II. ARTICLE 21 OF THE CONSTITUTION OF INDIA

* Due Process of Law.
* Legislative History of Article 21.
* Procedure Established by Law.
* Inter-relationship between Articles 14, 19 and 21.
* Judicial Evolution of Article 21 - Maneka Gandhi's Case: A Point of Inception and A Landmark.
CHAPTER II

ARTICLE 21 OF THE CONSTITUTION OF INDIA

DUE PROCESS OF LAW:

2.1 The origin of the "Due Process of Law" can be traced from the English common law - it was stressed first during the reigns of Henry I (1100-1135) and Henry II (1154-1189) due process has its basis also in Magna Carta of 1215. This is confirmed from the following proposition:

"No man shall be taken or imprisoned, disseized or in any way destroyed, save by the lawful judgement of his peers and by the law of the land."

2.2 In England the Parliament is supreme and the law made by the Parliament is the law of the land. This aspect has been treated as interchangeable with due process of law. This is corroborated from the observation made by Professor Dick Howard in his commentary on Magna Carta. He observed:

"...as early as 1354 the words 'due process' were used in English statute interpreting the Magna Carta, and by the end of fourteenth century 'due process of law' and 'law of the land' were interchangeable. The English colonists who established our courts brought the expression 'due process of law' with them. As it developed, 'due process of law' restrained a head of the Government from arbitrarily depriving a member of his realm of life, liberty or property."

Thus the framers of the American Constitution appear to have borrowed the phrase from the English common law.

2.3 Due process of law is a unique clause of the American Constitution. It is a very broad and flexible concept and it is difficult to give a precise definition of due process. The literal meaning of due process is the 'guarantee
of fair procedure'. In the words of Justice Frankfurter due process can be described as under:

"...'due process', unlike some legal rules, is not a technical conception with a fixed content...... 
Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment....." \(^{(2)}\)

2.4 Due process of law has two aspects. Both these aspects together constitute due process in its entirety. But these two aspects of due process sometimes overlap each other and it becomes virtually difficult to demarcate them independently. The two aspects of due process are: Substantive Due Process and Procedural Due Process. These two aspects cannot be defined and they are not separable from one another, they overlap each other.

2.5 Substantive due process refers to the content or subject matter of a law or an ordinance, whereas procedural due process refers to the manner in which a law, an ordinance, an administrative practice or a judicial task is carried out. In both the substantive and procedural due process concepts the judicial test of constitutionality or legality is the same.

2.6 The Constitution of United States twice promises the individual that the Government will not deprive him of life, liberty or property without due process of law.

The Fifth Amendment ratified on December 15, 1791 declares:

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

The Fourteenth Amendment ratified on July 23, 1868 imposes similar
limitation on the State authorities:

"No State shall.....deprive any person of life, liberty or property without due process of law."

2.7 Neither of these guarantees protects absolutely against loss of life, liberty or property. They simply assure the individual that this deprivation will occur only after the Government has adhered to certain standard approved procedures. One basic requirement of the concept of due process of law is that Government may not act in an "arbitrary", "capricious" or "unreasonable" manner in performing its task.

2.8 In England there is no constitutional guarantee safeguarding the freedom of the individual, it is safeguarded by the common law and it is also not open to a Court to invalidate a law on the ground that it seeks to deprive a person of his life or liberty contrary to due process clause; whereas in America law made by the Congress can be declared as bad by the judiciary if it is not in accordance with "due process".

2.9 This was illustrated by the Court in the year 1856 in Murray's Lessee case in the following words:

".....That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law'?.....

It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as on the executive and judicial powers of the government and cannot be construed as to have Congress free to make any process 'due process of law' by its mere will."^(3)
2.10 The United States Constitution does not define "due process" and the Courts have tried to interpret the concept of due process in a liberal manner depending on the facts and circumstances of each case. The contents of due process are not fixed and they vary from case to case.

2.11 In the year 1884 Justice John Marshall Harlan has tried to give a brief definition of the due process of law in the following words.

"Government should be confined within the limits of those fundamental principles of liberty and justice lying at the foundation of our civil and political institutions that no State can violate consistently with that due process of law required by the Fourteenth Amendment in proceedings involving life, liberty or property."(4)

2.12 The above opinion which was given by Justice Harlan was a minority judgement but in a later case of Palko v. Connecticut it became majority judgement in which due process clause was accepted, clarified and further refined by Justice Cardozo.(5)

2.13 Many landmark due process judgements have been given by Supreme Court but the definition of due process still remains incomplete and that was the observation made by Justice Felix Frankfurter in Wolf v. Colorado in the following words:

"Due process of law.....conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the Courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal varieties. It is of the very nature of a free society
to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.\(^\text{(6)}\)

2.14 Justice Frankfurter gave the above judgement in the year 1949 and since then the U.S. Supreme Court has expanded the meaning of due process to a considerable extent and now it virtually encompasses all specific guarantees of Bill of Rights.\(^\text{(7)}\)

2.15 The due process clause of the American Constitution has been working as an instrument of check and balance. This check sometimes has been strictly construed by the American Supreme Court and sometimes it is very liberally construed. The effect of this interpretation reflects no consistency or certainty as to the norms of due process under the American Constitution. The field is wide open before the Supreme Court of America to construe it strictly or to construe it liberally and ultimately it is the Court, which has to put the limitations on its own jurisdiction.

LEGISLATIVE HISTORY OF ARTICLE 21:

2.16 Draft Article 15 (now Article 21) as originally passed by the Constituent Assembly provided that:

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

The Drafting Committee introduced two changes in this Article:

"(i) the addition of the word 'personal' before the word 'liberty', and
(ii) the substitution of the expression 'except according to procedure established by law' for the
2.17 The reason given for the first change was that "otherwise (liberty) might be construed very widely so as to include even the freedoms already dealt with in Article 13" (now Article 19). The reason given for the second change was that "the (substituted) expression was more specific. They followed the Japanese Constitution." The reason given for the first change was clearly right, for Draft Article 13 (now Article 19) conferred certain freedoms only on citizens, whereas Article 15 (now Article 21) applied to citizens and non-citizens alike, and it was wise to foreclose the argument that the word "liberty" included the freedoms which had been denied to non-citizens by Draft Article 13.

2.18 According to H.M. Seervai, the reason given for the second change may be literally correct but was not candid. Both substantive and procedural "due process" were well established in the United States, and though the concept of "due process" was vague and flexible or (imprecise) it was used to enforce certain standards to which according to majority of Judges of the U.S. Supreme Court substantive and procedural laws had to conform. However, abuse of substantive due process by the U.S. Supreme Court produced second thoughts and 'due process' was replaced by 'procedure established by law.'

2.19 It is interesting to note that when the Constitution was in the process of being framed, B.N. Rau, who was the Constitutional Adviser had gone to the United States in order to have discussions with leading jurists in that country and he was advised by Justice Frankfurter of the Supreme Court of the United States not to include the due process clause in the Indian Constitution.
The Constitution of the United States contains the due process clause and it is by virtue of this clause that the U.S. Supreme Court is empowered to question and adjudicate upon procedural as well as substantive reasonableness of Congressional and State legislation. The due process clause has vested the U.S. Supreme Court with a vast power of judicial review and that is why it has come in for criticism at the hands of Judges and jurists who believe in judicial restraint as against judicial activism. (11)

2.20 On the question whether the expression 'due process of law' should be resorted in place of the words 'procedure established by law' there was a sharp difference of opinion in the Constituent Assembly amongst the members of the Drafting Committee. Shri K.M. Munshi expressed the view in favour of 'due process' as under:

".....if the clause stood as it is, it would have no meaning at all, because if the procedure prescribed by law were not followed by the Courts, there would be the appeal Court in every case, to set things right. This clause would only have meaning if the Courts could examine not merely that the conviction has been according to law or according to proper procedure, but that the procedure as well as the substantive part of the law are such as would be proper and justified by the circumstances of the case. We want to set up a democracy and the essence of democracy is that a balance must be struck between individual liberty on the one hand and social control on the other. We must not forget that the majority in the legislature is more anxious to establish social control than to serve individual liberty..... the amendment would enable the Courts to examine not only the procedural part.....but also the substantive law. When a law had been passed which entitled Government to take away the personal liberty of
an individual, the Court will consider whether the
claw which has been passed is such as is required
by the exigencies of the case and, therefore,.....the
balance will be struck between individual liberty
and social control."(12)

2.21 The views of Shri K.M. Munshi have been further substantiated by
Pandit Thakur Das Bhargava in the following words:

".....This is only victory for the Judiciary over
the autocracy of the legislature. In fact we want
two bulwarks for our liberties. One is the Legislature
and the other is the Judiciary. But even if the legis-
lature is carried away by party spirit and is sometimes
panicky the judiciary will save us from the tyranny
of the legislatures and the executive.

