahcan Singh, ibid., at p. 917.

that Art.14 did not "project the concept of reasonableness into Art.21".[161] As a result the Court found no test of reasonableness in Art.21 which it could apply, for, there is no 'due process' clause in the Constitution.

In Batra-I,[162] Krishna Iyer J., explaining the effects of the decisional developments from Gopalan to Maneka, said: "The martyrdom of Gopalan and resurrection by Cooper... paved the way for Maneka... where the potent invocation of the rest of Part III, even after one of the rights was validly put out of action, was affirmed in indubitable breadth".[163] It is submitted that there would be no wonder if some one may venture to add, prognostically, that Bachan Singh appears to have paved the way for the martyrdom of Maneka and resurrection of Gopalan.

A.K. Roy V. Union of India[164] is yet another major post - Maneka onslaught on the due process doctrine in the

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161. Maneka, op.cit., p.624. It may be noted that even in subsequent decisions in the context of Art.21, though Art.14 was applied to test the validity of the law under Art.21, Art.14 was not treated as emobodying the concept of reasonableness per se. It was treated as embodying the principle of equality and distributive justice. For eg. See, Mithu V. State of Punjab, AIR. 1983 SC 473, at pp.478-79; Deena V. Union of India, AIR.1983 SC 1155, at p.1166.

162. AIR. 1978 SC 1675.

163. Ibid., at p.1691.

164. AIR. 1982 SC. 710.

context of the deprivation of personal liberty. It indicates further depletion of judicial activism and strengthens the above view as to the resurrection of Gopalan. A.K.Roy once again brings forth the gross inadequacy of the 'alternate strategy' for the purpose of securing the protection of 'due process' to personal liberty in Art.21. It is disappointing to note that in spite of all the rhetorics of due process in Maneka and thereafter, the Court in A.K.Roy drew exactly the same conclusions which were drawn by the majority judges in Gopalan.[165]

In A.K.Roy, the petitioner and others challenged, under Art.32 of the Constitution, the validity of the National Security Ordinance, 1980 and certain provisions of the National Security Act (hereinafter called N.S.A.), 1980, which replaced the Ordinance. The multi-progned arguments of the petitioners gave rise to the following important issues, as classified by the Court:[166]

1. The scope, limit and justiciability of the ordinance - making power;

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165. This aspect has been highlighted by Prof. Tripathi in one of his articles. See, Prof.P.K.Tripathi, "The Fiasco of Overruling A.K. Gopalan", 1990 AIR Jour.1, pp.2-3.

166. A.K.Roy, ibid., at p.725.

2. The effect of the non-implementation of the 44th Amendment in so far as it bears upon the constitution of the Advisory Boards;

3. The validity of preventive detention in the light of the severe deprivation of personal liberty which it necessarily entails;

4. The vagueness of the provisions of the N.S.A., authorising the detention of persons for the reasons mentioned in Sec.3 of the Act;

5. The unfairness and unreasonableness of the procedure before the Advisory Boards; and

6. The unreasonableness and harshness of the conditions of detention.

The very apparently inconvenient nature of the above issues appears to have made the Court to retreat from the rhetorics of 'due process' to legalism and restraint. Thus Chandrachud C.J., speaking for the Court, has adopted the model of judicial review set out by Lord Selborne in 1878 in Queen V. Burah[167] in these words:

"The established Courts of Justice, when a question arises whether the prescribed limits have been

167. (1878)5 Ind. App. 178, 193-94.

exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers are created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited... it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions".[168]

His Lordisp also made it clear that in the field of constitutional adjudication the Court will decide 'no more than needs to be decided in any particular case'.[169]

On the first issue, as noted above, the Court, referring extensively to the history of constitutional developments and to the intention of the Constitution - makers, held that ordinance was 'law' within the meaning of Art.21.[170] The Court rejected the contention that an

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168. A.K.Roy, ibid., at p.726.

169. Ibid., at p.742.

170. Ibid., at p.723.

unbridled ordinance - making power of the executive would reduce Arts.14, 19 and 21 to dead letter on the ground that 'the Constitution did not impose by its terms any inhibition on the ordinance - making power'[171] and said: "...we are unable to appreciate how an ordinance which is subject to the same constraints as a law made by the legislature can, in its practical operation, result in the obliteration of these articles".[172] It is submitted that the correctness of the above statement made by the Court would depend on the kind of meaning which it would given to the word 'law' in Art.21. If 'law' means only any law made by the State, then it would operate as a protection only against the executive. And in that case it would be fallacious to assume that an unbridled power of the executive to make law in the form of ordinance would not 'obliterate' the rights to life and liberty secured by Art.21. But on the other hand, if 'law' means a reasonable law, then it would operate as a protection not only against the executive but also against the legislature. And in that case whether the 'law' is made by the legislature or by the executive, in the form of ordinance, the rights under Art.21 would not be obliterated, for, the requirements of reasonableness would serve as a protection for those rights.

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171. Ibid., at p.725.

172. Ibid., at p.725.

But unfortunately the Court appears to have failed to appreciate this aspect of the issue.

Similarly, on the second issue relating to the non-implementation of Sec.3 of the 44th Amendment regarding the constitution of the Advisory Boards, contemplated in Art.22, the Court refused to compel the Government to bring that Amendment into force, by issuing a mandamus.[173]

Then, on issues (3) to (6) also the response of the Court has been positivist, echoing at every step the jurisprudence of Gopalan. Considering the nature and legality of preventive detention vis-a-vis the right to personal liberty, the Court, after referring to the intention of the Constituent Assembly and to the provisions in the Constitution, held thus:

> "It is evident that the power of preventive detention was conferred by the Constitution in order to ensure that the security and safety of the country and the welfare of its people are not put in peril. So long as a law of preventive detention operates within the general scope of the affirmative words used in the respective entries of the Union and Concurrent Lists which give that

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173. Ibid., at pp.732-33.

power and so long as it does not violate any condition or restriction placed upon that power by the Constitution, the Court cannot invalidate that law on the specious ground that it is calculated to interfere with the liberties of the people".[174]

Then, the Court has denied to itself even the power to judge the fairness and reasonableness of the law of preventive detention which seriously infringes upon personal liberty for want of a 'due process' clause in Art.21.[175] Ironically enough, Chandrachud C.J., speaking for himself and on behalf of Bhagwati and Desai JJ., held:

"The power to judge the fairness and justness of procedure established by a law for the purpose of Art.21 is one thing: that power can be spelt out from the language of that article.... The power to decide upon the justness of the law itself is quite another thing: that power springs from a 'due process' provision such as is to be found in the 5th and 14th Amendments of the American Constitution..."[176]

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174. Ibid., at p.726.

175. Ibid.

176. Ibid.

Then, as usual, following the methodology of Gopalan, the Court resorted to the Constitutent Assembly Debates only to come to the conclusion that though the members urged for a 'due process' clause, the Constituent Assembly deliberately excluded it from Art.21; and therefore, to read a 'due process' clause into that Article by the Court would be to do violence to the intention of the makers of the Constitution.[177]

Further, His Lordship appears to have found an added reason for such an unqualified and absolute adherence to the intention of the Constituent Assembly by saying that the members of the Constituent Assembly, in the process of making the Constitution, "were neither bound by a popular mandate nor bridled by a party whip".[178] It is astonishing to note that the learned Chief Justice has made such a claim; it is astonishing because the claim is historically untrue. The truth is that on many crucial occasions in the process of making the Constitution, the members of the Constituent Assembly had been coerced to vote in a particular way by party whip. The death of the 'due process' clause in the Constituent Assembly itself is an infamous example of such an interference with the free will and intention of the members by party whip. As it has been

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177. Ibid., at pp.726-27.

