CHAPTER IV

RIGHT TO LIFE AND PERSONAL LIBERTY: JUDICIAL INTERPRETATION FROM GOPALAN TO MANEKA

The framers of the Constitution of India has provided under Article 21 that "No person shall be deprived of his life or personal liberty except according to procedure established by law." This Article has found its place along with the Articles 19, 20 and 22 in the heading "Right to Freedom" under the Part III of the Constitution which deals with the Fundamental Rights. The Indian Constitution enjoins the judiciary to interpret the Constitution in the light of the changing situation in such a way that the aims and objectives declared in the Preamble are realized. But it is unfortunate that during the period under consideration in this chapter the environment congenial to liberal interpretation of the right to life and personal liberty did not exist. During this period three emergencies were promulgated. While the first and second emergencies were declared in 1962 and 1971 in the wake of external aggression by China and Pakistan respectively, the third one was imposed in 1975 on the ground of internal disturbances. During the continuance of such emergencies, for the sake of the security of the Country, the freedoms and liberties of the individuals got sacrificed under the scheme of the Constitution. However, the judicial interpretation with respect to the terms "life", "personal liberty" and "procedure established by
law" changed from case to case and time to time. A trend of narrow interpretation of the above terms was set in by the Supreme Court in Gopalan case\textsuperscript{1} which continued more or less till Kharak Singh case\textsuperscript{2}, in which one of the points for consideration was whether right to privacy was a part of personal liberty. From Kharak Singh case onward the judiciary started giving a bit wider interpretation of the term "personal liberty", and as a result not only the right to travel abroad and the right to privacy became part and parcel of the right to personal liberty but a detenu was also recognized to have many varieties of personal liberties even during the period of detention.

But during the period of internal emergency, judicial interpretation of the right to life and personal liberty received a great set back when the Supreme Court, by interpreting Article 21 as the sole repository of the right to life and personal liberty, held that during the emergency when the operation of Article 21 was suspended by the Presidential Order under Article 359 a person had no judicial remedy for violation of his right to life and personal liberty, even against the illegal and \textit{mala fide} action of the State. However, when in 1977 parliamentary election the ruling party got defeated and internal emergency was withdrawn, the political situation changed.

\textsuperscript{1} A.K. Gopalan V. State of Madras, A.I.R. 1950 S.C. 27.  
and the supreme Court took the opportunity to rectify its mistake by giving a very liberal interpretation of the Article 21 in the Maneka Gandhi case.  

Two Dimensional Approach to the Right to Personal Liberty

The scope of the right to personal liberty received two dimensional judicial approach in the Gopalan case, which is the very first case on personal liberty in the Supreme Court of India immediately after the commencement of the Constitution of India. The majority judgement adopted the restricted approach. On the other hand, Justice Fazal Ali, dissenting, gave an expansive interpretation to the concept of personal liberty. In this case Mr. A.K. Gopalan, a communist, was detained under Preventive Detention Act, 1950 and one of the questions with which the Supreme Court was confronted was whether the concept of personal liberty included the freedom of movement under Article 19(1)(d).

The majority opinion was that the right to personal liberty was not so wide as to include within it the freedom of movement throughout the territory of India.

3. The majority judgement was given by Kania, C.J., Patanjali Shastri, Mahajan, B.K. Mukherjea and S.R. Das, JJ.
They were of the view that the concept of right to move freely throughout the territory of India, referred to in Article 19(1)(d) of the Constitution, was entirely different from the concept of right to personal liberty referred to in Article 21 and should not, therefore, be read as controlled by provisions of Article 21. Chief Justice Kania, Justice Patanjali Shastri, Justice Mukherjea and Justice Das were of the opinion that if the concept of personal liberty was interpreted to include the freedom of movement throughout the territory of India, then Article 19(1)(d) would become redundant and they kept both the freedoms in separate compartments.

However, the judges, in the majority opinion, did not follow the same line of approach. Justice Mukherjea adopted a very restricted view. According to him the concept of personal liberty was restricted "to freedom from physical restraint of a person by incarceration or otherwise". This means the learned judge accepted the definition of personal liberty as given by Dicey.

5. ibid. at 37
6. ibid. at 71
7. ibid. at 97
8. ibid. at 111
9. ibid. at 96-97
On the other hand, chief Justice Kania and Justice Das treated the concept as compendious expression. Chief Justice Kania held that personal liberty included not only freedom from bodily restraint, but also those rights which made the human personality. According to him, the right to eat and drink, the right to work, play, swim and many other rights are included in the concept of personal liberty.\textsuperscript{11}

Justice Das observed that personal liberties may be compendiously summed up as the right to do as one pleases within the law.\textsuperscript{12} He used the term "within the law" because "liberty is not unbridled licence".\textsuperscript{13} However, Chief Justice Kania and Justice Das stated that some of these liberties were separately dealt within the Constitution and, therefore, Article 21 contained only those freedoms which were not included under Article 19.

According to Justice Patanjali Shastri, liberty consisted of doing what one desired.\textsuperscript{14} He held the view that in Article 21 the word "liberty" is qualified with the expression "personal" to include those contents of liberty which were not included under Article 19.\textsuperscript{15}

\textsuperscript{12} ibid. at 108
\textsuperscript{13} ibid..
\textsuperscript{14} ibid. at 69
\textsuperscript{15} ibid. at 70-71
Justice Fazal Ali, the lone dissenter, was of the opinion that the addition of the word "personal" did not change the meaning of the concept of "liberty". According to the learned judge the expression "personal liberty," consisted of, inter alia, freedom of movement and locomotion. He appreciated the definition of personal liberty given by Blackstone and Lord Denning and held that one's personal liberty depended upon the extent of his freedom of movement and a person could go to whatsoever place his inclination may direct, without imprisonment or restraint unless by due course of law. He also disagreed with the majority on the point of relation of Article 21 and Article 19 and held that right to movement throughout the territory of India under Article 19(1)(d) was part of the concept of personal liberty under Article 21.

It thus appears that the majority gave a very narrow and restricted view of the expression personal liberty as against the expansive interpretation of Justice Fazal Ali.

16. ibid. at 53-54
17. ibid. at 53
21. ibid. at 48
22. ibid. at 47
According to C.M. Jariwala, one of the reasons of restrictive approach of personal liberty in Gopalan was that the majority judges who were administering justice with the English scale were presumably more concerned about protecting the nascent Indian democracy against any danger from opposition political party of which A.K. Gopalan was one. It is because of this that the tender plant of personal liberty was cordoned off as to allow restricted freedom to the free people of free India.  

It is submitted that, the majority of the judges in Gopalan could not expand the scope of the term personal liberty as that would have amounted to going against the constitutional intent of the constitution makers who by deliberate attempt incorporated the word "personal" before the term "liberty" to narrow down the meaning of the term "liberty". Moreover, there was no perceptible social, political and other changes also different from the ones existing at the time of framing the Article 21 in the Constituent Assembly that warranted a different and wider interpretation of the term "personal liberty". This restricted view was also applied in State of M.P.V. Balde Prasad and Dr. Khare V. State of Delhi when internment and externment aspects of personal liberty were discussed

25. A.I.R., 1950 S.C. 211
under Article 21 in these two cases. The view on personal liberty as held in Gopalan was also reaffirmed in Ram Singh V. State of Delhi. The restricted view on personal liberty delivered in Gopalan started getting liberal interpretation from Kharak Singh case onward where domiciliary visits at night by police was held to be violation of personal liberty.

Right to privacy — a New Dimension of Personal Liberty

The idea of privacy is a natural concomitant of the idea of natural person. A person though the member of the society claims in regard to certain matters total non-interference by other persons and by the State of which he is a citizen.