In a Democracy, the Courts are the ultimate
refuge of the citizens for the vindication of their
rights and liberties. I want the judiciary to be
exalted to its right position of palladium of justice
and the people to be secure in their rights and liberties
under its protecting wings."(13)

2.22 On the other side it was Shri Alladi Krishnaswami, who opposed
the inclusion of due process clause. He pointed out that the United States
Supreme Court had in the past, used such a clause to interfere with social
legislation and that its inclusion in the Indian Constitution would be dangerous.
He observed:

"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 modes
of proceeding applicable to the case. Possibly
if the expression has been understood according
to its original content and according to the interpretation of English Judges, there might be no difficulty at all. The expression, however, as developed in the United States Supreme Court, has acquired a different meaning and import in a long course of American judicial decisions. Today, according to Professor Willis, the expression means what the Supreme Court says what it means in any particular case. It is just possible, some ardent democrats may have a greater faith in the judiciary then in the conscious will expressed through the enactment of a popular legislature. Three gentlemen or five gentlemen, sitting as a Court of law, and stating what exactly is due process according to them in any particular case, after listening to long discourses and arguments of briefed counsel on either side, may appeal to certain democrats more than the expressed wishes of the legislature or the action of an executive responsible to the legislature. In the development of the doctrine of 'due process', the United States Supreme Court has not adopted a consistent view at all and the decisions are conflicting. One decision very often reversed another decision.....This clause may serve as a great handicap to all social legislation for the ultimate relationship between employer and labour, for the protection of children, for the protection of women.....One thing also will have to be taken into account, viz. that the security of the State is far from being so secure as we are imagining at present."(14)

2.23 It was Dr. Babasaheb Ambedkar who summed up the two views and left it to the House to decide in any way it likes. (15) The Constituent Assembly adopted the clause as drafted by the Drafting Committee rejecting 'due process'.

2.24 Although the Draft Constitution contained Article 15, it did not
in the first instance, contain any Article corresponding to Article 22 of the Constitution. When the proposal to delete "due process" suggested by the drafting Committee was debated in the Constituent Assembly on 6th December 1948 (16) and then on 13th December, 1948 (17), there was strong opposition to the proposal, nevertheless the Drafting Committee's suggestion was accepted by the Constituent Assembly. However the Assembly's vote did not finally settle the matter, for dissatisfaction with the deletion of "due process" continued inside and outside the Assembly. On 15th September 1949 Dr. Ambedkar moved that a new Article 15 A (which was amended corresponds to Article 22 of our Constitution) be adopted. Article 15 A, with certain amendments, was passed as it now stands in Article 22 of our Constitution.

2.25 In Gopalan's case (18) the attention of the Supreme Court was drawn to the legislative history of Article 21 which showed why the expression 'due process of law' was replaced by the expression 'procedure established by law'. However, it is unfortunate that legislative history of Article 22 particularly of clauses (1) and (2), whereby the substance of 'due process' was reintroduced, was not brought to the attention of the Supreme Court. Had this legislative history been brought to the Court's attention, a number of problems which caused the Judges' grave concern in Gopalan's case would have been simplified. The Court would have dealt with two aspects of Article 21, namely, the procedural due process available to every person (not preventively detained) before he was deprived of his life or personal liberty and attenuated procedural safeguards available to a person preventively detained, because Article 22(1) and (2) were expressly excluded in the case of preventive detention.

PROCEDURE ESTABLISHED BY LAW:

2.26 Article 21 of our Constitution lays down that no person shall be
deprived of his life or personal liberty except according to procedure established by law. (19) Two expressions are important in Article 21: (1) life and (2) personal liberty. They are guaranteed and can be affected only by 'procedure established by law'.

2.27 This article is not intended to be constitutional limitation upon the power of the Legislature. Its object is mainly to serve as a restraint upon the Executive so that it may not proceed against life or personal liberty of an individual except under the authority of some law and in conformity with the procedure laid down therein.

2.28 Before a person is deprived of his life or personal liberty the procedure established by law must be strictly followed and must not be departed from, to the detriment of the person affected. (20) The words 'except according to procedure established by law' suggest that Article 21 does not apply where a person is detained by a private individual and not by or under the authority of the State. (21) By the use of words 'established by law' our Constitution accepts the English principle of the supremacy of law, in preference to American doctrine of judicial review of legislation, so far as personal liberty is concerned. Therefore, liberty according to this view is a liberty which is confined and controlled by law. Law in this expression means State made law or enacted law and not the general principles like that of natural justice. The procedure established by law thus means procedure prescribed by Legislature.

2.29 The word 'life' in Article 21 can be interpreted in a widest possible manner. It does not simply mean physical life, but also covers other expressions of life. It is something more than a mere biological existence of a human body. The life also includes personality and whatever is reasonably required
to give expression to life, its fulfilment and its achievements. The expression 'personal liberty' does not mean merely the liberty of the body, i.e. freedom from physical restraint or freedom from confinement within the bounds of the prison. It does not only mean freedom from arrest and detention from false imprisonment or wrongful confinement but means much more than that. Therefore, personal liberty is a compendious term to include within it all the variety of rights of a person, which go to make up the personal liberty of man. The Supreme Court of India has given a very wide interpretation of the expression 'life and personal liberty'. To illustrate this further it would be proper to refer to some of the case laws.

2.30 In Kharak Singh's case (22) our Supreme Court held that the personal liberty which is safeguarded by Article 21 is the freedom from a tangible physical restraint and did not, therefore, include freedom from invasion of privacy or protection of a person's personal sensitiveness. Justice Subba Rao (minority) refused to abide by the Gopalan thesis that personal liberty was the antithesis of merely 'physical restraint or coercion'.

2.31 Even the majority implicitly rejected this narrow interpretation of Gopalan in so far as it came to hold that a domiciliary visit, involving an intrusion into a man's home, constituted an invasion of 'personal liberty', even though there was no 'physical restraint or coercion or interference with his freedom of locomotion'. Justice Subba Rao also went beyond the majority view and held that even a secret surveillance of a man's movements interfered with the freedom of his movement, because a man could hardly move 'freely' when all his activities were watched and noted. According to him, personal liberty meant not only absence of physical restraint but also of psychological restraints.
2.32 In yet another case of Govind v. State of Madhya Pradesh\(^{(23)}\) it was conceded by the Court that expression 'personal liberty' included 'privacy' involving freedom from psychological restraints.

2.33 In Satwant Singh v. A.P.O.\(^{(24)}\) the right to travel abroad was held to be an aspect of 'personal liberty' of an individual. Therefore, a passport for travel cannot be denied to a person except according to procedure established by law.

2.34 In R.M. Malkani v. State of Maharashtra\(^{(25)}\) the Supreme Court held that telephonic conversation of innocent citizens would be protected by Courts against wrongful or high-handed interference by tapping of the conversation by the police under Article 21 signifies the violation of personal liberty.

2.35 In Francis Coralie Mullin's case\(^{(26)}\) the theory propounded by Justice Bhagwati in Maneka Gandhi's case was enlarged. It included the right of a detenu to have interviews with members of his family and friends and it was considered as part and parcel of personal liberty.