178. Ibid., at p.719.

shown in Chapter II,[179] after sensing the mood of the substantial majority of the members of the Constituent Assembly, the Congress party had issued a whip to its members in the Assembly to vote out the amendment, moved by Pandit Thakur Das Bhargava, to draft Art.15, which corresponds to the present Art.21 of the Constitution, for substituting the words "without the due process of law" for the words "except according to the procedure established by law" and accordingly that amendment was voted out along with the 'due process' clause which it contained.[180] But unfortunately, from Gopalan onwards the Supreme Court has been focussing its attention only on the 'voting' and the 'Ayes' on the Constitutent Assembly, ignoring the coercive and stifling impact of the party whip on the free will and intention of the members in favour of the retention of the 'due process' clause. Similarly, the Assembly members obeyed the whip in voting out another amendment proposing the inclusion of the right against illegal search and seizure, quite against their free will and intention.[181] Thus, on many such occasions, especially where the Constituent Assembly was engaged in the process of balancing the liberty of the individual against the authority of the

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179. See Ch.II, supra.

180. C.A. Deb., Vol.VII, p.1000-1; see, Granville Austin, op.cit., p.109.

181. See C.A. Deb., Vol.VII, pp.796-841.

State, the course of the proceedings in the Assembly had been decisively influenced by the government of the day which happened to be, due to the historical accident, an integral and influential part of the Constituent Assembly.[182] As a result, in the conflict between liberty and authority, liberty had always been at the receiving end and the intention of the Constitutent Assembly on such matters had undoubtedly been tainted with the intention of the government of the day. It is not a mere surmise. Apart from the concrete illustrations of the 'due process' clause and the right against illegal search and seizure, many members had expressed their anguish in the Constituent Assembly as to the "extraneous influences from other authorities" on the Assembly.[183] But unfortunately the Supreme Court appears to have failed consistently in giving due allowance to those historical distortions in ascertaining the true intention of the Constituent Assembly on the various provisions dealing with the liberty of the individual. Instead, the Court appears to have added further distortions by making such unhistorical assertions that the members of the Constituent Assembly were not at all bridled by any political pressures or party whips.[184]

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182. See, C.A.Deb., Vol.IX, 1506; also Granville Austin, op.cit., p.110.

183. Ibid.

184. See, A.K.Roy, ibid., at p.719.

Further, it is respectfully submitted that it appears to have been the frequent practice of the Judges of the Supreme Court to appeal to the history of constitution making and to the 'intention' of constitution - makers as a cover for the policy choices they make without owning the responsibility for the choice, especially in cases where they prefer to adopt a 'hands-off' policy and such policy is not likely to be popular or is not compatible with their own rhetorics on libertarian activism in the Court or elsewhere.

Thus in Gopalan,[185] Shivakant,[186] Bachan Singh[187] and A.K. Roy[188] the Court, confronted with the challenge to the validity of laws authorising deprivation of life and personal liberty, did adopt a "hands-off" policy and refused to judge the justness and reasonableness of the laws on the ground that it could do so only within the framework of a 'due process' clause which the Constituent Assembly deliberately denied to them.[189] Recently an American

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185. AIR. 1950 SC.27.

186. (1976)2 S.C.C. 521.

187. AIR. 1980 SC 898.

188. AIR. 1982 SC 710.

189. On the other hand, in Batra, Hoskot, Hussainara and other similar post - Maneka cases, the Court adopted an activist policy and seldom referred to the 'intention of the Constitutent Assembly. Instead, it assumed the existence of a 'due process' clause in Art.21; and proceeded to excercise the power to judge the fairness and reasonableness of the laws which interfered with personal liberty of the individual.

author has written about the U.S. Supreme Court thus: "By now we all know the notorious fact: The Supreme Court has flunked history. The justices stand censured for abusing historical evidence in a way that reflects adversely on their intellectual rectitude as well as on their historical competence".[190] It is respectfully submitted that the above comment appears to be applicable to the Indian Supreme Court as well especially in view of the manner in which it has been making use of the historical evidence and the 'intention' of the Constituent Assembly in the context of Art.21 of the Constitution.

Having thus disowned the 'due process' clause in Art.21 in the name of the 'intention' of the Constituent Assembly, the Court in A.K. Roy considered the argument of the petitioner based on the 'new' due process doctrine as evolved by the Court in Maneka through the 'alternate strategy'. It was argued that the N.S.A. was violative of Arts.14, 19 and 21 on the ground that the Act deprived people of their personal liberty excessively and unreasonably, conferred vast and arbitrary powers of detention upon the executive, and sanctioned the use of those powers by following a procedure which was unfair and unjust.[191]

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190. Leonard W.Levy, Constitutional Opinions (1989), p.193.

191. A.K.Roy, ibid., at p.738.

Though the above argument provided to the Court an appropriate opportunity to articulate and apply the Maneka version of due process in the context of a preventive detention law which authorised flagrant deprivation of personal liberty, unfortunately Chandrachud C.J. said that the argument "can be disposed of briefly" on the ground that the Court had the authority of the previous decisions in Cooper, Khudiram, Haradhan Saha and Maneka on the issue.[192] Without advancing any additional reasoning or argument, without even making any attempt to extend the logic of Maneka to the case at hand, His Lordship simply referred to the opinion of Bhagwati J. in Khudiran[193] which followed Haradhan Saha[194] and then referred to Haradhan Saha itself and said that the question whether a law of preventive detention, which fell within Art.22, must have to meet the requirements of Arts.14, 19 and 21 was concluded in Haradhan Saha.[195]

The Court held:

"The question therefore as to whether MISA violated the provisions of these four articles, namely,

192. Ibid.

193. A.I.R. 1975 SC 1950.

194. A.I.R. 1974 SC 2154.

195. A.K.Roy, op.cit., p.739.

Articles 14, 19, 21 and 22, must be considered as having been finally decided in Haradhan Saha. Accordingly, we find it impossible to accept the argument that the National Security Act, which is in *pari materia* with the Maintenance of Internal Security Act, 1971, is unconstitutional on the ground that, by its very nature, it is generally violative of Arts.14, 19, 21 and 22".[196]

Obviously, therefore, the full implication of the decision in A.K. Roy and its impact on Maneka can be understood only in the light of the ratio in Haradhan Saha. In Saha, a post - Cooper case, the Court, speaking through Ray C.J., held that once it was found that the procedure in the MISA, 1971 complied with the requirements of Art.22, that procedure could not be struck down under Art.19 as unreasonable, or under Art.21 as violative of the principles of natural justice, or under Art.14 as discriminatory. The Court declared that the principles of natural justice "in so far as they are compatible with detention laws find place in article 22 itself";[197] and Art.19 "does not increase the concept of reasonableness required" by Art.22 in cases of preventive detention.[198] As it has already been pointed

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196. *Ibid.*

197. A.I.R. 1974 SC 2154, pp.2159-60.

198. *Ibid.*

out[199] the Court in Saha's case acted on the exclusionary theories laid down by the majority in Gopalan, and not on the rejection of those theories in Cooper; and held in effect Art.22 as a 'self-contained code'.

It is submitted that if Haradhan Saha has denigrated Cooper and resurrected Gopalan, A.K. Roy, which has treated Saha as 'final' and 'conclusive' on the issue, can reasonably be said to have denigrated Maneka and resurrected Gopalan. Naturally, therefore, in A.K. Roy, instead of scrutinising the validity of the N.S.A. and the procedures prescribed thereunder on the anivil of reasonableness and fairness with reference to Arts. 14 and 19, Chandrachud C.J. seems to have attempted only to establish that the impugned Act incorporated all the procedural safeguards enshrined in Art.22 and so was valid and constitutional.[200] Thus, as Prof. Tripathi has rightly remarked, with the decision in A.K. Roy 'the Supreme Court has returned, full circle, to the majority view in A.K. Gopalan's Case'.[201]

It is submitted that the fact situation that obtained as well as the issues raised in A.K.Roy rendered

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199. See, Ch.V, supra.