Though the importance and value of right to privacy is fully recognized in the west, particularly in U.S.A., it has remained somewhat obscured and underdeveloped in India. There has been much difference of opinion over what the concept of privacy embraces. Some define it as sum of all "private rights". Many, however, contemplate of discrete private right to privacy, though they may differ widely in its character and content. So we find innumerable references to it as the right to be

26. A.I.R., 1951 S.C. 270
let alone. Some contemplate it as to be free from unwanted intrusion, to be secreted and secretive, a right to be unknown (incognito), free from unwanted information about oneself in the hands of others. Some consider it as a right to be free from physical or spiritual violation, a right to integrity of one's personality.

Right to Privacy and Police Surveillance

In *Kharak Singh V. State of U.P.* the Supreme Court got the first opportunity to examine if privacy is a part of personal liberty. In this case the petitioner was acquitted of a charge of dacoity but the police was keeping surveillance on him in accordance with the Police Regulations. Rule 236 of the U.P. Police Regulation defined surveillance to include secret picketing, domiciliary visits at night, periodical inquiries into repute, habits, association etc. It was contended that such measures infringed the freedom of movement under Article 19(1)(d) and the right to personal liberty under Article 21.

31. Article 19(1)(d) provides: "All citizens shall have the right to move freely throughout the territory of India."
The majority of the Court held that Regulation 236(b) which provides for domiciliary visits at night was violation of personal liberty because they held that an unauthorized intrusion into the residence of a citizen and knocking at his door at night time disturbing his sleep and ordinary comfort was violation of right to personal liberty. But the court held that the other parts of Regulation 236 which provided for periodical inquires by police authority into repute, habits, associations, income, expenses, occupation, movement and absences from home etc. were not the violation of personal liberty. Because, the majority observed that the above activities were attributes of privacy and privacy was not a guaranteed right under the Indian constitution.

But the minority consisting of Justice Subba Rao and Justice Shah held that entire Regulation 236 was unconstitutional on the ground that it infringed Articles 19(1) and 21 of the Constitution. The minority Court, unlike the majority, took the help of the American Liberty Jurisprudence to expand the frontiers of Indian Liberty Jurisprudence and brought in personal sensitiveness within

32. A.I.R. 1963 S.C. 1295 at 1301
33. ibid. at 1303
34. ibid. at 1303 where Subba Rao, J. cited a recent case Law, Bolling V. Sharpe (1954) 247 U.S. 497 and did not approve the approaches of Dicey and Blackstone.
the concept of personal liberty.\textsuperscript{35} Justice Subba Rao by his creative interpretation further expanded the area of personal liberty and held that right to privacy was an essential ingredient of personal liberty.\textsuperscript{36} According to Justice Subba Rao every democratic country sanctified the right to rest, physical happiness, peace of mind and security and resort with his family in his house and in that light the concept of personal liberty should be defined as a right of an individual to be free from restrictions or encroachments on his person whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures.\textsuperscript{37} In the light of this dynamism, the minority Court applied Article 21 against all the acts of surveillance under Regulation 236.

The "carving" out approach in distinguishing Articles 19(1)(d) and 21 of the majorities in \textit{Gopalan} and \textit{Kharak Singh} cases also was dissented in the instant case by Justice Subba Rao. According to the learned judge "the carving out was not a correct approach as the Fundamental Right to life and liberty have many attributes and some of them are found in Article 19".\textsuperscript{38}

It is submitted that in the present case Justice Subba Rao was so much influenced by the dynamics of the

\begin{itemize}
\item \textsuperscript{35} ibid. at 1305-1306
\item \textsuperscript{36} ibid. at 1306
\item \textsuperscript{37} ibid.
\item \textsuperscript{38} ibid. at 1305
American Liberty Clause\textsuperscript{39} that he tried to bring concepts related to right to "life" within the ambit of "personal liberty".\textsuperscript{40}

It is further submitted that the majority Court in the instant case did not seriously develop the concept of personal liberty and cut out "personal sensitiveness" and "privacy" from the concept of personal liberty.\textsuperscript{40a}

However, twelve years later in Govind V State of M.P.\textsuperscript{41} the Supreme Court gave more expansive interpretation of personal liberty and recognized the right to "privacy" as the part of personal liberty. In this case, the petitioner complained that police were making domiciliary visits by day and night picketing his house, keeping watch on his movements and thus harassing him. In this case Justice Mathew after analysing the American cases\textsuperscript{42} held that the right to privacy cannot be out-rightly excluded from personal liberty, but this right

\begin{itemize}
\item \textsuperscript{39} See Subba Rao, J., supporting Field J's definition of "Life" in Munn V Illinois (1877) 94 U.S. 113, ibid. at 1306.
\item \textsuperscript{40} Post-Maneka case law uses the term "personal liberty" along with "life" while dealing with cases on personal liberty.
\item \textsuperscript{40a} See also C.M. Jariwala, "The Concept of Personal Liberty and Indian Judiciary 1950-81", 17, Ban.L.J., 1981, pp. 102-121.
\item \textsuperscript{41} A.I.R. 1975 S.C. 1378
\item \textsuperscript{42} See Munn V. Illinois, (1877) 94 U.S. 113; Wolf V. Colorado (1948) 338 U.S. 25; Griswold V. connecticut (1965) 381 U.S. 479; Olmstead V. U.S. (1927) 277 U.S. 438.
\end{itemize}
to privacy has to go through a process of case by case development. He held that the privacy-dignity claims deserve to be examined with care as the framers of the Constitution were opposed to "Police Raj" and they wanted to ensure conditions favourable to the pursuit of happiness. He observed that the individual and his personality should be free from official interference except where there exists a reasonable ground for intrusion. But Justice Mathew, in spite of his admissions that the "privacy-dignity" claims must be protected and that the Madhya Pradesh Police Regulations were "verging perilously near unconstitutionality" did not strike them down but he read the Regulations in such a manner as to save them from unconstitutionality.

It is submitted that the impugned Regulations which interfered with the privacy rights of the individuals should have been struck down as unconstitutional and should not have been left for the State to revise them.

Mohammad Ghouse analysing the judgement of Justice Mathew has held that unless the Fundamental Rights are

43. A.I.R. 1975 S.C. 1378 at 1385
44. ibid. at 1385
45. ibid. at 1384
46. ibid. at 1385
47. ibid. at 1384
48. ibid. at 1386
49. ibid.
interpreted in evolutive sense, the Constitution may, in course of time, degenerate into "a painted stick planted in the ground that neither strikes roots nor bears fruits".  

S**earches and Seizures Versus Right to Privacy**

The exercise of power of search and seizure by the State authority seriously invades the affected person's right to privacy, reputation, freedom etc.

It is unfortunate that though the right to life and personal liberty is the most important Fundamental Right guaranteed under the Indian Constitution, yet the protection of a person and his dwelling from unreasonable searches and seizures without warrants neither provoked much discussion in the Constituent Assembly nor did it find a place among the Fundamental Rights. The only constitutional safeguard is that, there should be a procedure established by law, and the State cannot interfere into this right without a law. Thus the Constitution makers gave the legislature wide powers to control the right to privacy of an individual in his residence or business premises. That is why it has been said that the constitutional protection available to this right of privacy is rather weak.  

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In Board of Revenue, Madras V. R.S. Jhavar the Supreme Court held that the power of search and seizure can be exercised by an administrative authority only when it is conferred on it by a statute. The stipulations made by the statutes in question regulating the power of search and seizure must be observed by the authority concerned, otherwise search and seizure will be declared illegal and nothing recovered at such a search can be made use of as evidence against the individual concerned.