2.36 After having dealt with life and liberty, it is now essential to deal the other part of the article, viz. 'procedure established by law.' The expression 'procedure established by law' does not have the same meaning as the expression 'due process of law' as used in the American Constitution and which expression has wider connotation than the expression used in the Indian Constitution.

2.37 The Due process clause was pressed into service for the first time after our Constitution came into force in A.K. Gopalan's case.\(^{(27)}\) It was only
Justice Fazal Ali (in a minority judgement) who tried to read the "due process" concept in Article 21. But the majority led by Kania C.J. held that law in Article 21 is lex and not jus and pleaded that absence of the word due process in Article 21 precluded the Court to go into the reasonableness of the law enacted by a competent legislation. Not only that the learned Judges refused to read Article 19 along with Articles 21 and 22, It was held by the majority that the 'procedure established by law' means procedure prescribed by the law of the State. These words are to be taken to refer to 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.

2.38 According to Justice Patanjali Sastri the process or procedure in this context connotes both the act and manner of proceeding to take away a man's life and personal liberty. The procedure thus established by valid enactment cannot be challenged on the ground of unreasonableness. It has been unequivocally laid down in Gopalan's case that when a person's liberty is restricted or taken away according to the 'procedure established by law', reasonableness of such restriction would be a different question and has no bearing on the right guaranteed by Article 19(1)(d) read with clause (5) of the Article. It was further stated that Article 21 affords no protection against competent legislative action in the field of substantive criminal law, for there is no provision for judicial review on the ground of reasonableness or otherwise of such laws.

2.39 The Supreme Court in Ram chandra Prasad v. State of Bihar(28) followed the meaning of 'law' in Article 21 as given by the majority of the Judges in Gopalan's case. In defending the constitutionality of section 4 of the
of the Prevention of Corruption Act, 1947 the Court stated that the procedure established by law means procedure established by law made by the State, that is to say, by Union Parliament or the Legislatures of the States. Section 4 of the Prevention of Corruption Act has been enacted by the Parliament and, therefore, it must be held that what it lays down is a procedure established by law.

2.40 In K.K. Kochuni's case it was held that where the State seeks to take away a man's property by a law made under Article 31(1), he may contend that the law is procedurally or substantively unreasonable and hence inconsistent with Article 19. The reason is that the 'law' under Article 31(1) must be a 'valid law' and the conditions of the validity of a law are two-fold - (a) Legislative vires or competence and (b) non-contravention of any of the fundamental rights guaranteed by Part III. Therefore, an attempt was made by Justice Subba Rao to agree with the views of Justice Fazal Ali in Gopalan's case.

2.41 In yet another case of Municipal Committee, Amritsar v. State of Punjab an attempt to recognise due process clause was frustrated and where Justice Shah reiterated Gopalan and observed as under:

"The Courts in India have no authority to declare a statute invalid on the ground that it violates the due process clause of law. Under our Constitution the test of due process of law cannot be applied to statutes enacted by Parliament or the State Legislatures."

2.42 The Court's attitude in earlier cases showed a marked change in later years. Although it was unequivocally decided by several decisions
that if the law is valid, it could not be challenged on the ground of unreasonableness, unless it was in conflict with any of the fundamental rights, the Court came to recognise the sanctity of personal liberty and held in Maneka Gandhi's case, that the audi alteram rule could not be wholly excluded where a person's liberty is affected and he must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relation exercise.

2.43 Maneka Gandhi's case\textsuperscript{[32]} and Sunil Batra's case\textsuperscript{[33]} are trend setters and that trend has been maintained by the Supreme Court even in subsequent cases. According to an eminent author:

"The post-Maneka cases witnessed an outburst of due process decisions converting most of Article 21 into a regime of positive rights. Right to life and personal liberty soon came to encompass within it, the right to bail, right against solitary confinement, right to humane treatment in prison, the right to human dignity and even the right to get compensation for undergoing torture. The Court innovated the strategy of what is called public interest litigation or social action litigation enabling the public spirited individuals or groups to move the Court to seek redress for the victimised groups. But Article 21 still remained the embodiment of procedural due process and had not matured as a limitation against legislative action."\textsuperscript{[34]}

2.44 In Sunil Batra's case\textsuperscript{[35]} while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Justice Krishna Iyer said:

".....True our Constitution did not have a 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 is shot down by Articles 14 and 19 and if inflicted with procedural unfairness falls foul of Article 21." (36)

2.45 In the same case Justice Desai observed:

"The word 'law' in the expression 'procedure prescribed by law' in Article 21 has been interpreted to mean in Maneka Gandhi's case that the law must be right, just and fair and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and requirement of Article 21 would not be satisfied." (37)

2.46 In Bachan Singh's case the Court relied on the absence of the American due process clause and the Eighth Amendment for upholding death penalty. Speaking for the majority, Justice Sarkaria held that the Courts were not law makers and thus could not sit over the wisdom of Parliament which alone could decide whether to retain or abolish death penalty. Chief Justice Chandrachud was party to Bachan Singh as well as Sunil Batra. In Bachan Singh's case the Court clarified that if Article 21 was understood in accordance with Maneka Gandhi's case, it will read to say:

"No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by a valid law." (39)

Bachan Singh reaffirmed that all pervasive omnipresence of reasonableness of Article 14 influenced the interpretation of 'procedure' and not of law. (40)

2.47 In Jolly George Varghese Justice Krishna Iyer extended the doctrine
of due process through Article 21 for giving social justice. He observed:

"Equally meaningful is the import of Article 21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and worth of human person enshrined in Article 21, read with Articles 14 and 19 obligate the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence." (42)

And he further observes:

"To be poor, in this land of Daridra Narayan (land of poverty) is no crime and to recover debts by procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of minimal fairness of his wilful failure to pay...." (43)

2.48 In A.K. Roy's case (44) the Chief Justice Chandrachud reaffirmed his view taken in Maneka Gandhi's case that Article 21 did not permit judicial review of reasonableness of substantive portion of the law. It allowed judicial scrutiny of procedural fairness only. He held that "the power to judge the fairness or justness of procedure established by a law for the purpose of Article 21 is one thing, "but" the power to decide upon the justness of the law itself is quite another thing" and "such power springs" from a "due process" provision such as to be found in the Fifth and Fourteenth Amendments of the American Constitution. (45)

2.49 Justice Bhagwati was a party in A.K. Roy's case and after this case Justice Bhagwati had delivered the opinion (minority judgement) in Bachan Singh's case. (46) He had taken a very peculiar view of Article 21 in which he interpreted procedure as including both substantive and procedural due process. He observed:

"The word procedure in Article 21 is wide enough
to cover the entire process by which deprivation is affected and that would include not only adjectival but also substantive part of law. Every facet of the law which deprives a person of his life or personal liberty would, therefore, have to stand the test of reasonableness, fairness and justness in order to be outside the inhibition of Article 21.\(^{(47)}\)

2.50 According to Justice Bhagwati, the substantive and procedural portions of law affecting deprivation are so inseparable that both must stand the test of reasonableness, fairness and justness. He believes that rule of law permits the entire fabric of the Constitution and constitute its basic feature. Rule of law excludes arbitrariness and therefore, law must not be arbitrary or irrational and it must satisfy the test of reason and the democratic form of policy and framers of law are accountable to the people.

2.51 In Mithu's case\(^{(48)}\) the Supreme Court went even further where it struck down section 303 of the Indian Penal Code on the ground that, that section violated not only Article 14, but even Article 21. The Supreme Court observed in Mithu's case that:

"....That these decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the Courts to follow it: That it is for the legislature to provide the punishment and for the Courts to impose it."\(^{(49)}\)

2.52 Explaining the scope of expansion, which Article 21 has undergone by reason of Bank Nationalisation case and Maneka Gandhi's case, the Supreme Court in Mithu's case declared:
"If a law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands the law will be bad as violative of Article 21. A savage sentence is anathema to the civilized jurisprudence of Article 21."(50)

2.53 The Court struck down section 303 of Indian Penal Code as violative of Articles 14 and 21 in so far as the subjective law of sentence in the section is held to be unreasonable and unjust and contrary to the text of Article 14. The possibility of all "unreasonable, unfair and unjust" laws is thus thrown open by the Court superseding the majority opinion in A.K. Roy's case, where the power to judge the reasonableness of the law itself in (contradiction to the power to decide the reasonableness of procedure established by law) was held to be absent in the Indian Constitution.