200. A.K.Roy, ibid., at pp.742 et.seq.

201. P.K.Tripathi, "The Fiasco of Overruling A.K.Gopalan", AIR 1990 Jnl.1, p.3.

that case an excellent acid test for the feasibility and adequacy of the 'alternate strategy' as a means to secure the requirements of due process as a protection for personal liberty in Art.21. In A.K. Roy, the petitioner was deprived of his personal liberty under the N.S.A., a State-made law. According to the 'just, fair and reasonable procedure' formula, forged by the Court in Maneka,[202] Art.19 would be applicable to test the validity of the N.S.A. which authorised deprivation of personal liberty of the petitioner, atleast in so far as the preventive detention of the petitioner imposed a restriction on his freedom to move, guaranteed under Art.19(1)(d). And as a result the Act would be required to comply with the standard of reasonableness and the court would be entitled to judge the reasonableness of the law. Secondly, either independently of or in addition to Art.19, according to the Maneka theory Art.14 would always and concurrently be applicable to test the validity of the Act; and 'on principle the concept of reasonableness must be projected in the procedure contemplated by Art.21 having regard to the impact of Art.14 on Art.21'.[203] Consequently the Court would be entitled to judge with reference to Art.14 the fairness and reasonableness of the procedure prescribed by the N.S.A.

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202. For the details of this aspect, see supra, Ch.6.

203. Maneka op.cit., p.622.

And, thirdly, the procedure prescribed by the Act must be consistent with the principles of natural justice and so must be just and fair. But this third limb of the 'alternate strategy' appears to have been already paralysed by virtue of the explicit exclusion of those principles of natural justice by the impugned Act. For, as conceded by the Court in Maneka if the principles of natural justice are excluded by statute 'no more question arises'.[204] If the Maneka doctrine were sound and satisfactory and if the Court were true to the dictum and reasoning of Maneka, then the Court could and would have applied the standards of fairness and reasonableness with reference to Arts.14 and 19 to judge the validity of the N.S.A. and the procedure which it prescribed for the deprivation of personal liberty. But it was not to be. The Court could not and did not apply the standard of reasonableness to judge the validity of the Act and the procedure it laid down; and the Court could not and did not even give any convincing reason for not applying the standard of reasonableness and not acting on the Maneka doctrine.[205] It must have been so certainly because of the inherent limitation and vulnerability of the 'alternate strategy' as a means to secure the standard of reasonableness as a protection against such flagrant

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204. Ibid., at p.624.

205. A.K. Roy, op.cit., see at pp.738-39.

deprivation of personal liberty in Art.21. For, it may be unfair to assume that the very architects of the Maneka doctrine would have been unsympathetic towards their own creation. It may be recalled that the majority in A.K. Roy consisted of Chandrachud C.J. and Bhagwati and Desai JJ.; and that Bhagwati J. was undoubtedly the architect of the Maneka version of due process and the 'alternate strategy' on which it was founded, and Chandrachud C.J. gave his full support to that 'strategy' in his concurring judgment in Maneka; and Desai J. has been known for his due process activism and staunch support for the Maneka doctrine. It is an irony that the 'alternate strategy' and the promise of due process it held out crashed and crumbled before the eyes of these very same judges.[206]

A.K.Roy, thus, appears to have pushed the Maneka version of 'due process' to a vanishing point, exposing the inherent limitation of the 'alternate strategy' to secure an adequate protection for personal liberty in Art.21. The decision has made it abundantly clear that the applicability of Arts.14 and 19 to test the validity of a law authorising

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206. Perhaps it may be the inner tensions arising out of this peculiar situation that might have made Bhagwati and Desai JJ. to silently concur with Chandrachud C.J., who spoke for the Court. And, in turn, may be for the same reasons, in responding to the challenge of the situation the learned Chief Justice also appears to have adopted an evasive and escapist policy.

the deprivation of personal liberty in Art.21 cannot always be taken for granted; and that Art.21, standing by itself independently of Art.14 and 19, does not provide a standard with reference to which a law authorising the deprivation of personal liberty can be declared as unconstitutional on the ground that the 'procedure' proscribed by that law is unjust, unfair and unreasonable. And in the subsequent decisions[207] involving personal liberty under Art.21 also the Court does not seem to have ever attempted either to construct a 'due process' framework within Art.21 or atleast to retrieve the promise of Maneka which has undoubtedly been denigrated by A.K. Roy.

207. See, for instance, Kishen V. Orissa, AIR 1989 SC 677; Triveniben V. Gujarat, AIR 1989 SC 142 where the Court refused to reconsider Bachan Singh; Meera Rani V. Tamil Nadu, AIR 1989 SC 2027; Abdulla Kunhi & Abdul Khader V. Union of India, AIR 1991 SC 574 wherein the Court, in the context of COFEPOSA, 1974 narrowed down the scope of the safeguard under Art.22 (5) considerably; G.S. Sodhi V. Union of India, AIR 1991 SC 1617 in the context of Army Act (46 of 1950); Louis DC Raedt V. Union of India, AIR 1991 SC 1886 etc.

CHAPTER VIII

CONCLUSION

There can neither be any finality in conclusion nor can there be any final solution to the eternal problem of liberty under law. Yet it is proposed to conclude this present study with a brief resume of the inferences drawn from the foregoing chapters along with a few suggestions emerging out of these inferences, however tentative these inferences and suggestions may be.

The historical perspective of the development of personal liberty as a constitutional value in the United Kingdom and as a constitutional guarantee in the United States, presented in the first chapter[1] of this study, brings forth the historical metamorphosis of the pledge the English noblemen extracted from King John that he would not deprive them of life, liberty or property except according to "the law of the land" into the modern constitutional guarantee that 'no persons shall be deprived of his life, liberty or property without due process of law'. It unfolds

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1. Supra, pp. 15-68.

the truth that liberty and justice are inseparable values and that the evolution of personal liberty as a constitutional right has really been the evolution of 'due process of law' as a standard of protection for the personal liberty of the individual against the authority of the State. The historical analysis also reveals the crucial significance of judicial process as the bulwark of personal liberty. The chapter further shows that the requirements of 'due process of law' as a protection for the liberty of the people have also been recognised by the international legal order.[2]

It is apparent from the analysis of Indian thought, attempted in the second chapter,[3] that the values of liberty and justice are deeply rooted in the fundamentals of Indian philosophy and political thought. The discussion leads to the inference that a conscious effort to assimilate the constitutional models and methods which we accepted from the West into the cultural values which we inherited from the past, would yield fruitful results in our endeavour to expound the proper meaning and scope of personal liberty and to evolve a just and flexible normative concept to regulate that liberty.

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2. Supra, pp. 69-82.

3. Supra, pp. 83-104.

The political history of freedom struggle in India, as discussed in this chapter,[4] shows that the people's demand for freedom was not a demand for mere change of rulers. Their demand was for a new political and legal order wherein the dignity and liberty of the individual would be respected as an enforceable limitation on the powers of the State. The fact that they were fighting for their freedom against an exploitative political order wherein a semblance of procedure laid down by a semblance of of law was all what was required to deprive the people of their life or personal liberty indicates that their demand for liberty, in substance, was a demand for 'due process of law' as a guaranteed protection for their personal liberty.

Further, the close scrutiny, made in this chapter, of the framing of Article 21 in the Constituent Assembly[5] unfolds the truth that the Constituent Assembly was not against guaranteeing "due process of law" as a protection for personal liberty in Art.21. The analysis in fact reveals that the real intention of the Constituent Assembly was in favour of the retention of the 'due process' clause in Art.21, though that intention was unduly clouded by the intention of a few prominent members in the Assembly who, by a historical coincidence, were also at the helm of affairs

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4. <u>Supra</u>, pp. 105-129.

5. <u>Supra</u>, pp. 130-169.

in the government of the day. This historical truth is hoped to be of tremendous importance for arriving at a proper interpretation of the expression "procedure established by law" in Art.21.

The discussion and evaluation of the judicial process in the interpretation of Art.21 in Parts II and III of this study bring to light many interesting facets of the liberty jurisprudence in India.