In Harikishndas Gulbdas and Sons V. State of Mysore it was held by the Mysore High Court that when a search was committed in an illegal manner the assessee was entitled to return of all seized documents and books including any copies and notes made by the department from these materials. This decision thus amounts to saying that the department cannot make use of such illegally seized material. The Madras High Court, however, took a contrary view in S. Natarajan V. Commercial Tax Officer. The judgement of the Madras High Court does not seem to be in line with the Supreme Court judgment in Jhavar's case. Commenting on Jhavar's case the Madras High Court pointed out: "But the learned judge did not say that they should be returned without such material being used for the

52. A.I.R. 1968 S.C. 59
53. (1971) 27 S.T.C. 434
54. (1971) 28 S.T.C. 319
55. A.I.R. 1969 S.C. 59
purposes of assessment proceedings." It is submitted that the view of Madras High Court is not convincing and also not based on sound reasoning. The view of Mysore High Court is favourable to protection of privacy right and S.N. Jain also agrees with the Mysore High Court's interpretation. It is to be noted that in post-Maneka period the procedures through which the searches and seizures are made should also be fair, just and reasonable.

Interception of Communications and Right to Privacy

Interception of telephonic communication or wire tapping also poses a serious danger to the right to privacy. The U.S.A. Supreme Court in several cases held that evidence obtained by such interception was inadmissible. The Indian Supreme Court has in several cases accepted the evidence taken with the help of mechanical

57. See for details Alan F. Westin, Privacy and Freedom, 1967;
devices, more particularly tape recorder. In Yusuf Ali Ismail Nagree V. State of Maharashtra\textsuperscript{60} the Court was faced with the question whether tapping of the appellant's conversation without his knowledge offended his right under Article 21. In this case the police inspector tapped the conversation between Nagree and Sheikh, a municipal clerk, whom Nagree wanted to bribe. Nagree had no knowledge of this. Nagree challenged the admissibility of such evidence. The Court evolved two directions for guidance in admitting such evidence. First, the Court will find out whether it is genuine and free from tampering or mutilations. Secondly, the Court may also secure scrupulous conduct and behaviour on behalf of the police. The reason is that the police officer is more likely to behave properly if improperly obtained evidence is to be viewed with care and caution by the judge. In every case the position of the accused, the nature of investigation and the gravity of the offence must be judged in the light of material facts and the surrounding circumstances.

The Court also rejected the appellants's argument that his right to privacy was violated. It said Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephonic conversation of an "innocent citizen" would be protected by courts against wrongful or high-handed interference by

\textsuperscript{60} A.I.R. 1968 S.C. 147.
tapping the conversation. The protection is not for a "guilty citizen" against the efforts of police to vindicate the law and prevent corruption in public servants. It must not be understood that the courts would tolerate safeguards for the protection of the citizen to be imperilled, by permitting the police to proceed by unlawful or irregular methods. In the present case, no unlawful or irregular method was adopted in obtaining the tape-recording of conversation.

In *Rama Reddy V.V.V. Giri* the Court held that the tape recorded conversation is admissible provided, first, the conversation is relevant to the matter in issue; secondly, there is identification of voice; thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape recorder.

A contemporaneous tape record of relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is also comparable to a photograph of a relevant incident. The taped conversation is, therefore, a relevant fact and is admissible under Section 7 of the Evidence Act.

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61. (1971) I.S.C.R. 399
In Megraj Patodia V. R.K. Birla\textsuperscript{62} the Supreme Court clearly stated that a document which was procured by improper or even illegal means could not bar its admissibility provided its relevance and genuineness were proved. Mr. Justice Ray reiterated this opinion in R.M. Malkani V. State of Maharashtra.\textsuperscript{63}

It is submitted that though the judiciary is attempting to read right to privacy in Article 21 so as to widen the concept of personal liberty, in the cases related to interception of communications, the courts have been more tilted towards the interest of the security of the State than the privacy rights of affected person.

**Right to Travel Abroad — A Component of Right to Personal Liberty**

Towards the end of the first emergency, which was promulgated in 1962 at the time of Chinese aggression, some of the High Courts were required to decide whether a right to travel abroad was included in the concept of personal liberty. The Full Bench of Bombay,\textsuperscript{64} Kerala\textsuperscript{65} and the Mysore High Courts\textsuperscript{66} expanded the frontiers of

\begin{itemize}
\item \textsuperscript{62} A.I.R. 1971 S.C. 1295
\item \textsuperscript{63} A.I.R. 1973 S.C. 157
\item \textsuperscript{64} A.G. Kazi V. C.V. Jethwani, A.I.R. 1967 Bom. 235(F.B.); Choithram V. A.G. Kazi, A.I.R. 1966 Bom. 54.
\item \textsuperscript{65} Francis V. Govt. of India, A.I.R. 1966 Ker 20(F.B.)
\item \textsuperscript{66} Dr.S.S.S. Rao V. Union of India, 1965(2) Mys. L.J. 605
\end{itemize}
personal liberty to include the right to travel abroad as well. The High Courts heavily relied on the liberal view of personal liberty in Gopalan and Kharak Singh cases and on the English, American and International personal liberty jurisprudence as well. The High Courts took the stand that to stop a person from going out or from entering into the Country is to impose a physical restraint on his person and it would attract the personal liberty clause. The High Courts declared that an unauthorized refusal of passport would be violative of Article 21. The High Courts treated "personal liberty" in Article 21 to include "residue" of personal freedom.

Chief Justice Tambe of Bombay High Court defined "personal liberty" to include "a full range of conduct which an individual is free to pursue within law, for instance, eat and drink what he likes, mix with people whom he likes, read what he likes, sleep when and as long as he likes, say what he likes, travel wherever he likes, go wherever he likes, follow profession, vocation or business he likes".

The Full Bench of the Delhi High Court took a different stand. The Court had the problem whether "non-

67. ibid. at 28
68. ibid. at 240 per Tambe, C.J. and ibid. at 240 per Menon, C.J. and ibid. at 29 per Raman Nayarm J.
69. A.I.R. 1967 Bom. 235(F.B.) 240
citizen" was also included in "person" under Article 21, because, if the "non citizens" or "aliens" are included in the word "person" they, though not guaranteed even free movement throughout the territory of India, would have the Fundamental Right of going out of the Country and coming into the Country, and such interpretation, according to Dua, Acting C.J., would be against interest of national security. And in the light of above reasoning the learned Acting Chief Justice refused to accept the contention that personal liberty guaranteed by Article 21 is intended to extend to the liberty of going out of India and coming back. It is submitted that a mere fact that a non citizen could also claim protection of the said right or allowing such person would be against the interest of national security could not be considered as powerful reasonings so as to restrict the scope of the multi-dimensional concept.

The judicial dichotomy of the right to get passport was brought to the Supreme Court for the first time in Satwant Singh's case where the petitioner, a citizen of India having import-export business, had to go abroad in connection with his business, but the Government

71. ibid. at 6
72. See Anwar V. State of J.K., A.I.R. 1971 S.C. 337. where the Supreme Court has allowed even "non citizen" to claim protection of article 21.
withdrew his passport facilities. The petitioner challenged the action under, *inter alia*, Article 21. Chief Justice Subba Rao in majority with Shelat and Vaidialingam, JJ. tried to raise the Indian personal liberty jurisprudence to the height of the American clause when he opined, "Liberty in our Constitution bears the same comprehensive meaning as is given to the expression liberty by the 5th and 14th Amendment to the U.S. Constitution." But the learned Chief Justice could not bring it on par with the American liberty clause because "personal liberty" according to him did not include the ingredients of "liberty" enshrined in Article 19 of the Constitution. And thus, according to the majority, the right to travel abroad was covered by the expression "personal liberty". But Hidayatullah, J. with whom Shah, J. also joined forming minority, was of the opinion that a passport was a political document over which the Government had ownership and as such no Fundamental Right to travel abroad could be claimed. The learned judge refused to take support from the American developments because according to him a claim of such a right must be established strictly on the terms of our own fundamental law. The majority of the Court in the present case affirmed the minority view in *Kharak Singh Case*.  