2.54 In Mithu's case the Supreme Court implied that imposition of death sentence even under section 302 I.P.C. would have been held in Bachan Singh's case invalid and ultra vires of the protection guaranteed by Article 21, if the Parliament had not provided for alternative sentence of life imprisonment and death sentence, but provided for only a mandatory death sentence. A mandatory death sentence would then have been shot down by the civilized jurisprudence of Article 21. Now savagery of a death sentence is more an attribute of substantive law. Justice Chinnappa Reddy, ascribed the whole of his concurrence to Article 21.

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

2.56 In Deena's case the Supreme Court upheld the procedure for executing death sentence by hanging a convict by rope. In the majority opinion written by Chief Justice Chandrachud it observed that two fold consideration has to be kept in mind in the area of sentencing. Substantively, the sentence has to meet the Constitutional prescription contained especially in Articles 14 and 21. Procedurally the method by which the sentence is required by law to be executed has to meet the mandate of Article 21.

2.57 The above observation can be interpreted to mean that the substantive provision in the area of sentencing should be fair, just and reasonable under Article 14 which influenced the interpretation of 'law' under Article 21, whereas the procedural provisions relating to the execution of a sentence should satisfy the requirement of procedural fairness which requires that the execution should not be in a 'cruel, barbarous and degrading manner'. The Court in Deena's case, therefore, upheld the execution of death sentence by hanging by rope, because according to the Court it was not cruel, barbarous and degrading.

2.58 Following Mithu's case the Andhra Pradesh High Court in T. Sareetha v. Venkata Subbiah invalidated section 9 of the Hindu Marriage Act, 1955 which provides matrimonial remedy of restitution of conjugal rights. Mithu's case enabled the Andhra Pradesh High Court to describe the decree of restitution of conjugal rights as a 'savage' and 'barbarous' remedy violating the right to marital privacy implicit in Article 21.

2.59 Similar pronouncements of the Supreme Court in the recent past
have amply demonstrated that by extending the concomitants and contours of Article 21, the highest Court of the land has shown immense judicial creativity in energising the dormant due process jurisprudence in the Indian Constitution. It still remains to be seen whether this view will prevail in the judgements to follow.

**INTER-RELATIONSHIP BETWEEN ARTICLE 14, 19 AND 21:**

2.60 Article 21 of our Constitution is very much in the limelight and its frequent use in Supreme Court cases fully convinces us that it is probably the key organ in the body of our democracy as the central nervous system in the organic human body. If Article 21 represents the nervous system, Article 14 playing the role of heart represents the circulatory system. Article 19 similarly represents the senses with the only difference that whereas human body has five senses, Article 19 has six senses, Article 20 acts as a defence mechanism. Hence Fundamental Right embodied in our Constitution form a composite body in which survival of democracy has become possible.

2.61 In the past the survival of democracy had become dubious on account of the thinking of Supreme Court to treat different Articles of the Fundamental Rights Chapter without any co-relation between them. The question of inter-relationship of Articles first arose in A.K. Gopalan’s case where he as the leader of undivided Communist Party of India was detained under the law of Preventive Detention. The Supreme Court said in this case that Article 22 being a complete code relating to Preventive Detention, the validity of an order of detention must be determined strictly according to the terms and within the four corners of that Article. Article 22 of the Constitution provides that a person can be preventively detained without charge-sheet and trial. Such a detention may deprive an individual of rights such as freedom
to move freely throughout the territory of India guaranteed by Article 19(1)(d). This freedom can be restricted only on two counts - either in the interest of general public or for the protection of any scheduled tribe as provided under Article 19(5). But the Supreme Court ruled that Articles 22 and 19 were exclusive to each other. An act of preventive detention should be judged on the basis of the form and object of the State action and not on the basis of its impact on the various fundamental rights of the detenu.

2.62 Therefore, a law of preventive detention did not have to satisfy the requirements of Articles 19, 14 and 21 so long as the law of preventive detention satisfies the requirements of Article 22, it would be within the ambit of Article 21 and it would not be required to meet the challenge of Article 19. This view proceeded on the assumption that certain articles in the Constitution exclusively deal with specific matters and where the requirements of an article dealing with the particular matter in question are satisfied and there is no infringement of the fundamental rights guaranteed by that article, no recourse can be had to a fundamental right conferred by another article.

2.63 In his famous book, "Liberty in the Modern State", Harold Laski, the greatest political thinker of our times has stated:

"Law must take account of the totality of experience and this can only be known to it as that experience is unfettered in its opportunity of expression".

He has clarified his view by stating;

"No State for instance, could rightly legislate about the hours of labour if only businessmen were free to offer their opinion upon industrial conditions. We could not develop an adequate law of divorce if only those happily married were entitled to express
2.64 For this reason it was not right on the part of the Supreme Court to exclude totality of experience from which each article under the Fundamental Rights Chapter has amenated. This folly, however, was corrected after 1970 when the Supreme Court very rightly recognised the interrelationship of Articles and started deciding the cases from those directions.

2.65 In Bank Nationalisation case Mr. R.C. Cooper, a rich banker in India, complained before the Supreme Court that his rights under Articles 19 and 31 amongst other rights, were being violated by the nationalisation of banks. The test applied in this case was: what were the direct and inevitable consequences of effects of the impugned State action on the fundamental rights of the petitioners.

2.66 Article 19(1)(f) entitled all citizens to acquire, hold and dispose of property. The right could be restricted either in the interest of the general public or for protection of the Scheduled Tribes. Article 31(1) assures that no person would be deprived of property save by authority of law. In addition, Article 31(2) specified that no property would be acquired or requisitioned save for a public purpose and then not without compensation the adequacy or inadequacy of which could not be challenged in a Court of law. The form and object of the State action vis-a-vis bank nationalisation related only to Article 31. But one of the challenges in Cooper's case against bank nationalisation was that it did not fulfil the requirement of Article 19.

2.67 Accepting the argument of the petitioners and rejecting the theory of 'pith and substance' adopted in A.K. Gopalan's case, the Supreme Court
of India said that all the fundamental rights in the Constitution together weaved a pattern of guarantees on the texture of basic human rights. The pith and substance of the State action may deal with a particular fundamental right, but its direct and inevitable effect may be on another fundamental right. In that case the State action would have to meet the challenge of latter fundamental right. The State action of bank nationalisation had to satisfy not only the requirements of Article 31, but also of Article 19.

2.68 In this case Justice Shah delivering the majority judgement observed that it is not the object of the authority making the law imparting the right of a citizen, nor the form of action taken that determines the claim, it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief. If this be the true view, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislatures, nor by the form of action, but by the direct operation upon the individual right.

2.69 On the termination of the proclamation of emergency, the scope of the meaning of the expression 'personal liberty' enshrined in Article 21 and inter-relationship between Articles 14, 19 and 21 fell to be considered by the Supreme Court in Maneka Gandhi's case. In this case Maneka's passport was impounded in public interest by an order of the Government without furnishing any reasons for such an action. Justice Bhagwati expressed the following view:

"The expression 'personal liberty' in Article 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 Article 19....If a law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation ex hypothesi it must also be liable to be tested with reference to Article 14 of the Constitution."

2.70 It was further observed in the same case that it is now well settled by various decisions of the Supreme Court i.e. Cooper's case, Sambhu Nath Sarkar's case, Haradhan Saha's case and Khudiram Das's case that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of personal liberty, and there is consequently no infringement of the fundamental right conferred by Article 21, such law in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that Article.