The analysis of the decisions in the third chapter[6] shows that through a liberal judicial interpretation, 'personal liberty' in Art.21 has emerged as a compendious and residuary concept, capable of absorbing into itself any new and emerging human right, competing for constitutional recognition.

But the discussion in the fourth chapter[7] reveals that this liberalism of the Supreme Court in interpreting the expression 'personal liberty' and in delineating its contents has not been matched by the Court's attitude towards the protection of personal liberty. The analysis of the decisions brings into sharp focus the persistent refusal of the Court to interpret the standard of protection for personal liberty in Art.21 as 'due process of law', the

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6. Supra, pp. 170-226.

7. Supra, pp. 227-325.

major reason for the refusal being the 'intention of the Constituent Assembly'. The critical exposition of the judicial techniques and arguments[8] adopted by the Court in Gopalan, defending its denial of 'due process' clause in Art.21 has shown that the Court was only making a policy choice in the conflict between the claim of the individual for a 'due process' of law as a protection for his personal liberty and the claim of the State for absolute authority to deprive personal liberty in the name of law and order, and that the choice was made under the cloak of constitutional logic and textual inevitability. The analysis exposes the myth of mechanical jurisprudence in constitutional adjudication and it shows that without being confronted with any doctrinal or constitutional hurdle the Court could have interpreted the expression "procedure established by law" in Art.21 as "due process of law", and have reconciled the liberty of the individual with the authority of the State through an open, informed policy-making mode of constitutional adjudication.

The inquiry in the fifth chapter[9] brings to surface the fact that having found itself in a dilemma between its own obsession with the expression "due process of law" on the one hand and its awareness as to the gross

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8. Supra, pp.241 et. seq.

9. Supra, pp.326-386.

inadequacy of the standard of protection for personal liberty in Art.21, as interpreted in Gopalan, on the other, the Supreme Court has attempted to evolve an alternate technique to secure a meaningful protection for personal liberty. As a result, the inquiry reveals, instead of deducing the elements of 'due process' from within Art.21, the judicial attempt has been to gather those elements from without Art.21, through the 'alternate strategy' of inter-linking Art.21 with Arts.14 and 19.

The detailed and elaborate analysis of the decision in Maneka, presented in the sixth chapter,[10] helps to clarify the doubtful claim made in different quarters that Maneka has unequivocally inducted a 'due process' clause into Art.21. The discussion brings forth the failure of the Court in Maneka to interpret the expression "procedure established by law" in Art.21 as embodying the requirements of "due process of law". Instead, the Court has preferred only to adopt the 'alternate strategy' to evolve the "just, fair and reasonable procedure" formula as a protection for personal liberty in Art.21. The analysis of the reasoning and argumentations[11] advanced by the Court reveals that the theoretical foundation of the 'alternate strategy'is not sound and stable and that the "just,fair and

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10. Supra, pp.387-450.

11. Supra, pp.420 et.seq.

reasonable procedure" formula founded on such an unsound strategy is not an adequate substitute for the standard of 'due process of law' as a protection for personal liberty. All this leads to the inference that the claim about an unqualified induction of a 'due process' clause into Art.21 by Maneka cannot be accepted without reservation. The inquiry, however, shows that Maneka, despite its failure to induct a 'due process' clause in Art.21, appears to have imparted a 'due process' dynamism to the judicial process in the field of personal liberty.

The survey and analysis of the post - Maneka decisions of the Court, made in the seventh chapter[12] further fortifies the above inference. The survey shows that the post - Maneka Court has displayed an unprecedented activism and creativity; and read into Art.21 many new rights and liberties, proceeding on the assumption as to the existence of a 'due process' clause in Art.21 after Maneka. The inquiry reveals that because of the above assumption during this spell of 'due process' dynamism the Court has failed to address itself to the necessity of articulating and strengthening the theoretical foundation for a "due process" framework within Art.21; and that that the failure has eventually recoiled both on the possibility of the emergence of a 'due process' framework in Art.21 as well as

12. Supra, pp.451-522.

on the 'due process' dynamism of the Court. The second line of the post - Maneka decisions[13] such as Bachan Singh and A.K. Roy, discussed in this chapter only confirm this recoiling. The analysis has shown that the 'new' rights and privileges delineated by the Court as the content of the "just, fair and reasonable procedure" could not become as integral parts of Art.21 in the absence of a 'due process' framework within that Article, capable of accommodating and assimilating those rights. A.K.Roy, for instance, demonstrated the myth of Maneka and the barrenness of Art.21 on the face of a State - made law which authorised the deprivation of personal liberty according to a set of procedures which were patently 'unjust, unfair and unreasonable' and were bereft of those 'new' rights claimed to have been read into Art.21.[14] The inquiry into the post - Maneka judicial process, thus, unfolds a paradox: a judicial display of 'due process' dynamism under Art.21 without having a 'due process' clause in that Article.

It follows from what has been discussed so far that even after four decades of judicial process in the interpretation of Art.21, the Supreme Court does not appear to have succeeded in accomplishing a due process doctrine as

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13. Supra, pp.495 et.seq.

14. Supra, pp.452 et.seq.

a principle of constitutional adjudication in order to safeguard the personal liberty of the individual against unjust and unreasonable legislative action of the State. The standard of protection available in Art.21 still remains to be the poor and shrunken formula of "procedure established by law" - a standard which has proved to be sterile as a limitation on the legislative powers of the State. Thus all the attempts made in the Constituent Assembly as well as the persistent efforts made in the judicial process to give the contents of 'due process' to Art.21 and to secure an adequate protection for personal liberty without using the language of 'due process' clause seem to have failed.

Therefore, in view of the above findings and conclusions, it is suggested that the standard of protection which Art.21 itself secures to personal liberty through the expression "procedure established by law" should be interpreted to mean "due process of law", without rendering that Article dependent on, and subservient to, Arts.14 and 19. Such a forthright interpretation of the expression "procedure established by law" as 'due process of law' alone can render Art.21 as a limitation on the legislative power of the State and such an accomplishment of a 'due process' clause as a criterion for judicial review in Art.21 alone can secure an adequate and reasonable protection which is

matching to the value and importance of personal liberty as a fundamental right.

Since the deprivation of personal liberty can deprive a person of all other valuable rights and such deprivation is possible without necessarily attracting the applicability of either Arts.14 or 19[15] it is imperative that Art.21 itself should have an independent standard of 'due process' protection within that Article. That apart, 'personal liberty' in Art.21, as evolved through judicial process, has become the most compendious and comprehensive formulation of liberty,[16] transcending the traditional notion of mere freedom from physical restraint. It encompasses many diverse and less tangible attributes of personal freedom which are recognised as fundamental to human dignity and individual autonomy. It is, therefore, highly essential and desirable that Art.21 must have within itself an equally comprehensive and flexible standard of protection embodying the fundamental principles of justice and reason and thereby imposing the requirements of 'due process of law' as a limitation on the authority of the State so that whenever any agency of the State, including the legislature, attempts to deprive the people of any of

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15. See, <u>supra</u>, pp.420 <u>et.seq</u>.

16. See, <u>supra</u>, pp.181 <u>et.seq</u>.

those fundamental and diverse attributes of freedom, forming part of personal liberty, the requirements of 'due process of law' would come into play.

It is submitted that such an interpretative incorporation of a 'due process' clause into Art.21 by construing the expression of "procedure established by law" would only be consistent with the spirit and philosophy of the Constitution; with the high value and purpose of personal liberty as a constitutional guarantee; with the aspiration and intention of the people who fought for the freedom and liberty and made this Constitution as an instrument to realise those ideals;[17] with the cultural and philosophical (or spiritual) heritage of this country;[18] with the history and experience of other civilized democracies in the world;[19] and with the emerging standards of human rights in the international legal order.[20]

Of course it may be true that an unequivocal induction of a 'due process' clause into Art.21, as suggested above, may evoke a few criticisms as well, though the facts of history have demonstrated the untenability of most of those criticisms.