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74. ibid. at 1844  
75. ibid.  
76. ibid. at 1849-1850  
77. A.I.R. 1963 S.C. 1295
After eleven years of Satwant Singh case the controversy whether the right to travel abroad formed a part of general right to personal liberty came up in post-internal emergency period before the seven judges bench of the Supreme Court in Maneka Gandhi case. The Court unanimously held that the right to travel abroad was included in the concept of personal liberty.

Justice Bhagwati, while interlinking Articles 21 and 19(1) defined personal liberty to cover "a variety of rights and some of which were raised to the status of distinct Fundamental Rights and were given additional protection under Article 19(1)". The learned judge, while giving the above definition suggested judicial activism in this field. He opined that 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.

Chief Justice Beg went to the extent that Article 21 comprised Blackstonian dual concept of "personal security" and "personal liberty". Justice Krishna Iyer also expressed the same opinion.

78. A.I.R. 1967 S.C. 1836
79. A.I.R. 1978 S.C. 597
80. ibid. at 622
81. ibid.
82. ibid. at 608
83. ibid. at 657
It is submitted that the above views put the concept of personal liberty in a position advocated by Justice Fazal Ali in Gopalan case. However, the zeal with which the Court widened the scope of personal liberty was not put into operation in this case. In this case, though the Court was convinced that there was a violation of the petitioner's right to personal liberty, yet, in the light of the assurance from the Government that the petitioner would be given a right of hearing, the majority did not interfere with the impugned order. It is submitted that once an action attracted unconstitutionality under Part III of the Constitution, Article 13(2) imposed a mandatory duty on the Court to quash such action.

Detenu and His Right to Personal Liberty

We find that the judiciary widened further the concept of personal liberty when the Supreme Court in the State of Maharashtra v. Prabhakar Pandurang Sanzgiri held that the right to write a book and eventually get it published by a detenu was the part of his right to personal liberty. In this case the Bombay High Court held that the civil rights and liberties were in no way curbed by the order of detention and that the detenu had the right to carry on his activities within the conditions governing his detention. It was held that there were no

84. A.I.R. 1950 S.C. 27
85. A.I.R. 1966 S.C. 424
rules prohibiting a detenu from sending a book out side the prison in order to get it published. So, the High Court had directed the Government to allow the manuscript book to be sent by the detenu to his wife for its eventual publication.86 When the case came to the Supreme Court it was argued on behalf of the State that when a person was detained, he would loose his freedom and he could exercise only such rights and privileges which were conferred on him by the order of detention. In this argument the support was drawn from the observatin of Justice Das in Gopalan case where he held that if a citizen had lost the freedom of his person due to lawful detention, he could not claim the rights under Article 19 of the Constitution, because the rights enshrined in the said Article were only the attributes of a free man.87 The Supreme Court neither accepted the argument that the rules under Bombay Conditions of Detention Order, 1951, which laid down conditions regulating the restrictions on the liberty of a detenu, conferred only some privileges on the detenu nor was convinced by the argument on behalf of the State, because if that argument was accepted, it would mean that the detenu could be starved to death if there was no condition providing for giving food to the detenu. The Court held that the conditions regulating the restrictions on the liberty of a detenu were not the privileges con-

86. ibid. at 425-426
87. ibid. at 426
ferred on him, but were the conditions subject to which his liberty could be restricted. The Court held that as the Bombay Conditions of Detention Order, 1951 did not authorize the authority to impose ban on writing a book or sending it for publication, the Maharashtra Government violated the detenu's right to personal liberty.

It is submitted that the Court rightly rejected the restricted view on personal liberty given by Justice Das in Gopalan case, as the Courts should follow a liberal attitude towards the right to personal liberty unless there are compelling reasons otherwise. The detenu by writing a book during his detention was exercising his intellectual right under personal liberty. He was not anyway endangering the security of the State by writing a book on science entitled "Inside the Atom".

However, it is unfortunate that the Andhra Pradesh High Court in P. Sagar V. State of A.P. missed the opportunity to hold that right to education and intellectual freedom are part of personal liberty. It is submitted that if attention of the Court would have been directed to the verdict of the Supreme Court in Prabhakar's case, the verdict would have been different.

88. ibid. at 428
89. ibid.
90. A.I.R. 1968 A.P. 165
91. A.I.R. 1966 S.C. 424
Personal Liberty and Taking of Blood from Human Body

In the State of Maharashtra V. Sheshappa the question before the Bombay High Court was whether taking of blood from the human body for ascertaining a case of intoxication affected the right to personal liberty. In this case, the accused who was charged under the Bombay Prohibition Act, offered resistance to the medical officer before whom he was produced and he refused to allow the medical officer to collect his blood on one of the grounds that it violated his personal liberty guaranteed under Article 21. The High Court examined the validity of the above provision under the personal liberty clause. The Court following the American case law held that the right to personal liberty included the right not to allow taking of a sample of blood. But since in the present case the taking of sample of blood was in accordance with the provision of Article 21, it was held not to be bad.

Right to Life, Livelihood and Status of Life

The right to life is the most fundamental of all Fundamental Rights, because without life one cannot exercise the other Fundamental Rights. But unfortunately during the period from Gopalan to Meneka the term "life" has not received much judicial attention compared to the expression "personal liberty" and the phrase "procedure

92. A.I.R. 1964 Bombay 253
93. Breithaupt V. Abram (1957) 352 U.S. 432
established by law" under Article 21.

The term "life" which under Section 45 of Indian Penal Code, 1860 is defined to be life of a human being, has not been interpreted by the Indian judiciary in the initial stage in broader sense to include different components of the concept of life. Justice Patanjali Shastri simply observed in Gopalan's case that the right to life, though the most fundamental of all, is also one of the most difficult to define and its protection generally takes the form of a declaration that no person shall be deprived of it save by process of law or by authority of law. He did not proceed further to elaborate the term "life".

However, Justice Ayyangar in Kharak Singh case widened the concept of life to some extent where it was pointed out by him that the right to life under Article 21 did not merely confer the right to the continuance of a person's animal existence but a right to possession of each of his organ. He further pointed out that the word, "life" in Article 21 bore the same significance as in the 5th and 14th Amendments of the American Constitution. As such the above observation is same as Justice Field of the Supreme Court of U.S.A. who in Munn V. Illinois\(^{94}\) observed as follows: "By the term life as used in Due Process Clause in the American Constitution is meant something

\(^{94}\text{94 U.S. 113 (1877)}\)
more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg or the putting off an eye or the destruction of any other organ of the body through which the soul communicates with the outer world."