2.74 From the aforesaid discussions with reference to different case laws one thing is certain that consistency is lacking. Though the concept of 'due process' of law is accepted in some cases, it is doubtful whether same would be the position in future. The trend of decisions given by different Courts of the land so far creates this suspicion. In any event whether it is 'due process' of law or 'procedure established by law' both suffer from inherent defects. In the concept 'procedure established by law' the interpretation relates to the law enacted by the Legislature and Legislature is bound to make laws which encroach upon the liberty of the people and in such a situation even personal liberty could be at stake despite Article 21 being on the statute book. In similar manner a situation may arise even in United States where the concept of 'due process of law' i.e. the 'enacted law' exists.
Therefore, even if Article 21 were to be suffixed with 'due process of law' it should not be 'any' law enacted by the Legislature, but it should be a law which is just, fair and reasonable.

2.72 While interpreting the expression 'procedure established by law' initially the highest Court of the land was not prepared to read 'due process of law' in its place in Article 21. As a matter of fact, the distinction sought to be made between the two concepts was meaningless. Subsequently the word 'procedure' used in Article 21 was interpreted to cover entire process by which deprivation was affected and that would include not only the procedural law, but also the substantive part of the law. It is therefore necessary to read the concept of due process of law in Article 21 and that must include every facet of the law, which deprives the person of his life or personal liberty and that must include the test of reasonableness, fairness and also justness. If this is achieved, life and personal liberty as enshrined in Article 21 would be freely available to the people of our country.

JUDICIAL EVOLUTION OF ARTICLE 21 - MANEKA GANDHI'S CASE - A POINT OF INCEPTION AND A LANDMARK:

2.73 In Maneka Gandhi's case (64) our Supreme Court has taken 'personal liberty' to that altitude that it would not be possible for the Court to waterdown the ratio of that case in subsequent cases. In other words, Maneka has expanded and enriched personal liberty. This has also been corroborated by an eminent author. (65) The author while affirming the above proposition stated thus:

"This judicial endorsement of authoritarianism in 1975 and 1976 and democratic liberalism in 1978 discredits the tenet of mechanical jurisprudence that the judge and the judicial decision are aloof from politics and political struggle and brings
into focus the need to evolve in India also 'political jurisprudence' which regards judges as participants in the political process and the judicial decisions as political events and provides a framework for relating judicial behaviour of the other branches of the government'.

2.74 From the above paragraph it transpires that a great transformation has taken place in the judicial attitude towards protection of personal liberty and that can be attributed to the traumatic experience of the emergency which came to be imposed in between the years 1975 to 1977. But this is not wholly correct. The transformation in judicial attitude can never be attributed solely to the political influence existing at that time. The Judiciary whose functions are to protect the rights of people as guaranteed by the various provisions of the Constitution has to act if such rights are violated irrespective of the political situation that may exist. Therefore, it is not possible for this researcher to agree with the author that a need has arisen to evolve 'political jurisprudence' in India. The Judiciary and politics are two different entities having distinct and different subject matter and jurisdiction and they are independent of each other. This is obvious from the fact that the Judges can never become a part of political process and judicial decision can never be the part of political events. It is in this light that American Supreme Court has evolved the concept of 'political question doctrine' whereby the Courts are refrained from interfering in matters which relate to executive or political branch of the Government. The day judiciary makes an attempt to toe the line of the Government it will be impossible for the Judges to give justice to the people rendering the whole system ineffective. The judiciary is expected to uphold the rights of the people as laid down in the Constitution and it cannot be influenced by the Government in power whosoever they may be.
2.75 In Maneka Gandhi's case an important right i.e. the right of an individual to go abroad, was read in Article 21 as an important aspect of personal liberty. The right to go abroad is not a specifically enumerated fundamental right in our Constitution. However there are some provisions like Article 19(1)(a), 19(1)(d) and Article 21 which have some bearing on the aspect of right to go abroad.\(^{(66)}\)

2.76 The significance of the right to go abroad can be seen from Article 13(2) of the Universal Declaration of Human Rights, which proclaims as under:

"Every one has the right to leave any country including his own and to return to his own country.\(^{(67)}\)"

Therefore, every person has a right to go abroad, but an individual can leave his own country provided he has a valid passport.

2.77 A passport is a document which entitles the holder thereof to enter another country.\(^{(68)}\) The passports were unknown during the First World War. It was only as a result of international conventions and usages that a country had a right to demand the passport from foreigners wishing to enter their territory. A country may refuse entry to a particular person and such a person had no legal right to enter that country. In India prior to the passing of the Passport Act, 1967 the passports were being issued by the Government in exercise of the executive powers keeping in view the foreign relations. Grant of passport at that time was the sole discretion of the Government as no rules were formulated for its regulation. A passport was then essentially a political document issued in the name of the President to the Government or authorities in foreign country requesting them to afford facilities to the holder thereof mostly for safe travel and ensuring assistance and necessary action.
2.78 Gradually various High Courts in the country encroached upon the sole discretion of Government since according to them the denial of the passport was held nothing short of violation of right of personal liberty to move about in and out of country. It was as a consequence of Satwant Singh's case that the enactment of 1967 came to be passed. The views expressed by different High Courts about the right to go abroad are discussed underneath.

2.79 In V.G. Row v. State of Madras the Madras High Court dismissed the petition on the ground that there was no fundamental right vested in the petitioner to passport and the law of the State did not prevent a person from leaving any country on the ground that he did not hold a passport. The refusal of the Government to endorse the petitioner's passport to visit the Soviet Union was challenged on the ground that it violated the fundamental right guaranteed under Articles 14 and 19(1)(d) which guarantee the right of equality and the right to move freely within the territory of India.

2.80 However, in Francis Manjooran v. Government of India, the Kerala High Court held:

"...that the right to travel, except to the extent provided in Article 19(1)(d) of the Constitution is, within the ambit of the expression "personal liberty" as used in Article 21 of the Constitution and that as a passport is essential for the enjoyment of that right, the denial of a passport amounts to a deprivation of that right. It is true that Article 21 permits a deprivation by procedure established by law. The hurdle in the path of the Union of India is the absence of any such procedure."

2.81 In A.G. Kazi v. C.V. Jethwani the Bombay High Court again held that the theory of the royal prerogatives in the granting of passport had not
been imported into India, therefore, that theory was of no avail and could not be pressed into service in considering the granting of the passports.

2.82 In Sadashiva Rao v. Union of India\(^{(73)}\) it was held that the right to go abroad must be held to fall within Article 21....a citizen has a fundamental right....to go abroad.

2.83 In Malik v. The Regional Passport Officer,\(^{(74)}\) the Delhi High Court handed down a contrary decision. Chief Justice Dua in his concurring but separate opinion gave reasons for his view that the right to go abroad and return to India could not be read into the expression 'personal liberty'.

2.84 Justice Kapur who delivered a separate opinion, was inclined to give the expression personal liberty widest scope but according to him 'personal liberty' does not include the right to travel abroad. He observed as under:

"I agreed with the learned counsel for the petitioner that the right of personal liberty guaranteed by Article 21 is not dwarfed into mere freedom from physical restraint of the person of the citizen but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his creator. But it is here that the agreement ends, for I am not prepared to accept the argument that Article 21 also guarantees the right to travel outside the country."\(^{(75)}\)

2.85 Thus from all the above cases we can see that there were conflicting judgements of various High Courts and the matter came up for consideration before the Supreme Court in Satwant Singh's case.\(^{(76)}\) In this case, the petitioner an Indian citizen, was the proprietor of two business concerns. For
the purpose of his business it was necessary for him to travel abroad and for that he was given passport facilities. The said passports were impounded by the Government under certain circumstances. The petitioner alleged that the said action of the Government infringed his fundamental rights under Articles 14 and 21 and he filed a writ petition before the Supreme Court for issuance of a writ directing the respondents to forebear from depriving the petitioner of passport. The respondents contested the petition mainly on the ground that the fundamental right had not been infringed, that the petitioner had contravened the conditions of import licence, and investigations were going on against him in relation to offences under the Export and Import Control Act and that the passport authorities were satisfied that if the petitioner was given a passport he was likely to leave India and would not return to face a trial before a Court and therefore his passports were impounded.