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17. See, Ch.II, *supra*.
18. *Ibid*.
19. See, Ch.I, *supra*.
20. *Ibid*.

One may say, for instance, that the requirements of 'due process', if it is inducted into Art.21, would always be at war with the claimed need for governmental efficiency in the field of public security and law and order. It may be remembered, at the outset, that speed and efficiency or expediency and convenience are not the sole virtues of a democratic government. As Justice Frankfurter once said:[21]

"The establishment of prompt and efficacious procedures to achieve legitimate State ends is a proper State interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praise worthy government officials no less, and perhaps more, than the mediocre ones".

The adoption of a 'due process' clause should not be misconceived as a negation of the police power of the State to restrain and regulate the use of liberty in order to promote public security, order and welfare.[22] On the

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21. Stanley V. Illinois, 405 U.S.645 (1942).

22. See, George W. Wickersham, "The Police Power, A Product of Reason", 27 Harv. L. Rev. 297 (1914).

contrary, 'due process of law' is only a guarantee against the arbitrary exercise of the police power of the State under the pretext of efficiency and expediency. As McWhinney[23] has rightly described, 'due process of law' is a 'guarantee of reasonableness in relations between Man and the State'; and it is in this sense the 'due process' clause has come to be an indispensable condition of ordered liberty in every civilized democracy.

The doctrine of 'due process' was not born out of a delphic oracle. It was born out of the realities of human nature and the history and experience of the political organisation of the human societies. It was born out of the collective instinct of mankind for fairness and justice against governmental oppression and arbitrariness. It is the same instincts that one can perceive from the procedural protections of Magna Carta down to the constitutional guarantee of 'due process of law'.[24]

'Due process of law' is not a mechanical or inflexible instrument, cramping the efficiency of the administration. As Pandit Thakur Das Bhargava[25] said in the Constituent Assembly, 'the due process clause would not weaken the administration, but of course the administration

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23. McWhinney, Judicial Review, op.cit., p.205.

24. See, Ch.I, supra.

25. C.A.Deb., Vol.VII, p.848.

would not have its way'. And as Justice Warren of the U.S. Supreme Court has rightly said, "If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system".[26] To quote again Justice Frankfurter:

> "'Due process of law' as a standard only operates as a limitation upon the legislative power of the State in as much as the determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to the supervision by the Courts. And as a standard, 'due process' is not a mechanical instrument. On the contrary, it is a delicate process of adjustment inescapably involving the exercise of judgement by those whom the Constitution entrusted with the unfolding of the process".[27]

Therefore the argument that the induction of a 'due process' clause would hamper the efficiency of administration need not be overemphasized.

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26. Escobedo V. Illinois, 378 U.S. 478, 490 (1964).

27. Joint Anti-Fascist Refugee Committee V. McGrath, 341 U.S. 123 (1951).

Of course, one may still object to the introduction of a 'due process' clause in Art.21 on the ground that the concept of 'due process of law' is too vague, imprecise and elusive to serve as a meaningful criteria of judicial review and that the consequential uncertainty as to the contents of 'due process' would leave open an undesirable degree of leeway for judicial choice and policy-making.

But such an objection can be said to have been founded on a misconception of about the very nature and dynamics of judicial process in constitutional adjudication. Both constitutional logic as well as experience show that it is often the vagueness of such concepts as 'liberty', 'equality', 'reasonableness', or 'due process of law' that gives vitality to the written constitution, enabling it to grow from within and to adapt itself to the changing values and needs of the society it saves and endure as the fundamental law. Such concepts are only the vehicles of national values which bear the imprint of every generation that reads and interprets them. And as Cardozo[28] said, the content of constitutional immunities is not constant but varies from age to age. In the context of the American Constitution, which contains such ambignous expressions, Edward H. Levi says that a change of mind among judges in

28. B.N.Cardozo, <u>The Nature of Judicial Process</u>, (1965), p.17.

interpreting such expressions from time to time is inevitable when there is a written constitution and that a written constitution must be enormously ambiguous in its general provisions[29]. Referring to the very intention of the framers of the constitution, he says: "Perhaps they expected the words to change their meanings as exigencies arose. Perhaps they realised that ambiguity was best".[30]

Therefore, even admitting that the concept of 'due process of law' is vague it is submitted that the vagueness of the concept by itself need not and cannot be a deterrence to the adoption of that concept. For, vagueness is neither unique to the 'due process' clause, nor is it unique to the Indian Constitution. History demonstrates the onward march of many constitutional democracies under the majesty of such 'glorious ambiguities' [31] as 'liberty', 'equality', 'basic structure', 'reasonableness' and 'due process of law'.

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29. E.H.Levi, An Introduction to Legal Reasoning, University of Chicago Press (1949), 14th Impression (1972), pp.58-59.

30. Ibid., at p.65.

31. Shirley M. Hufstedler, "In the Name of Justice", 14 Stan. Lawyer 3, 4(1979) as cited in Mauro Cappelletti, The Judicial Process In Comparative Perspective, Clarendon Press, Oxford (1989) pp.29-30. Hufstedler says: "I intend no irony in describing the words from the Bill of Rights as 'glorious ambiguities'. The very elusiveness of their content has made it possible to shape and reshape constitutional doctrine to meet the needs of an evolving, pluralistic, free society. Precision has an honored place in writing a city ordinance, but it is a death warrant for a living constitution".

As a matter of fact, the concepts of 'due process of law' and 'police power' are in no way alien to the Indian Bill of Rights. They are integrated into the scheme of Art.19 of the Constitution. As Justice Mathew held in the Fundamental Rights Case[32]:

> "The limitations in Article 19 of the Constitution open the doors to judicial review of legislation in India in much the same manner as the doctrine of police power and its companion, the due process clause, have done in the United States. The restrictions that might be imposed by the legislature to ensure the public interest must be reasonable and, therefore, the Court will have to apply the yardstick of reason in adjudging the reasonableness. If you examine the cases relating to the imposition of reasonable restrictions by a law, it will be found that all of them adopt a standard which the American Supreme Court had adopted in adjudging reasonableness of a legislation under the due process clause".[33]

The Learned Judge also explained:

> "The reason why the expression 'due process' has never been defined is that it embodies a concept of

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32. Kesavananda Bharathi V. State of Kerala, AIR 1973 SC 1461.

33. Ibid., at p.1946.

fairness which has to be decided with reference to the facts and circumstances of each case and also according to the mores for the time being in force in a society to which the concept has to be applied".[34]

Further, from a functional point of view, one may notice that despite the disagreements over various elements of 'due process' there can hardly be any dispute as to what is at the core of that concept. As J.M. Gora[35] says, at a minimum, 'due process' requires reasonable notice of the charges or accusations made against the individual and an opportunity to be heard in one's defense in a hearing that is fair and not a sham. Justice Frankfurter said:

"The right to be heard before being condemned to suffer grievious loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society.... The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth - seeking, and self righteousness gives too slender

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34. Ibid.

35. Joel M. Gora, Due Process of Law, American Civil Liberties Union, New York (1977), p. xii.

an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done".[36]

Finally one may still have an apprehension about the democratic legitimacy of the judicial policy - making under the cover of 'due process' for we may have to depend on judges to declare what is required by 'due process of law'. But a proper perspective of judicial policy - making through the instrumentality of judicial review in the context of an entrenched Bill of Rights in a written constitution would surely dispel the above apprehension.