Whether the right to livelihood came within the purview of Article 21, was the question before the Supreme Court in *In re Sant Ram's case.* In this case the petitioner, whose name was included in the list of touts, with a view to stop the practice of toutism, in accordance with the Supreme Court Rules, claimed protection, *inter alia* of Article 21. He argued that a restriction on his livelihood affected his right to "life" in Article 21 but the Court unanimously rejected his argument. Sinha, C.J., took the stand that the language of Article 21 cannot be pressed into the aid of the argument that the word "life" in Article 21 includes "livelihood" also. The learned Chief Justice was of the opinion that the right to "livelihood" is included in the freedom enumerated in Article 19, particularly Clause(g) or even in Article 16 in a limited sense. It is submitted that in

95. A.I.R. 1960 S.C. 932
96. Article 19(1)(g) guarantees the freedom to practise any profession, or to carry on any occupation, trade or business
97. Article 16 provides equality of opportunity in matters of public employment.
98. A.I.R. I 1960 S.C. 932 at 935
this case the petitioner missed the opportunity to press in the concept of personal liberty and the Court had to deal only with the right to life. If the concept of personal liberty would have been pressed in and interpreted as in one of the American cases, which included right to livelihood within the term liberty, the Indian Supreme Court certainly would have included the right to livelihood under Article 21 instead of under Article 19. The Supreme Court's reluctance to include the right to livelihood within the concept of life shows that the Court was not prepared to give broader interpretation of the term "life" and it was still in the close grip of the restricted view of Fundamental rights expressed in Gopalan's case. Thus the concept of "life" did not find suitable atmosphere for expansion even after ten years of the commencement of the Constitution of India.

The Court in Sant Ram's case further held that even if the right to livelihood was assumed to have been included within the concept of life, since the deprivation of the toutship was according to procedure established by law, there was no violation of Article 21. This

99. See American Judicial dynamism where the court interpreted "liberty" to include the right to earn livelihood — Allegeyer V. Louisiana (1897) 165 U.S. 578,589.


101. ibid. at 106

102. A.I.R. 1960 S.C. 932 at 935
reasoning of the Court makes it amply clear that Articles 19 and 21 were independent of one another and the law challenged under Article 21 was not required to be tested on the touchstone of Article 19. However, as we know, now it has been established by the Supreme Court in subsequent cases, particularly from R.C. Cooper V. Union of India\textsuperscript{103} onward, that Articles 19 and 21 are not mutually exclusive of each other. They constitute one code of freedom and liberty.

In Kishta Reddy V. Collector of Karim Nagar\textsuperscript{104} the question before the Andhra Pradesh High Court was whether "life" includes within its scope the status of life also. In this case the petitioner was intimated under Section 25(2) of the Andhra Pradesh Panchayat Act, 1964 that he had ceased to be "Sarpanch.". It was contended that the deprivation of "Sarpanchship" violated the petitioner's right under Article 21 which guaranteed not only the animal life but also the status of life. But the Full Bench of the Court negatived this contention and held that right to life did not include matter like individual status enjoyed by a person.

It is submitted that right to livelihood is an important aspect of the right to life. One cannot live a life without livelihood. Under Article 39(a) of the

\textsuperscript{103} A.I.R. 1970 S.C. 564

\textsuperscript{104} A.I.R. 1970 A.P. 180 (F.B.)
Constitution, the State is required to direct its policy towards securing to the citizens the right to an adequate means of livelihood. The State is also expected to make effective provisions for securing the right to work\(^{105}\) and ensure a decent standard of life.\(^{106}\) These provisions are contained in part IV of the Constitution dealing with the Directive Principles of State Policy which are fundamental in the governance of the Country.\(^{107}\) The Directive Principles serve the courts as a code of interpretation. Fundamental Rights should thus be interpreted in the light of the Directive Principles and the latter should, whenever and wherever possible, be read into the former.\(^{108}\) Probably the non-enforceable nature of the Directive Principles led the judiciary to hold during the Pre-Maneka period that right to life does not include within its purview the right to livelihood.

**Judicial Passivism during Internal Emergency and Judicial Activism in Maneka with Respect to Right to Life and Personal Liberty**

During national emergency, the security of the State must have precedence over the rights and liberties of the individuals. When war or external aggression or internal disorder threatens the State, the individuals are

105. See Article 41 of the Constitution.
106. See Article 43 of the Constitution.
107. See Article 37 of the Constitution.
expected to surrender their rights and liberties to the extent it is necessary in the interest of the State, because without preservation of the State as a sovereign body, exercise of rights and liberties will be impossible. But it seems from Article 4(1)\textsuperscript{109} and 4(2)\textsuperscript{110} of the International Covenant on Civil and Political Rights, 1966 that there is limit to which Human Rights and Fundamental Freedoms may be curtailed by the State during emergency as there are some rights and freedoms which are so basic to the existence of an individual that even the consideration of security of the State cannot be permitted to suppress them.

In the case of A.D.M.Jabalpur v. Shivkant Shukla\textsuperscript{111}, popularly known as the Habeas Corpus case, while nine High Courts upheld personal liberty against heavy odds, the Supreme Court displayed little enthusiasm for it. In this case the question before the Court was whether, in view of the Presidential Order dated 27 June, 1975 issued under

\textsuperscript{109} Article 4(1) provides, \textit{inter alia}, that the State may depart from their obligations when an emergency "threatens the life of the nation", but only to the extent strictly required by the exigencies of the situation.

\textsuperscript{110} Article 4(2) provides, \textit{inter alia}, that the Government under its emergency powers, must not arbitrarily deprive an individual of life and subject him to cruel, inhuman or degrading treatment or punishment.

\textsuperscript{111} A.I.R. 1976 S.C. 1207
Article 359(1) of the Constitution, \textsuperscript{112} a petition under Article 226 before a High Court for a writ of \textit{habeas corpus} \textsuperscript{113} to enforce the right to personal liberty of a person detained under the Maintenance of Internal Security Act (MISA), 1971 was maintainable.

Nine High Courts of the Country\textsuperscript{114} held that though the petitioners could not move the court to enforce their Fundamental Rights under Article 21, it was open to them to challenge their detention on the ground that it was \textit{ultra vires}, i.e., by showing that the detention order \textit{ex-facie} was passed by an authority not empowered to pass it or it was in excess of the powers delegated to the authority, or the power had been exercised in breach of the conditions prescribed in that behalf by the Detention Act or the order was not in strict conformity with the provisions of the said Act, despite the Presidential Order dated 27 June, 1975 issued under Article 359(1) of the Constitution. In a way, the High Courts upheld the vital principle that though the emergency barred the enforcement of certain Fundamental Rights, it did not abrogate the rule of law or the obligation of the executive to obey the law.

\textsuperscript{112} Article 359(1) as it stood before the 44th Amendment, empowered the President to suspend the enforcement of any of the Fundamental Rights during emergency. But the 44th Amendment has made Articles 21 and 22 non-suspendable by Presidential Order.

\textsuperscript{113} While Supreme Court can issue this writ under Article 32 the High Courts can issue it under Article 226.

\textsuperscript{114} The High Courts of Allahabad, Andhra Pradesh, Bombay, Delhi, Karnataka, Madras, Madhya Pradesh, Punjab and Haryana.
On the other hand, the majority of the Supreme Court held that in view of the Presidential Order dated 27 June, 1975 under Article 359(1) of the Constitution, no person had any locus standi to move any writ petition under Article 226 before a High Court or any other court for *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order was not under or in compliance with the Act (MISA) or was vitiated by *mala fides*, factual or legal, or was based on extraneous considerations. Broadly speaking, the majority based its decision on the ground that Article 21 was the sole repository of the right to life and personal liberty and after its suspension there was no legal right to personal liberty. These judges also pointed out that during the emergency, the provisions in Chapter XVIII themselves represented the rule of law. As regards the writ of *habeas corpus* they asserted that, since this writ would tantamount to the enforcement of Article 21, it could not be granted so long as the bar created by the Presidential Order continued.