It was also alleged that a passport was a document which was issued at the pleasure of the President in exercise of his political function and was a political document and the refusal to grant passport could not be subjected to judicial review.

2.86 In this case, the petitioner had raised the following questions:

1. The right to travel abroad and to return to India was part of personal liberty guaranteed by Article 21.

2. Refusal of a passport amounted to deprivation of personal liberty since without such a passport one could not leave the country and if he did he could not come back.

3. The deprivation of personal liberty so caused was not in accordance with the procedure established by law as there was no law placing restrictions on the citizens of the country to travel abroad, and
4. The unfettered discretion given to the passport authorities to issue or not to issue a passport to a person offended the equality provision of the Constitution.

2.87 Chief Justice Subba Rao delivered the majority judgement on behalf of himself, Shelat and Vaidialingam, JJ and upheld all the above contentions. (77)

Chief Justice Subba Rao observed as under:

"This decision is a clear authority for the position that "liberty" in our Constitution bears the same comprehensive meaning as given to the expression "liberty" by the 5th and 14th Amendments of the U.S. Constitution and the expression "personal liberty" in Article 21 only excludes the ingredients of liberty enshrined in the Article 19 of the Constitution. In other words, the expression "personal liberty" in Article 21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is not covered by it in as much as it is specially provided in Article 19." (78)

The learned Chief Justice further observed:

"As a result of international convention and usage among nations it is not possible for a person residing in India to visit foreign countries, with a few exceptions, without the possession of passport. The Government of India has issued instructions to shipping and airline companies not to take on board passengers leaving India unless they possess valid passport ...... (Passport) is a necessary requisite for leaving India for travelling abroad. The argument that the Act does not impose the taking of a passport as a condition of exit from India, therefore, it does not interfere with the right of a person to leave India ......... is a rather hypertechnical and ignores the realities of the situation. Apart from the fact that the possession of passport is necessary condition
of travel in the international community the prohibi-
tion against entry impliedly indirectly prevents
the persons from leaving India.....We have, therefore,
no hesitation to hold that an Indian Passport is
factually a necessary condition for travel abroad
and without it no person residing in India can travel
outside India."(79)

He, therefore, concluded that a refusal of a passport without the authority of
a valid law interfered with the fundamental right of personal liberty to travel
abroad. The Chief Justice cited the earlier pronouncements of the Supreme
Court in Gopalan's case and Kharak Singh's case. (80)

2.88 Justice Hidayatullah gave the dissenting opinion joined by Justice
Bachawat, and he pointed out that passport must be treated as falling within
the prerogative domain of foreign affairs and the authorities which granted
or withheld them must possess considerable freedom of action. Before the
Government placed in the hands of a person a document which pledged the
honour of the country, it had to scrutinize the credentials of such persons.
His Lordship, therefore, observed that:

".....There is thus no absolute right that the State
must grant a passport to whomever applies
for it and subject to a question of arbitrariness
or discrimination no one can really be said to possess
a right enforceable at law."(81)

2.89 The learned Judge observed that the American analogy could not
be used to establish that the Indian Constitution gave the right to travel
abroad as a part of the personal liberty of the individual. The Indian position
is different in respect of the scope of "personal liberty" from the American
position because of the existence of certain specified fundamental rights
in Article 19. Since that article expressly conferred the right to move freely
through-out the territory of India, it would be strange to argue that the right to travel abroad was included in another article of the Constitution. The only right which Article 21 could include in addition to the one expressly included in Article 19 was the right to leave the country. Further it was doubtful in the opinion of His Lordship whether the Indian Constitution was competent to confer the right of motion and locomotion in a foreign country. According to him:

"...there is no doubt a fundamental right to equality in the matter of grant of passports but there is no fundamental right to travel abroad or to the grant of passport." (82)

2.90 It is submitted that the majority Justices nowhere said that there was a fundamental right to the grant of a passport. The majority merely held that since travelling abroad was an attribute of personal liberty it could not be restricted except by procedure established by law. Such a law must be constitutionally valid. A law may impose restrictions on travelling abroad through the power of the executive to grant or refuse a passport, and such law will be valid unless, it is discriminatory. That means in so far as the obtaining of a passport is concerned, there is only a fundamental right to equality and no fundamental right to the grant of a passport. The majority and the minority Justices seem to be in agreement in so far as this point is concerned. However, they differed in their assessment of the actual fact situation. The majority felt that the executive's power to grant or refuse a passport was capable of being exercised discriminately whereas the minority Judge felt that in fact there was no discrimination. The petitioner was alleged to have been indulging in passport frauds and hence the Government had decided to withdraw his passport and his freedom to travel abroad, therefore, had been validly restricted. To meet out the effects of this decision, the Passports
Ordinance, 1967 was promulgated which was later replaced by the Passports Act, 1967.

2.91 In Maneka Gandhi's case the provisions of Passport Act, 1967 were challenged. The facts of the Maneka Gandhi's case are as under:

2.92 The petitioner, a member of Indira Gandhi family was informed by the Central Government in July, 1977 that her passport was impounded in 'public interest' under section 10(3)(c) of the Passport Act. In response to her inquiry she was told that the Government had decided in public interest not to furnish the reasons for taking such action. Maneka challenged the validity of the order on the ground that section 10(3)(c) violated Articles 14, 19 and 21 and that order issued thereunder without giving any reasons to her was ultra vires section 10(3)(c).

2.93 The grounds for impounding the passport are contained in sub-clause (a) and (h) of section 10, clause (3) of the Act and which is as under:

Section 10(3)(c) reads:

The passport authority may impound or cause to be impounded or revoke a passport or travel document—
(c) if the passport authority deems it necessary so as to do in the interest of the sovereignty and integrity of India, the security of India, friendly relations with any foreign country, or in the interest of the general public.....

2.94 Section 10(5) requires the authority to furnish on demand the statement of reasons for impounding a passport to the passport holder, unless it was not in the interest of general public.
2.95 Justice Bhagwati cited with approval, leading cases on personal liberty.\(^{(84)}\) He said that in Satwant Singh's case the Court had read the right to passport into personal liberty in Article 21. Therefore to impound the passport of an individual, the executive must act in accordance with the procedure established by law. To emphasize this view he said:

"Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirement? Obviously, the procedure cannot be arbitrary, unfair or unreasonable.\ldots\) We find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21 having regard to the impact of Article 14 on Article 21."\(^{(85)}\)

2.96 Justice Bhagwati examined the Passport Act and found that there is no procedure for impounding the passport and even if some procedure is found in the Act it is unreasonable and arbitrary as it does not provide for giving an opportunity to the holder of the passport to be heard against the order. The Court held that in the absence of any procedure, the principles of natural justice should be followed - audi alteram partem and nemo judex in sua causa. He held that if these requirements are read into Passport Act, the procedure for impounding a passport would be right, just and fair. On the Attorney General's undertaking that the Government would consider the petitioner's representation against the impounding of her passport and give her an opportunity within two weeks after the receipt of her representation the learned Judge held that the challenged order was valid.

2.97 The contribution of Justice Bhagwati in this case can be found out only by seeing how far Article 21 has been freed from the interpretation which was given to personal liberty in Gopalan's case.\(^{(86)}\)
2.98 The construction of 'personal liberty' brings out the substantive rights implicit in it. The construction of the word 'procedure' brings out procedural safeguards fortifying those substantive rights and 'law' identifies the authorities against whom the substantive rights as fortified by those procedural safeguards, are available. This shows that the rights in personal liberty and the procedural safeguards will be available against the legislature and the executive only if law is construed as reasonable law. If law is treated as lex, the rights & safeguards will not be available against the legislature. Therefore to enrich procedure and enlarge personal liberty without treating law as reasonable law will not serve any purpose. In Maneka, it was only Justice Krishna Iyer who treats law as reasonable law. According to Justice Bhagwati Articles 14 and 19 will take care of draconian laws and strengthen Article 21. But here also he converted the direct and immediate effect into direct and inevitable effect. Inevitable is more exacting than immediate. It is not necessary that all encroachment on personal liberty will have a direct and immediate effect on Articles 14 and 19. In such cases Article 21 will have to stand alone.