The very adoption of a written constitution by a people is reflective of their distrust in an unlimited government. The conception of a fundamental law is surely a check on the majoritarian principle of democracy. As Justice Mathew has pointed out:

"Our Constitution is the offspring of two divergent principles, namely popular sovereignty and

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36. Joint Anti-Fascist Refugee Committee V. McGrath, 341 U.S. 123(1951).

limitation there on by superior enacted natural law principles. Popular sovereignty suggests will and fundamental law suggests limits. One conjures up the vision of an active State, the other emphasises the negative restricted side of the political problem. The principle behind it is that men in pursuit of their immediate aims are apt to violate rules of conduct which they would nevertheless wish to see generally observed. Because of restricted capacity of our minds, our immediate purpose will always loom large and we will tend to sacrifice long term advantage to them. It may be possible to harmonize these seeming opposites by a logical sleight of hand that the doctrine of popular sovereignty and fundamental law are fused in the Constitution, which was popularly willed limitation. The propensity to hold contradictory ideas simultaneously is a significant feature of mankind at all stages of its history and it is no wonder that that feature got embodied in the most significant expression of the political will of the people of India".[37]

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37. K.K. Mathew, Three Lectures, Eastern Book Co., Lucknow, (1983), p.1.

    See also H.R. Khanna, Judiciary in India and Judicial Process, Tagore Law Lectures, Ajoy Law House, Calcutta (1985), pp.14-15.

The doctrine of judicial review is only the functional fall-out of such a conception of fundamental law as a check on absolute majoritarianism. Thus the Constitution envisages two institutions to reflect the will of the people and the limitation on that will separately - the legislature and the judiciary. As justice Mathew says, 'the legislature which is to represent the immediate interest of the people embodied the doctrine of popular sovereignty and the guardianship of the fundamental law was assigned to the courts.[38]

Obviously, therefore, the introduction of an entrenched Bill of Rights in the fundamental law is surely to expand the scope of judicial review and to render the role and responsibility of the courts more onerous and challenging. Mauro Cappelletti puts the whole issue succinctly thus:

> "It seems undeniable that this phenomenon (of entrenched _bill of rights_), which characterizes the constitutional life of very large and growing areas of the world, has been caused, _inter alia_, by the crisis of, and by the deepening distrust in the giant legislator. As long as national legislatures were accepted as 'supreme', no 'higher law' and,

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38. _Ibid_., at p.2.

> most especially, no bills of rights binding upon legislatures were considered necessary or, indeed, even possible. They have become both possible and necessary only at the moment people have felt that certain principles and rules enshrining fundamental values could be - indeed were - threatened by the legislatures themselves....
>
> Bills of Rights, ... cease to be mere philosophical proclamations at the moment their actual enforcement is entrusted to the courts, ... the enforcement of a bill of rights greatly increases the scope of judiciary law', i.e. judicial creativity".[39]

And, as noted earlier, such declarations of bill of rights often embody in them vague, elusive and value - loaded concepts as liberty, equality, property, reasonableness or 'due process' which do not obviously have any fixed frontiers or definite content.

And naturally, as Ehrlich[40] said, the more general the legal proposition, the greater the freedom of the judge.

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39. M.Cappelletti, op.cit., pp.28-29.

40. Eugen Ehrlich, Fundamental Principles of the Sociology of Law (1936 trs.) pp.173-74. See also Learned Hand, The Spirit of Liberty, Papers and Addresses, (1952 I. Dilliard ed.) pp.118 and 123.

In this regard the concept of 'due process of law' can be regarded only as any other value - loaded concept as 'liberty or 'reasonableness'. There is nothing unique or extraordinary about 'due process' as a criteria of judicial review.

In the process of delineating the content of those concepts and enforcing them against the political branches of government, the court is inevitably engaged in policy - making, which Learned Hand has described as an authentic bit of 'special legislation'.[40a] That inevitability is a constitutional truth.

In the process of constitutional adjudication, involving interpretation and enforcement of fundamental rights, the Court is often faced with the dilemma either to be 'bravely creative, or to be thoroughly ineffective'.[41] Obviously the Court cannot afford to be 'thoroughly ineffective' consistent with its constitutional obligation as a protector and guarantor of the fundamental rights of the people.[42] The nation expects, as the Constitution commands, the Court to guide it on to its goal, of a just political order. Our legislatures have been shaped by an

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40a. See Learned Hand, <u>Bill of Rights</u>, p.26.

41. M. Cappelletti, <u>op.cit</u>., p.30.

42. See, The Constitution of India, Arts.13 and 32.

understanding that the judiciary will help charting governmental policy[43] and will share the 'power to govern'.[44]

Therefore it is unrealistic to perceive an antinomy between democracy and 'due process', on the ground that that clause would entail extended scope for judicial review. On the contrary, history shows that a democracy can survive only through the preservation and protection of the fundamental liberties of man against governmental oppression with reference to the principles of justice and reason, the embodiment of which is called 'due process of law'. And as Judge Koopmans said: 'Democracy and human rights are, empirically speaking, closely connected; protection of one at the expense of the other therefore always runs the risk of being counter-productive.... If we want to retain democracy, the courts should face their share of the job'.[45]

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43. K.K. Mathew, The Lectures, op.cit., p.4.

44. See, Robert K. Carr, The Supreme Court and Judicial Review, Greenwood Press, Connecticut, (1942) Reprint, 1970, p.292. The author asserts that the Supreme Court is an instrument which shares with President and Congress the power to govern.

45. Koopmans, "Lelislature and Judiciary: Present Trends", in New Perspective for a Common Law of Europe (M. Cappelletti ed. 1978) p.337.

    For a staunch defense of functional legitimacy of judicial activism and policy-making in the field of human rights in a democracy, see Michael J. Perry, The Constitution, The Courts, and Human Rights, An Inquiry into the Legitimacy of Constitutional Policymaking by the judiciary, Wiley Eastern Ltd., New Delhi, (1986), pp.91-145.

And the concept of 'due process of law' which is an injunction against governmental arbitrariness, intolerance and oppression,[46] only provides the criteria for the judges to do their 'share of the job'. And in a democracy, emphasising the importance of 'due process', Justice Frankfurter once said:

> "The heart of the matter is that democracy implies respect for the elementary rights of man, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one - sided determination of facts decisive of rights...."[47]

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46. McWhinney, op.cit., p.205.

47. Joint Anti-Fascist Refugee Committee V. McGrath, 341 U.S. 123 (1951).

    See also M.Cappelletti, The Judicial Process in Comparative Perspective, op.cit., p.46. After a thorough analysis of the whole issue, Cappelletti sums up thus:

    "Clearly, the notion of democracy cannot be reduced to a simple majoritarian idea. Democracy, as already stated, also means participation, and it means tolerance and freedom. A judiciary reasonably independent from majoritarian whims can contribute much to democracy...."

    As Dr.Radhakrishnan said, 'the ethical basis of democracy is the sacredness of human personality and respect for the individual. Democracy is a faith in the spiritual possibilities of man'. See Occasional Speeches and Writings, Second series, February 1956 - February 1957, pp.284-86.

Thus it is reasonably clear that none of the above mentioned objections can find support either in constitutional logic or experience. It is submitted, therefore, that a 'due process' clause can be inducted into Art.21 undeterred by any of those objections. For, after all, we have the strength of our instincts for justice and freedom; we have our conviction that democracy in India is matured and is deeply rooted in its cultural heritage;[48] we have our trust in the judiciary and in its resilience, ability and wisdom[49] to 'preserve constitutional continuity by mediating successfully between an unchanging constitution and a changing world';[50] we have our faith that the availability of 'due process' does make things better, rather than worse, does make it more difficult for arbitrary or oppressive government action to occur in violation of the liberty of man; and finally we have our commitment, as any other civilized people, to the principle that, 'when all is

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48. See Ch.II, _supra_. pp.83 _et seq_.

49. The landmark decisions of the Court in _Golak Nath_ V. _Punjab_, AIR 1967 SC 1643; _Kesavananda_ V. _State of Kerala_, AIR 1973 SC 1461; _Election Case_, AIR 1975 (Supp.) S.C.C.1.; _Cooper_, AIR 1970 SC 564; _Maneka_, AIR 1978 SC 597; and the post - _Maneka_ judicial activism and creativity and the evolution of Public Interest Litigation (see Ch.VII, _supra_,) all would provide a sufficient justification to have such a faith in the Court.