But Justice H.R. Khanna gave his dissenting opinion and held that in spite of the Presidential Order, a detenu could challenge his detention. According to him,

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115. Justice H.R. Khanna gave the dissenting opinion.
117. ibid., pp. 1235, 1241
Article 21 was not the sole repository of the right to life and personal liberty because it was not a gift of the Constitution; rather it existed and was in force before the drafting of the constitution. He observed that even in the absence of Article 21 in the Constitution, the State had no power to deprive a person of his life or personal liberty without the authority of law and that was the essential postulate of the rule of law in every civilized society. In absence of such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning. It is submitted that neither the Constitution nor any other law grants right to life and liberty. The right to life and liberty are birth rights and so they are called inherent in the living beings. Since the nature created this earth and man was born, consciousness about the right to life and liberty has been prevailing in the human beings. The Constitution and different laws are protectors of our right to life and liberty, and not the originators or grantors of these valuable and inalienable rights. If a constitution declares the rights of men with pride, it is not that there have been rights because of the declaration but there have been declarations because of the rights. In this background, the humanistic approach of Justice Khanna seems to be correct when he held that Article 21 was not the sole repository of the right to

118. ibid. p. 1276
life and personal liberty and that right to life and personal liberty were not the gifts of the Constitution. If two interpretations of some provisions can be there—one taking away the priceless right to life and the other guaranteeing its protection, the latter interpretation must be followed keeping in mind the sanctity of the right to life and personal liberty.

It is further submitted that the view of Justice Khanna and the nine High Courts was in accordance with the Supreme Court's decision in _Makhan Singh V. State of Punjab_\(^{119}\) which was a seven member bench Court and, therefore, the Supreme Court bench of five judges in the _Habeas Corpus case_ had no constitutional authority to over-ride the decision of _Makhan Singh's case_.\(^{120}\) The Supreme Court followed the ruling given in the _Makhan Singh's case_ in later cases, such as _Prabhakar Pandurang's case_\(^{121}\) and _Lohia's case_\(^{122}\) and it is significant that the decisions in all these cases were given when the Country was passing through 1962 emergency declared on account of external aggression\(^{123}\) and the problems of national defence and

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119. A.I.R. 1964 S.C. 381
120. See Also Uma Gupta, _Supreme Court and Civil Liberties_, 1988, p.84.  
121. A.I.R. 1966 S.C. 424
122. A.I.R. 1966 S.C. 740
123. During the continuance of the first emergency from 1962 to 1968 we faced Chinese aggression in 1962 and Pakistani aggression in 1965.
public safety were more serious than they were during the period of internal emergency.\textsuperscript{124}

The decision of the majority in the \textit{Habeas Corpus} case was most disturbing when it held that \textit{prima facie mala fide} orders of detention could not be quashed by a writ of \textit{habeas corpus}. Even during the colonial rule, power was not conceded to the executive to order illegal and \textit{mala fide} detentions during emergency.\textsuperscript{125} H.M. Seervai has remarked that the \textit{Habeas Corpus case} is the most glaring instance in which the Supreme Court has suffered most severely from self inflicted wound.\textsuperscript{126} The Court instead of playing the role of judicial self abnegation, could have accepted the interpretation offered by Justice Khanna and the nine High Courts to ensure the rule of law.\textsuperscript{127} The Court after giving historic decision with respect to status and importance of Fundamental Rights in our Constitution in \textit{Golaknath case}\textsuperscript{128} and \textit{Kesavananda Bharati case}\textsuperscript{129} should not have played the negative role by surrendering a citizen with respect to his Fundamental Right to life and liberty to the whims and mercy of the executive. Life and liberty

\begin{thebibliography}{99}
\bibitem{124} See Uma Gupta, \textit{Supreme Court and Civil Liberties}, p. 83.
\bibitem{125} Liversidge \textit{v. Anderson} and another (1942) A.C. 206.
\bibitem{127} See also S.M.N. Raina, \textit{Law, Judges and Justice}, 1979, p. 129.
\bibitem{128} A.I.R. 1967 S.C. 1643
\bibitem{129} A.I.R. 1973 S.C. 1461
\end{thebibliography}
are priceless possessions which cannot be made the play-
thing of executive whims and caprices and that any act of
the executive which has the effect of tampering with life
and liberty must receive disapproval from the judiciary
under all circumstances. It is because of this reason
that the view of the majority in Habeas Corpus case has
failed to receive support from people conscious of their
right to life and liberty.

The Court did not change its attitude even in the
case of Union of India V. Bhanudas where it held that
during the emergency when Articles 21 and 22 were
suspended by Presidential Order under Article 359 the
State could do what it pleased with respect to detenus and
the detenus had no right to complain against illegal or
unreasonable conditions of detention. The Court
accepted the contention of the Union of India that what
was not permitted by detention legislation was prohibited
by it, overlooking its own approach in Prabhakar Pandu-
rang's case in which this plea was rejected by saying
that, if it were to be accepted, it would mean that the
detenus could be starved to death, if there was no
provision for giving food to the detenus.  

130. For a somewhat contrary view see Rajeev Dhavan,
Justice on Trial : The Supreme Court Today,
1980, p. 27.
132. ibid. at 1044
133. A.I.R. 1966 S.C. 424
134. ibid. at 428
From the analysis of the judicial pronouncements made on right to personal liberty, we find that though the judiciary was widening gradually the horizon of the concept of personal liberty from the Kharak Singh case onward, it failed to give protection to the detenus in Habeas Corpus case and Bhanudas case due to lack of judicial activism.

However, soon after the withdrawal of the internal emergency, the Supreme Court realized the serious consequences of its pronouncements in Habeas Corpus case and Bhanudas case, and in Maneka Gandhi case, it tried to give right to life and personal liberty a new status by creative and civil libertarian activism. The Court acquired a clear anti-authoritarian role that helped revive the confidence of people in judicial process and endeavoured to show that it was still the protector of western system of law and justice. As such in Maneka Gandhi case, the withering right to life and personal liberty, which was almost totally mauled in Habeas Corpus case, got rejuvenated. It is because of this judicial activism Prof. Baxi has observed that Maneka vibrates with humanism and single-minded judicial dedication to the


cause of Human Rights in India. The judiciary in the post-Maneka period has interpreted the right to life and personal liberty such a liberal way that new constitutional jurisprudence has come into being.

In Maneka Gandhi the Court not only upheld its earlier decision in Satwant Singh case that the right to travel abroad was a Fundamental Right which could not be arbitrarily denied, but it also laid greater emphasis on the procedural safeguards to be complied with before an individual was deprived of his personal liberty. The concept of "procedural due process", which the framers of the Constitution were not willing to accept, got judicially incorporated in Article 21 in this case. The importance of Maneka decision lies in the fact that it overruled Gopalan in most unequivocal manner and declared in unmistakable terms for the first time that legislative as well as executive acts must meet the requirement of procedural due process before a person is deprived of his life or personal liberty.

Procedural Safeguard to the Right to Life and Personal Liberty

Liberty-Security dichotomy has presented a problem which no democracy in the world has been able to resolve.

it. While the liberty of the citizens in a democracy must be protected, the due care of the security of the State also has to be taken. Because, without security there will be either fear or chaos, and liberty cannot prosper in either of them. The makers of the Indian Constitution also faced the problem in bringing about a solution to the Liberty-Security dichotomy. Initially they were influenced in this regard by Anglo-American model, but ultimately preferred largely the English pattern by accepting the phrase "procedure established by law" in place of "due process of law".