2.99 Maneka Gandhi's case rejects the theory that each fundamental right is an island complete unto itself. Justice Bhagwati and Justice Krishna Iyer have highlighted the need to keep in view the synthesis of these rights while interpreting each right. This development will not allow a valid encroachment on one fundamental right to sustain an invalid encroachment on other rights so a valid denial of passport does not validate an invalid infringement of freedom of speech or freedom of occupation.

2.100 If Article 21 leaves a legislature free to dispense with "fair play in action" while authorising deprivation of life or liberty it will be a subversion
of a fundamental right, if it is held that Article 21 contemplates deprivation of life and liberty through a "a foul play in action." It was only Justice Krishna Iyer who has interpreted procedure as fair play in action and law as reasonable law. Justice Bhagwati's application of the theory that Central Government cannot abuse its powers specially when the Court is alive and active to correct such abuses is not at all correct. What happened at the time of emergency need not be repeated here.

2.101 Justice Krishna Iyer's contribution in this case is noteworthy. Although he has agreed with Justice Bhagwati's observation, he goes much beyond the interpretation given by him on Article 21. In fact Justice Krishna Iyer has used Maneka Gandhi's case to enrich and enlarge Article 21 in post Maneka cases on personal liberty. According to him:

"Procedural safeguards are the indispensable essence of liberty. In fact the history of procedural safeguards and the right to a hearing has a human right ring. In India, because of poverty and illiteracy the people are unable to protect and defend their rights: Observance of fundamental rights is not regarded as good politics and their transgression as bad politics."(87)

2.102 He further held that if Gopalan on Article 21 remained intact, procedural safeguards, as a result of Article 22, would be available only for deprivation of personal liberty through punitive or preventive detention. Deprivation of other rights forming part of personal liberty and the right to life, more fundamental than any other right and paramount to the happiness, dignity and worth of the individual would not be entitled to any procedural safeguards. He agreed with the dissent of Justice Fazal Ali in Gopalan and held that "procedure in Article 21 means fair and not formal procedure and
2.103 According to Chief Justice Beg, the opportunity to be heard in defence should 'ordinarily' be given before and not after the impounding of passport. He was therefore inclined to quash the orders of the passport authority impounding the passport. Justice Chandrachud differed from Justice Bhagwati and maintained that the compulsions of due process did not form part of Article 21.

2.104 Justice Kailasam in his dissent denied that any fundamental right could have extra-territorial operation. His main contention was that the State could only restrict or enforce a fundamental right within the territory of India. Therefore, there could be no extra-territorial operation of a fundamental right. He held that Cooper was not an authority for the proposition that any legislation trenching on Article 21 should also satisfy the requirements of Articles 14 and 19. He could have evaluated the Court's opinion in Cooper's case, Saha's case and Sarkar's case but he chose to ignore those cases on the ground that they were not authorities on the relationship between Articles 19 and 21.

2.105 He also held that procedure established by law in Article 21 refers to statute law and as the legislature is competent to change the procedure, the procedure as envisaged in the Criminal Procedure Code cannot be insisted upon as the legislature can modify the procedure.

2.106 Thus from all the above discussion, it can be seen that the Court has laid down a number of propositions seeking to make Article 21 more meaningful than what it was before. The propositions can be summarised...
(1) The Court reiterated the proposition that Articles 14, 19 and 21 were not mutually exclusive. This means that a law prescribing a procedure for depriving a person of personal liberty has to meet requirements of Article 19. The procedure established by law in Article 21 must answer the requirement of Article 14 as well.

(2) The expression personal liberty in Article 21 was given an expansive meaning. The Court emphasised that the expression personal liberty was of wide amplitude covering a variety of rights which go to constitute the personal liberty of man, some of these attributes have been raised to the status of distinct fundamental rights and given additional protection under Article 19. This expression should not be read in a narrow and restricted sense so as to exclude those attributes of personal liberty, which were specifically dealt with in Article 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. The right to travel abroad therefore falls under Article 21. Thus no person can be deprived of his right to go abroad except according to procedure established by law.

(3) The Court gave new interpretation to the expression "procedure established by law" in Article 21. To deprive a person of personal liberty Article 21 no longer means that law could prescribe some semblance of procedure however, arbitrary or fanciful. It would now mean that procedure must satisfy certain requisites in the sense of being fair and reasonable. The procedure 'cannot be arbitrary, unfair or unreasonable. The concept of reasonableness can be projected in the procedure contemplated by Article 21. The Court now has the power to judge the fairness and justness of procedure established by law to deprive a person of his personal
2.107 Therefore, it can be said that Maneka's case has brought the fundamental right of personal liberty into prominence. This has been aptly described by an eminent Jurist in his book "The Indian Supreme Court and Politics" in the following words:

"It (the Supreme Court) magnified some inherently ordinary cases into great constitutional controversies. If due process had died three early deaths in the Constituent Assembly, in Gopalan and in Shivkant during emergency - it was to be re-born in Maneka. Once reborn, justices decided on a vigorous breast feeding of the new infant: they did not let a single occasion go by in which the due process interpretation of Article 21 could not be nurtured into a giant infant. Article 21 (bashed around quite a bit by the Executive and Courts in 1975-1977) now began to become the soul of the Constitution."(93)

2.108 From the above para it is clear that Article 21 has acquired an activist magnitude. In a number of post Maneka cases our Supreme Court has given content to the concept of procedural fairness in relation to personal liberty. These cases have been dealt separately in this thesis.

2.109 While this trend is most welcome, it should be mentioned that the Supreme Court should never be instrumental in denying fundamental rights to the individuals which it is enjoined to enforce. But unfortunately this has happened in the landmark Maneka Gandhi case. The Court in this case after elaborately discussing the principles of natural justice and evolving the new concept of personal liberty did not grant her the necessary relief. After having held that the order of impounding the passport was ultravires
the law, the Court should have proceeded further to restore the impounded passport to the petitioner. Instead, the matter was left open knowing fully well as to what would be the outcome thereof.

2.110 In yet another recent case of the Union of India v. Charanjit Kaur, passport of respondent Smt. Charanjit Kaur was impounded by the Regional Passport Officer by an order dated August 18, 1984. The reasons for impounding her passport were not furnished to her 'in view of the grave nature of her activities and serious implications in terms of sovereignty and integrity of India and the security of India' in terms of section 10(5) of the Passport Act. Reported activities detrimental to the security of India, attract the provision of section 10(3)(c) of the Passport Act. No separate show cause notice was issued to the respondent due to seriousness of the case.

2.111 The respondent is the wife of Dr. Jagjit Singh Chauhan, self styled President of so-called National Council of Khalistan Movement who is now resident of U.K. and who was been engaged in sustained anti-India and secessionist activities.

2.112 The order of the Regional Passport Officer was confirmed on appeal by the Chief Passport Officer, but that order was quashed by the Punjab and Haryana High Court on the ground that there was no material before the Passport Officer to impound the passport in public interest. It was also held by the High Court that 'Bhindranwale factor' was long over as Bhindranwale had died on June 6, 1984 and the order of impounding of passport was made on August 18, 1984.