50. See Charles A.Miller, _The Supreme Court and the Use of History_, The Belknep Press of Harv. University Press, Cambridge (1969), p.187.

said and done, it is the process by which the government acts, not necessarily the results which are reached, that is of ultimate importance. For, if the high command of 'due process of law' is obeyed, as a reality as well as a norm, the evils of official tyranny will not prevail.

Hence may it be concluded with the hope that the Supreme Court of India will make a comprehensive review of its previous decisions on this subject matter and reinterpret Art.21, as suggested in this study, and thus will eventually induct a 'due process' into that Article as a complete and adequate protection for the most fundamental of all fundamental rights - the right to personal liberty.

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> "The worth of a State, in the long run, is the worth of the individuals composing it ... a State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes... will find that with small men no great things can really be accomplished...."
>
> (J.S. Mill, <u>On Liberty</u>).

ANNEXURE

ANNEXURE I

Magna Carta

John by the grace of God, King of England, Lord of Ireland, duke of Normandy and Aquitaine, and count of Anjou, to his archbishops, bishops, abbots, earls, barons, justiciars, foresters, sheriffs, reeves, and to all his bailiffs and faithfull subjects, greeting. Know that we, having regard to God and the safety of our soul, and those of all our ancestors and heirs, to the honour of God, and the exaltation of holy church, and the betterment of our Realm, by the advice of our reverend fathers, Stephen arch bishop of Canterbury, primate of all England, and cardinal of the holy Roman church, Henry, archbishop of Dublin, William of London, Peter of Winchester, Jocelin of Bath and Glastonbury, Hugh of Lincoln, Walter of Worcester, William of Coventry, and Benedict of Rochester, bishops; Master Pandulph, the Pope's subdeacon and household official; brother Aymeric, master of the Kinghts of the Temple in England; and of the noble persons, William Marshal, early of Pembroke William, earl of Salisbry, William, earl of Warenne, William, earl of Arundel; Alan de Galloway, constable of Scotland, Warin Fitz-Gerald, Peter Fitz-Herbert, Thomas Basset, Alan Basset, Philip d'Aubigny, Robert de Roppelay, John Marshal, John Marshal, John Fiz-Hugh, and others of our faithful men.

1. Have, in the first place granted go God, and by this our present charter confirmed for us and our heirs for ever, that the English church shall be free, and enjoy her rights in their integrity and her liberties inviolate; and we will that it be so observed; and this is manifest from this, that we, of our mere and unconstrained will, before the contest between us and our barons had arisen, granted, and by our charter confirmed and procured to be confirmed by pope Innocent III, the freedom of elections which is most important and essential to the English church; and this we will observe in good faith by our heirs for ever. We have also granted to all the freedom of our kingdom, for us and for our heirs for ever, all the underwritten liberties, to have and to hold to them and to their heirs, of us and of our heirs.

* * * *

38. No bailiff shall in future put any one to trial, upon his bare word, without credible witnesses to support it.

39. No free man shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go upon him, nor will we send against him, except by the lawful judgment of his peers or by the law of the land.

40. To none will we sell, to none will we deny, or delay, right or justice.

* * * *

42. It shall be lawful in future for anyone to leave our kingdom, and to return, safe and sound, by land and by water, saving the allegiance due to us, except for a short space in time of war, for the common good of the kingdom, except those imprisoned and outlawed according to the law of the land, and persons from a land hostile to us, and merchants who shall be dealt with as is aforesaid.

* * * *

Wherefore we wish and firmly enjoin that the English church be free and that the men in our kingdom have and hold all the aforesaid liberties, rights, and grants, well and in peace, freely and quietly, fully and wholly, to them and their heirs, of us and our heirs, in all things and places, forever as is aforesaid. This has been sworn to as well on our part as on the part of the barons, that all the aforesaid shall be kept in good faith and without malice.

. . . .

ANNEXURE II

Petition of Right 1628

* * * *

X. They i.e., the Lords Spiritual and Temporal, and Commons in Parliament assembled do therefore humbly pray your Most Excellent Majesty, that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by Act of Parliament; and that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same, or for refusal thereof; and that no freeman, in any such manner as is beforementioned, be imprisoned or detained; and that your Majesty will be pleased to remove the said soldiers and mariners quartered on the population , and that your people may not be so burdende in time to come; and that the aforesaid commissions for proceeding by martial law, may be revoked and annulled; and that hereafter no commission of like nature may issue forth to any person or persons whatsoever, to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed or put to desth, contrary to the laws and franchise of the land.

ANNEXURE III

Bill of Rights, 1689

An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown

Whereas the lords spiritual and temporal and commons assembled at Westminister lawfully fully and freely representing all the estates of the people of this realm did upon the thirteenth day of February in the year of our Lord one thousand six hundred and eighty-eight present unto their Majesties then called and known by the names and style of William and Mary, Prince and Princess of Organge, being present in their proper persons, a certain declaration in writing made by the said lords and commons in the words following, viz.,

Whereas the late King James the Second by the assistance of diverse evil councillors, judges, and ministers employed by him did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom.

By assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament.

By committing and prosecuting diverse worthy prelates for humbly petitioning to be excused from concurring to the said assumed power.

By issuing and causing to be executed a commission under the great seal for erecting a court called the court of commissioners for ecclesiastical causes.

By levying money for and to the use of the Crown, by pretence of prerogative, for other time and in other manner than the same was granted by Parliament.

By raising and keeping a standing army within this kingdom in time of peace without consent of Parliament and quartering soldiers contary to law.

By causing several good subjects being protestants to be disarmed at the same time when papists were both armed and employed contary to the law.

By violating the freedom of election of members to serve in Parliament.

By prosecutions in the Court of Kings Bench for matters and causes cognizable only in Parliament and by diverse other arbitary and illegal courses.

And whereas of late years partial, corrupt and unqualified persons have been returned and served on juries

in trials and particularly diverse jurors in trials for high treason which were not freeholders.

And excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of subjects.

And excessive fines have been imposed.

And illegal and cruel punishments inflicted.

And several grants and promises made of fines and forfeitures before any conviction or judgement against the persons upon whom the same were to be levied.

All which are utterly and directly contary to the known laws and statutes and freedoms of this realm.

And whereas the said late King James the Second having abdicated the government and the throne being thereby vacant, his highness the Prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitary power) did (by the advice of the lords spiritual and temporal and diverse principal persons of the commons) cause letters to be written to the lord spiritual and temporal being protestants and other letters to the several countries, cities, universities, boroughts, and cinque ports for the choosing of such persons to represent them as were of right

to be sent to Parliament to meet and sit at Westminister upon the two and twentieth day of January of this year one thousand six hundred and eighty-eight in order to ordain such an establishment that their religion, law and liberties might not again be in danger of being subverted, upon which letters elections having been accordingly made.

And thereupon the said lords spiritual and temporal and commons, pursuant to their respective letters and elections, being now assembled in a full and free representative of this nation taking into other most serious consideration the best means for aiming the ends aforesaid do in the first place (as their ancestors in like cases having usually done) for the vindicating and asserting of their ancient rights and liberties, declare:

Suspending Power: - That the pretended powr of suspending of laws and the execution of laws by regal authority as it hath been assumed and exercised of late is illegal.

Late Dispensing Power - That the pretended power of dispensing with laws or the execution of laws by regal authority as it hath been assumed and exercised of late is illegal.

Ecclesiastical Courts Illegal - That the commission for erecting the late court of commissioners for ecclesiastical causes and all other commissions and courst of like nature are illegal and pernicious.

Levying Money - That levying money for or to the use of the crown by pretence of prerogative without grant of Parliament or for longer time or in other manner than the same is or shall be granted is illegal.

Right to Petition - That it is the right of subjects to petition the king and all commitments and prosecutions for such petitioning are illegal.

Standing Army - That the raising or keeping a standing army within the kingdom in time of peace unless it be with the consent of Parliament, is against the law.