Though it may be said that the makers of the Constitution in preferring the English pattern was influenced by the colonial heritage, but in fact if we study the debates of the Constituent Assembly, we find that it was the need of security of the State that influenced the members to accept the phrase "procedure established by law" in place of "due process of law". Actually, in the Constituent Assembly the debates centered around two issues, viz., security versus liberty and legislative finality versus judicial review, but the Assembly ultimately accorded priority to the security and


legislative finality.\textsuperscript{141}

Under the constitutional scheme of our Constitution the judiciary has been entrusted with the duty to strike a balance between the needs of law enforcement authorities on the one hand and the protection of the citizens from oppression and injustice at the hands of law enforcement machinaries, on the other.\textsuperscript{142} In United States of America there are two models,\textsuperscript{143} viz., "crime control model" and "due process model" that help in administration of criminal justice. The "crime control model" is pro-security and since its main objective is preservation of law and order in the society, it does not give much importance to the means by which its objective is achieved. But on the contrary, the "due process model" is pro-liberty and it gives emphasis on the process or means by which the guilt of the accused is determined and the law and order of the society is secured. Under the "due process model" the laws and procedures, through which the guilt of the accused is determined and the order of the society is secured, have to meet the challenge based on the doctrine of reasonableness. The laws and procedures, which cannot pass through the test of reasonableness in the hands of the judiciary, are declared

\textsuperscript{141} This matter has been already discussed in chapter II of this work.

\textsuperscript{142} P.N. Bhagwati, "Human Rights in Criminal Justice System", \textit{J.I.L.I.}, Vol.27, 1985, p.3.

\textsuperscript{143} Herbert Packer, \textit{The Limits of Criminal Sanctions}, 1968 p.149.
invalid. That is to say under the "due process model" it is not the legislative finality but the judicial review which ultimately prevails. The Supreme Court of India, as we find from the discussion below, was influenced in the pre-Maneka period by the "Crime control model," but from Maneka onward it was been influenced by the "due process model".

Procedural Safeguard to the Right to Life and Personal Liberty in Pre-Maneka Period

In Gopalan's case, while interpreting the phrase "procedure established by law", the majority was very much concerned about the security of the State and favouring the "crime control model" upheld the legislative finality of the procedure through which life or personal liberty is deprived. The Court rejecting the contention of the petitioner held that the word "law" in the phrase "procedure established by law" meant "enacted law" and the word "procedure" meant a procedure enacted by a legislature. It was held in this case that once a law laid down a procedure which satisfied the requirement of Article 22 the Court could not examine the validity of the law howsoever harsh, unreasonable and archaic its provisions may be.

Justice Das went a step further and observed that he was prepared to concede that if a law provided that the cook of the Bishop of Rochester be boiled to death, it would be valid under Article 21.145 While the majority held that "procedure established by law" meant the procedure enacted by the legislature, the minority wanted to apply "due process clause" of the U.S. Constitution. According to this view the procedure should not be arbitrary and oppressive.146 Justice Fazal Ali held that the phrase "procedure established by law" represented the procedural due process of the American Constitution147 and after referring Willis148 and Halsbury149 observed that "law" in Article 21 meant "valid law".150 Thus, the minority tried to bring in judicial review over legislative enactments and the majority preferred to give legislative supremacy with respect to procedural safeguard to the right to life and personal liberty of the individuals. U.N. Gupta seems to favour the minority view when he observed that both judiciary and legislature take part in law making function.151 But Vinod Sethi seems to support the majority

145. A.I.R. 1950 S.C. 27 at 119
146. ibid. at 84
147. ibid. at 57
150. A.I.R. 1950 S.C. 27 at 61
opinion as he held that the word "law" cannot be given any extended meaning comprising the principles of natural justice in view of Article 13 which has specifically defined the term "law". According to P.K. Tripathi, the interpretation of the majority in Gopalan would have been correct if the expression "procedure according to law" had been used in Article 21 in place of "procedure established by law". Justice Chinnappa Reddy holds the view that Gopalan is a victory of the bourgeoisie as it denied right to processual fairness.

It is to be submitted that at the time Gopalan was decided the incidents of mass scale violence relating to partition of the Country, assassination of Mahatma Gandhi and the deliberations of the members in the Constituent Assembly and in its various Committees and Sub-Committees were very fresh in the memory of the majority of the

judges. Moreover, the judges were at that time trained under English legal system which followed the doctrine of supremacy of parliament. All these factors must have influenced the majority in Gopalan to favour the legislative finality of law under the "crime control model" and so they held that the "law" under Article 21 meant enacted law by the legislature which was not subject to judicial scrutiny under the doctrine of reasonableness.

The trend set in Gopalan's case with respect to interpretation of the phrase "procedure established by law" continued till the end of internal emergency. Though the judiciary tried to expand the concept of personal liberty from Kharak Singh onward, the domination of "crime control model" continued to have its sway. In Govind V. State of M.P.156 though the right to privacy was regarded by the majority as a part of personal liberty and widened the ambit of personal liberty, yet the Court was heavily tilted towards the security of the State and by applying the "crime control model" demonstrated that it was not prepared to show mercy to those "determined to lead a life of crime". In R.M. Malkani V. State of Maharashtra157 Chief Justice Ray emphatically held that privacy of telephonic conversation of an innocent citizen would be protected by courts against the wrongful or high-handed interference by tapping of conversation; but the protection was not for

156. A.I.R. 1975 S.C. 1378
157. 1973 I.S.C.C. 471
the "guilty citizen" against the efforts of the police to vindicate the law.\textsuperscript{158} Security of the society made the Court hold in \textit{D.B.M. Patnaik V. State of A.P.}\textsuperscript{159} that prisoners had no right to complain against the electric live wire mechanism fixed on the walls of the prisons to prevent their escape nor had they the right to dictate where the police guards are to be posted. The same attitude towards security and "crime control model" led the Court to hold in \textit{Jagmohan Singh V. State of U.P.}\textsuperscript{160} in favour of constitutionality and retention of death sentence. It is submitted that support to "crime control model" can be inferred from Prof. Baxi's observation also when he said that "the public protest against the action of suspension of certain police officers with reference to Bhagalpur blinding episode should not be taken lightly".\textsuperscript{161}

In this case some police officers being unable to bring forth the judicial conviction against some hard-core and known criminals got frustrated under the prevailing legal system and punished the criminals by blinding them so that they could not commit the crimes again, even if they got acquitted by the courts. The public had sympathy for the police officers as the security of people was affected by the criminals. The judiciary, therefore, should be mindful

\textsuperscript{158} ibid. at 478
\textsuperscript{159} A.I.R. 1974 S.C. 2092
\textsuperscript{160} A.I.R. 1973 S.C. 947
to the difficulties of the law enforcement authorities, while discharging its judicial functions.

It is to be noted that a similar attitude towards "pro-crime model" grew up in U.S.A. when Warren Court delivered some judgement favouring the rights of the criminals. The critics of "due process model" accused that the judges delivering judgements in favour of the liberty of the criminals actually hampered the efforts of law enforcement authorities and made it difficult for the police to secure evidence against the criminals. 162 Thirty six State Chief Justices criticized the "due process model" which gave too many concessions to the accused and highlighted the need for preferring the security value. 163 We find that the Supreme Court of U.S.A. due to criticism from different quarters modified its approach and started giving due weightage to the societal interest in security by favouring "crime control model" from 

\[ \text{Kriby V. Illinois} \] 164 onward.