2.113 The High Court gave the opinion that there was no danger from
the activities of Smt. Chauhan and just because she happens to be the wife of Jagjit Singh Chauhan, the order was made. The Union of India preferred the appeal by special leave under Article 136 of the Constitution relying on Maneka Gandhi's case where it was observed:

"In matters such as grant, suspension, impounding or cancellation of passports, the possible dealing of an individual with nationals and authorities of other States have to be considered. The contemplated or possible activities abroad of the individual may have to be taken into account. There may be questions of national safety and welfare which transcend the importance of the individual's inherent right to go where he or she pleases to go......"(95)

2.114 The opinion in this case was delivered by Justice Chinappa Reddy and he has rightly observed that respondent is the wife of leader of Khalistan Movement and this fact can be viewed with other circumstances. Though Bhindranwale had died, the movement initiated had not died. The authorities were justified in suspecting her of being an emissary or a contact person between Dr. Chauhan and the Sikh Militants in India. If the Regional Passport Officer thought that she was likely to indulge in a manner detrimental to the sovereignty and integrity of India and the security of India, it cannot be said that he was acting on no material.

The Court made the following observations:

".....We do not see any justification for treating such a recent event as an incident of the ancient past. We are satisfied that the order of impounding the respondent's passport is based on relevant material and not merely on the sole circumstance that she is the wife of Dr. Jagjit Singh Chauhan. The appeal is allowed, the judgement of the High Court is set aside and the writ petition is dismissed."(96)
2.115 In the above para the Court has justified the action taken by the Passport Officer on the ground that Smt. Chauhan was the main link between Dr. Chauhan and Sikh Militants in India. Any person who tries to endanger the security of India should be dealt with strictly. The sovereignty and integrity of India is of utmost importance than the liberty of an individual person.

2.116 Smt. Charanjit Kaur's case speaks of added dimension of liberty under Article 21 of the Constitution. This added dimension is nothing but the concept of relative liberty under the Indian Constitution. It means that concept of liberty is to be analysed by the Court by taking into consideration the facts and circumstances of each and every case. The facts and circumstances of the case will certainly influence the decision of the Court in providing liberty to the people. In this context two situations can be assumed wherein liberty can be dealt with relatively -

(1) The ordinary concept of liberty wherein the liberty has been violated in the ordinary circumstances,

(2) Liberty has been violated in extra-ordinary circumstances.

2.117 The concept of relativity of liberty has major role to play in extra-ordinary circumstances. The above mentioned case is the best example of the extra-ordinary circumstances wherein the Court has a major role to determine the relativity of liberty and if as a result of this extra-ordinary circumstance, liberty of an individual is curtailed to a considerable extent, the Courts would be justified in doing so.
NOTES. Chapter Two.

5. Harlan’s dissenting opinion on p. 546.
8. The following provisions of the Bill of Rights have been included within the term “due process of law” clause:
   1. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures (Fourth Amendment).
   2. Issuance of a search and/or arrest warrant only upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized (Fourth Amendment).
   3. Indictment by grand jury for capital or otherwise infamous crime (Fifth Amendment).
   4. No double jeopardy (Fifth Amendment).
   5. Immunity against compulsory self-incrimination (Fifth Amendment).
   6. The right to a speedy and public trial, by an impartial jury, in the state and district wherein the crime was committed (Sixth Amendment).
   7. The right to be informed of the nature and cause of the accusation (Sixth Amendment).
   8. The right of the accused to be confronted with adverse and favourable witnesses (Sixth Amendment).
   9. The right for compulsory process to obtain witnesses in the accused’s favour (Sixth Amendment).
   10. Counsel in criminal cases (Sixth Amendment).
   11. Safeguards against excessive bail, excessive fines, cruel and unequal punishments ( Eighth Amendment).
9. Japanese Constitution 1946: Article XXXI: “No one shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.”
11. Please see: Granville Austin - The Indian Constitution - Cornerstone of a Nation at p. 103.
13. Id. at p. 848.
14. Id. at pp. 853-854.
15. Id. at pp. 999-1001.
16. Id. at pp. 842-857.
17. Id. at pp. 999-1001.
19. Please see:

20. See the following cases:
   - Ram Narayan Singh v. Delhi, AIR 1953 SC 272.

   Also see a comment on this case by Raju Ranchandran, 'Article 21 and the Ghost of Shamdasani,' (1987) 1 SCC (Journal Section) 42.


   Also see Meenak Gandhi v. Union of India, AIR 1978 SC 597.


   Also see Supra Note 18.


29. Id. at p. 1103.


   Also see Moneko Gandhi v. Union of India, AIR 1978 SC 597.


34. Supra Note 33.

35. Id. at p. 1690.

36. Id. at p. 1732.


38. Id. at p. 930.

40. Please see:


42. Id. at p. 475.

43. Ibid.

44. A.K. Roy v. Union of India, AIR 1982 SC 710.

45. Id. at p. 726.


47. Id. at p. 1340.


49. Id. at p. 476.

50. Ibid.

51. See Supra Note 38.

52. Deena v. Union of India, AIR 1983 SC 1155.
   Also see: T.V. Vatheeswaran v. State of Tamil Nadu, AIR 1983 SC 361.


54. Please see:
   1. M.S. Sharma, Judicial Creativity and Due Process Clause under the Constitution
of India. Vol. XII 1985 IBR 56.

55. See Supra Note 18.
Also See :
Rom Singh v. Delhi. AIR 1951 SC 270.
In this case the Supreme Court observed as under :
"Although Personal Liberty has a content sufficiently comprehensive to include the freedoms enumerated in Article 19(1), and its deprivation would result in the extinction of those freedoms, the Constitution has treated these civil liberties as distinct from fundamental rights and made separate provisions in Article 19 and Articles 21 and 22 as to the limitations and conditions subject to which alone they could be taken away or abridged....The interpretation of these articles and their co-relation was elaborately dealt with by this Court in Gopolan's case.....It was decided by a majority of 5 to 1 that a law which authorizes deprivation of personal liberty did not fall within the purview of Article 19 and its validity was not to be judged by the criteria indicated in that article, but depended on its compliance with the requirements of Articles 21 and 22....."

56. Harold Laski, Liberty in the Modern State, pp. 81 - 82
57. R.C. Cooper v. Union of India. AIR 1970 SC 564.
Also see : Bennett Coleman & Co. v. Union of India. AIR 1973 SC 106.
58. See Supra Note 32.
59. Id. at p. 622.
60. See Supra Note 57.
64. See Supra Note 58.
A Bench of seven Judges was constituted : C.J. Beg, Justice Chandrachud, Justice Bhagwati Justice Krishna Iyer, Justice Untwalia, Justice Murtaza Fazal Ali and Justice Kailasam.
65. "Maneka has enriched and enlarged 'personal liberty'." This was the observation made by Prof. Mohammed Ghouse based on Maneka v. Union of India (Ibid) in the matter of impounding her passport. XIV ASIL (1978) at pp. 392-393.
Also see :
66. Please see :
4. B. Errobi, Right To Go Abroad : Judicial Treatment In India Vol. 8 JBCI (1981) 183.
68. The history of the passport system has been traced by Chief Justice Menon (of Kerolo High Court) in Francis Manjuran v. Government of India, AIR 1966 Ker. 20.
69. AIR 1954 Mad. 240.
70. See Supra Note 68.
71. Id at p. 24.
    Also see: Jethwoni v. A.G. Kazi. AIR 1966 Bom. 54.
73. (1965) 2 Mys. L.J. 605.
74. AIR 1967 Delhi 1:
    A bench of three Judges was constituted. Justice Khanna and Justice Kapur concurred
    with Chief Justice Dua, although Justice Kapur delivered a separate opinion.
75. Id. at p. 11.
77. Ibid - Chief Justice Subba Rao accepted the view of the Bombay and Mysore High Courts in
    preference to that taken by Delhi High Court.
78. Id. at p. 1844.
79. Id. at p. 1839.
81. Supra Note 76 at p. 1849.
82. Id. at p. 1852.
83. Supra Note 64.
84. Supra Note 80 - Kharak Singh.
     Supra Note 76 - Satwant Singh.
85. Supra Note 64 at p. 622.
86. Supra Note 80 - Gopalan.
87. Supra Note 64 at pp. 658-659.
88. Id. at p. 660.
89. See Supra Note 57.
90. Ibid.
94. AIR 1987 SC 1057.
95. Id. at p. 1058.
96. Id. at p. 1059.

******