Subjects' Arms - That the subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law.

Freedom of Election - That the election of members of Parliament ought to be free.

Freedom of Speech - That the freedom of speech and debate or proceeding in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Excessive Bail - That excessive bail ought not to be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Juries - That jurors ought to be duly impanelled and returned.

Grants of Forfeiture - That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.

Frequent Parliaments - And that for redress of all grievances and for the amending, strengthening and preserving of the law Parliament ought to be held frequently.

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ANNEXURE IV

Declaration of Independence, 1776

When, in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold thses truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the prusuit of Happiness. That to secure thses rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any form of Government becomes destructive of these ends, it is the Right of the people to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form; as to them shall seem most likely to effect their Safety and Happiness. Prudence indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath

shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the the same object evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let facts be submitted to a candid world.

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ANNEXURE V

The Constitution of the United States 1787- the Preamble and the Bill of Rights

Preamble

We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to our-selves and our posterity, do ordain and establish this constitution for the United States of America.

The Bill of Rights

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of te press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT II

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

AMENDMENT III

No soldier shall, in time of peace, be quartered in any house without the consent of the owners, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been comitted, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his his defense.

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

* * * *

AMENDMENT XIV

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

ANNEXURE VI

Universal Declaration of Human Rights
(Adopted by the General Assembly of the United Nations on December, 10, 1948).

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human

rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realisation of this pledge,

Now, therefore,

The General Assembly Proclaims

This Universla Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1. - All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and sould act towards one another in a spirit of brotherhood.

Article 2. - Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international satus of the country or territory to which a person belongs, whether it be independent, trust non-self-governing or under any other limitation of sovereignty.

Article 3. - Everyone has the right to life, liberty and security of person.

Article 4. - No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5. - No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6. - Everyone has the right to recognition everywhere as a person before the law.

Article 7. - All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8. - Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9. - No one shall be subjected to arbitrary arrest, detention or exile.

Article 10. - Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11. - (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier

penaity be imposed than the once that was applicable at the time the penal offence was committed.

Article 12. - No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13. - (1) Everyone has the right to freedom of movement and residence within the borders of each State.

(2) Everyone has the right to leave any country, including his own and to return to his country.

Article 14. - (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15. - (1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16. - (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the naturaland fundamental group unit of society and is entitled to protection by society and the State.

Article 17. - (1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18. - Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19. - Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20. - (1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

Article 21. - (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

* * * *

ANNEXURE VII

International Covenant on Civil and Political Rights, 1966

Preamble

The States Parties to the Present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, have duties to other individuals and to the community to which he belongs,

is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1. - 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely puruse their economc, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of internaitonal economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be depived of its own means of subsistence.

3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2. - 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in acordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3. - The states Parties to the present Covenant undertake to ensure the equal right to men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4. - 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, though the intermediary of the Secretary-General of the United Nations of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary on the date on the date on which it terminates such derogation.

Article 5. - 1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6. - 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishement of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7. - No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8. - 1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;

(b) Paragrah 3 (a) shall not be to preclude, in countries where imprisonment with hard labour may be imposed as a punishement for a crime, the performance of hard labur in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term forced or compulsory labour' shall not include:

(i) Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a militar character and, in countries where con-scientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or or service which forms part of normal civil obligations.

Article 9 - 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other

officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the dention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10. - 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2 (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11. - No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12. - 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13. - An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14 - 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public

except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Note to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishement as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or party attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the lw and penal procedure of each country.

Article 15 - 1. No one shall be held guilty of any criminal offence on account of any act or ommission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or ommission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16. - Everyone shall have the right to recognition everywhere as a person before the law.

Article 17. - 1 No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18. - 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19. - 1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the rüght to freedom of expression; this right shall include freedom to seek, réceive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsicilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20 -1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national racial or religious hatred that constitutes incitement ot discrimination, hostility or violence shall be prohibited by law.

Article 21-1.The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a

democratic society in the interests of national secutity or public safety public order (ordre public), the protectionn of public health or morals or the protection of the rights and freedoms of others.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre publec) the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take ligislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

. . .

Article 23. - 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24 - 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25. - Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without un-reasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be lected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26. - All persons are equal before the law and are entitled with out any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other openion, national or social origin, property, birth or other status.

Article 27. - In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

ANNEXURE VIII

Constitution of India, 1950 - Preamble and Articles 14, 19, 21, 22 and 32

Preamble

We, the People of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens:

Justice, social, economic and political;

Liberty of though, expression, belief, faith and worship;

Equality of status and of opportunity:

and to promote among them all

Fraternity assuring the dignity of the individual and the unity and integrity of the Nation:

In Our Constituent Assembly this twenty-sixth day of November, 1949, do Hereby Adopt, Enact and Give to Ourselves this Constitution.

Fundamental Rights

Art 13. Laws inconsistent with or in derogation of the fundamental rights. - (1) All laws in force in the territory of India immediately before the commencement of

this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires, -

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usuage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that nay such law or any part there-of may not be then in operation either at all or in particular areas.

** (4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 .

Art.14. Equality before law. - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Art. 19. Protection of Certain Rights Regarding Freedom of Speech, etc. (1) All citizens shall have the right -

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) (* * *)

(g) to practise any profession, or to carry on any occupation, trade or business.

**((2) Nothing in sub-clause (a) of clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making, any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in (the interest of the sovereignty and integrity of India,) the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence).

(3) Nothing in sub-clase (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of (the sovereignty and integrity of India or) public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of (the sovereignty and integrity of India or) public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in (sub-clauses (d) and (e)) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable

restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, (nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, -

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise).

Art.21. Protection of Life and Personal Liberty. - No person shall be deprived of his life or personal liberty except according to procedure established by law.

Art.22. Protection against arrest and detention in certain cases. - (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate

within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply -

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe -

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

Art.32. Remedies for Enforcement of Rights Conferred by this Part.-(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of _habeas corpus_, _mandamus_, prohibition, _que warranto_ and _certiorari_, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may be law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

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ABBREVIATIONS

LIST OF ABBREVIATIONS

A.I.R.	All Indian Reporter
ALIG. L.J.	Aligar Law Journal
A.S.I.L.	Annual Survey of Indian Law
C.A.Deb.	Constituent Assembly Debates
Calif.L.Rev.	California Law Review
Colum.L.Rev.	Columbia Law Review
C.P.C.R.	Covenant on Political and Civil Rights
D.B.	Division Bench
D.L.R.	Delhi Law Review
Et. seq.	et sequentia (L) (and the following)
F.B.	Full Bench
Harv.L.Rev.	Harvard Law Review
I.B.R.	Indian Bar Review
Ibid	Ibidem (L) (In the same Place)
J.B.C.I.	Journal of the Bar Council of India
J.I.L.I.	Journal of Indian Law Institute
K.L.J.	Kurukshetra Law Journal
Op.cit	Opere Citato (L) (In the Work Quoted)
S.C.	Supreme Court
S.C.C.	Supreme Court Cases
U.D.H.R.	Universal Declaration of Human Rights
U.K.	United Kingdom
U.N.	United Nations
U.S.	United States
Yale.L.J	Yale Law Journal

A.K.Roy	A.K.Roy V. Union of India, AIR 1982 SC 710.
Bachan Singh	Bachan Singh V. State of Punjab, AIR 1980 SC 898.
Cooper	R.C.Cooper V. Union of India, AIR 1970 SC 564.
Gopalan	A.K. Gopalan V. State of Madras, A.I.R. 1950 SC 27.
Kharak Singh	Kharak Singh V. U.P., A.I.R. 1963 SC 1295.
Maneka	Maneka Gandhi V. Union of India, AIR 1978 SC 597.
Saha	Haradhan Saha V. West Bangal, AIR 1974 SC 2154.
Shivkant	A.D.M. Jabalpur V. Shivakant Shukla, (1976)2 SCC 521.

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