Procedural Safeguard to the Right to life and Personal Liberty from Maneka onward

The Supreme Court of India about 27 years after its decision in Gopalan gave up the "crime control model" and switched over to "due process model" in Maneka and gave judiciary the final say, in place of the legislature, about the procedural protection of right to life and personal liberty. Maneka, therefore, can be described as "pro-liberty" decision. This case also can be described as the birth place of fair, just and reasonable procedure as the Court held that the "procedure established by law" under Article 21 must be fair, just and reasonable procedure and not fanciful, oppressive or arbitrary procedure.\textsuperscript{165} Chandrachud, J. held that reasonableness of procedure was implicit in Article 21 and having regard to the impact of Articles 14 and 19 on Article 21 he observed that the procedure must satisfy the requirement of Articles 14 and 19 also, otherwise, it would be no procedure at all.\textsuperscript{166} Justice Bhagwati (who delivered the majority view for himself and on behalf of Untawalia and Murtaza Fazal Ali, JJ), Chief Justice Beg and Justice Krishna Iyer in their separate judgements concurred with the above opinion that "procedure" under "procedure established by law" meant "fair, just and reasonable procedure".\textsuperscript{167} But regarding the interpretation of "law" the

\textsuperscript{165} A.I.R. 1978 S.C. 597 at 613 (per Chandrachud, J.)

\textsuperscript{166} ibid. at 622

\textsuperscript{167} ibid. at 624
Court (except Justice Krishna Iyer) kept Gopalan intact. That is, "law" meant "enacted law". But Justice Krishna Iyer treated "law" as "reasonable law". Thus we find that while Justice Krishna Iyer wanted to read both "procedural as well as substantive due process" of the Constitution of U.S.A. in the "procedure established by law" of Article 21 of the Indian Constitution, the other Judges of the majority opinion remained content by introducing the "procedural due process" only in the Article 21.

Though the innovative interpretation in Maneka has, in general, been welcomed, it has faced criticism also. While Prof. Ghouse has expressed dissatisfaction for not including the substantive due process in the "procedure established by law", there are some who could not appreciate for importing the "due process clause" in Article 21 against the unambiguous intention of the framers of the Constitution.

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168. ibid., at 659


170. ibid. at 392


172. About the intention of framers of the Constitution see chapter II of this work.
However, the Court has not been consistent in post-Maneka period about its role of interpretation of "substantive due process" in Article 21. While in cases like Sunil Batra V. Delhi Administration, Francis Coralie Mullin V. Union of India, Ranjan Dwivedi V. Union of India, Olga Tellis V. Bombay Municipal Corporation and Mithu V. State of Punjab, the Court held that "both procedural and substantive due process" are to be read in Article 21, in other cases like Hussainara Khatoon V. State of Bihar, Jolly George Varghese V. Bank of Cochin, M/S Kasturi Lal V. State of J & K, Bachan Singh V. State of Punjab and A.K.Roy V. Union of India, the Court expressed disinclination to include "substantive due process" in Article 21. This inconsistent judicial attitude with respect to substantive due process is really very surprising. Prof. Sathe has expressed surprise when Justice Bhagwati, after supporting the "substantive due process" clause in his dissenting opinion in Bachan Singh case, joined hands with Justice Chandrachud to state that

175. A.I.R. 1983 S.C. 624
176. A.I.R. 1986 S.C. 180
177. A.I.R. 1983 S.C. 473
178. A.I.R. 1979 S.C. 1306
182. A.I.R. 1982 S.C. 710
the Court had no power to judge the justness of preventive detention.\textsuperscript{183} It is to be noted that in United States it took for the Supreme Court three decades, from the time of incorporation of the "due process" clause in the 14th Amendment, to spell out the substantive implications of the clause.\textsuperscript{184} Therefore, it is natural that in India also the judiciary will take some time before it finally holds that the "procedure established by law" includes both substantive and procedural due process.

It is true that the framers of the Constitution had more faith in the legislature than in judiciary and so the "due process" clause was not incorporated in the Article 21. But we have seen during the period of internal emergency in 1975-77 how the legislature and the executive, executive being under the control of the legislature, wiped out deliberately the paramount right to life and personal liberty. The executive had let loose on the society totalitarianism and tyranny, put under detention prominent opposition leaders and ordinary citizens, gagged the press, censored the judgements of the High Courts and the Supreme Court and punished a number of judges for delivering irksome judgments. The Parliament under the huge majority of the ruling party even brought


about 42nd Amendment, whereby not only the scope of judicial review was curtailed but disfigured the Constitution of the founding fathers. That is to say, the legislature also did not live up to the expectation of the makers of the Constitution. Therefore, the Supreme Court in Maneka has thought it proper to interpret Article 21 in such a way that the procedural protection to right to life and personal liberty ultimately remains in the hands of the judiciary instead of with the legislature. One way to say is that the excess of emergency committed by the executive and the legislature became one of the main reasons, if not the sole reason, for the liberal interpretation of the Article 21 in Maneka whereby the procedural due process got incorporated in the "procedure established by Law". The judiciary in Maneka acquired the necessary encouragement and enthusiasm also from the verdict of the parliamentary election of 1977, held immediately before withdrawal of the internal emergency. In this election the National Congress Party, which through the emergency provisions of the Constitution brought in the draconian laws into operation and suppressed the civil rights and liberties of the people of India, got removed from the Centre for the first time in the history of independent India. This defeat of the Congress Party led to withdrawal of the internal emergency and change of the Government in the National Capital of India. The change of the Government brought in total change in the political
atmosphere of the Country, and the totalitarianism and tyranny of the internal emergency era got replaced by the thought and spirit of new libertarianism. Under the changed circumstances of libertarianism each organ of the Government got activated and enthused to undo the excesses committed during the period of the internal emergency.

The newly formed Janata Party Government with a view to undoing the excesses committed during the internal emergency by the previous Government proposed, as per the election promises, to bring about major constitutional amendment, to make right to life and personal liberty unsuspendable during emergency by Presidential Order under Article 359 of the Constitution and to put the scope of judicial review to its pre-42nd Amendment position. From the election verdict and the above mentioned proposal of constitutional amendment, the judiciary could feel the "pro-liberty" pulse of the people and their representatives in the parliament, and therefore, by including "procedural due process" in the expression "procedure established by law" under Article 21 gave in Maneka a "pro-liberty" interpretation to the Fundamental Right of life and personal liberty. Thus, it shows how social, political and other changing circumstances have influenced the judicial pronouncement on the phrase "procedure established by law" and consequently on right to life and personal liberty.

185. This proposed constitutional amendment subsequently became known as 44th Amendment.
under Article 21 of the Constitution. While in Gopalan the attending circumstances compelled the Court to give a very restricted and conservative interpretation of the phrase "procedure established by law" and kept "procedural due process" outside the purview of Article 21 by following the "pro-security and crime-control model", in Maneka the Court got impelled to deliver a "pro-liberty" verdict with respect to the said phrase by incorporating through judicial activism the "procedural due process" within the scope of the Article 21.

Prof. Baxi says that the Court has of late been observing a populist policy in order to rehabilitate its credibility, lost during the internal emergency, in the minds of the people.\(^1\) This observation of Prof. Baxi also indirectly supports the view that under changed circumstances the Court is making judicial pronouncement to restore its credibility lost under different situations existing at the time of internal emergency. Moreover, Prof. Baxi holds the view that "the Supreme Court is the centre of political power"\(^2\) because "it can influence the agenda of political action, control over which is what power politics is all about".\(^3\) Therefore, this implies

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187. ibid. at 5
188. ibid. at 10
that the development of law through the judicial pronounce-
ment is bound to be dependent upon the political process 
in the Country. And it is because of this we find that the 
Supreme Court, consisting of more or less the same judges, 
gave judicial support to the authoritarianism of the 
internal emergency period as well as to the democratic 
libertarianism of the post-internal emergency era. This 
also demonstrates the fact that judicial pronouncements 
cannot remain divorced from political and other changes in 
the society. Therefore, it will not be too far stretched, 
if we say that social changes effected by political 
factors made the judges in the Supreme Court give judicial 
support to both authoritarianism of internal emergency 
period and democratic libertarianism of post internal 
emergency period.