CHAPTER - IX
CONCLUSION AND SUGGESTIONS

9.1 Conclusion

The concept of ‘due process’ originated in the *Magna Carta*. The concept has been interpreted differently by the courts in different sense under different circumstances at different points of time. Thus, due process can be said to be a relative term rather than an absolute expression which is dynamic and flexible. The Due Process obligates the State to respect the rights of people and any deprivation of such rights shall not be arbitrary, unreasonable and capricious. Due Process has substantive and procedural dimensions. Procedural due process guarantees that the process adopted by the state to deprive the rights of individual should be fair and non-arbitrary. The expression ‘due process of law’ is not used in any provisions of the Indian Constitution. However, it can be inferred by reading Articles 14, 19, 20, 21 and 22 together. The Supreme Court of India in *A.K. Goplan v. Union of India* held that procedure established by law under Article 21 need not comply with the principles of natural justice and reasonableness under Article 19.\(^1\) Nevertheless, the Supreme Court in *Maneka Gandh v. Union of India*\(^2\) has interpreted the ‘procedure established by law’ in Article 21 to be equivalent of the ‘due process of law.’\(^3\)

It means the procedure prescribed by law under Article 21 must not be discriminatory and arbitrary and it should answer the requirement of reasonableness under Articles 14 and 19 also. This judicial approach has made the ‘procedure established by law’ of Article 21 more or less synonymous with the concept of procedural due

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\(^1\) AIR 1950 SC 27.
\(^2\) (1978) 1 SCC 248.
\(^3\) See, Chapter -2, pp. 75-76.
process obtaining under the United States Constitution. The dynamic interpretation of Articles 14 and after 1978 marks a watershed in the development of Indian Constitutional Law. It has been aptly said that judicial review is always a function, so to speak, of the viable constitutional law of a particular period. The viable constitutional law of India since 1978 has been the concept of due process of law in the Constitution. The new dimensions added by interpretation of Article 21 ensured so many rights to the accused, which were not explicitly mentioned in the Constitution.

The Preamble of the Constitution contains the primordial goal of securing Justice – social, economic and political to all its citizens. It is the guiding principle of the nation. The social change as contemplated in the Constitution was sought to be achieved through the exercise of fundamental rights by the individuals and direction of the policy by the state towards the goals set in the directive principles of state policy. To effectively translate these constitutional principles and goals into reality and as a sentinel of these rights the judiciary was constituted in the Constitution. It is a trite saying that it is the remedy that makes the rights effective. Therefore the question of access to courts assumes central importance. To facilitate access to justice, the judiciary relaxed the rule of *locus standi* in favour of a person acting bonafide and having sufficient interest in the proceedings of Public Interest Litigation (here in after referred as PIL). This liberal trend is all the more apparent form the fact that the courts, especially the Supreme Court, have entertained petitions filed by law students, law teachers, NGOs, public spirited individuals and good Samaritans. Further the courts have admitted the letters, postcards,

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5 See, Chapter 3, pp. 107-22.
6 See, Chapter 4, pp. 160-61.
telegrams, and even newspaper items as writ petitions under Article 32 of Indian Constitution. PIL has an important role to play in the justice system; it affords a ladder to justice to the disadvantaged sections of the society, some of which might not even be well-informed about their rights. Furthermore, it provides an avenue to enforce diffused rights for which either it is difficult to identify an aggrieved person or where aggrieved persons have no incentives to knock at the doors of the courts.\(^7\)

Judiciary has adopted the innovative methods like epistolary and creeping jurisdiction in the PILs to make justice available at the doors of the disadvantaged people. In the quest to do complete justice, the Apex Court has often surpassed the traditional boundaries of separation of powers. However, the proactive judiciary has always justifies its surfeit into the domain of legislative and administrative as inevitable as otherwise justice would be a casualty. The PIL has emerged as a powerful tool capable of fulfilling the promises that the Constitution has held out. Equally the PIL has certain inherent flaws. It may prompt the judges to entertain cases that do not deserve judicial attention; the judiciary may be overburdened; the judiciary has no machinery to supervise the implementation of its directions, etc. Judges are human being obviously they are also fallible while discharging their functions. However, the role of PIL in ameliorating the conditions of millions is to be appreciated. The Supreme Court in PIL cases has adopted innovative methods of non-adversary procedure to provide justice\(^8\) without sacrificing the core requirements of procedural due process.

The Supreme Court has appreciated the fact that the problems of the disadvantaged people are qualitatively different from others. They need a different kind of

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\(^7\) Ibid.
\(^8\) See, Chapter 5, pp. 190-91.
legal skill and a different kind of judicial approach. The non-adversarial method always provides room for negotiation, conciliation and mediation which facilitates the customizing of justice according to the need of the parties. Further, the judge’s active role in the form of investigation and appointment of commission leads to discovery of the truth which lessens the burden of the disadvantaged people, as far as the proof is concerned, making the process justice oriented and cost effective.9

Access to justice and availability of qualitative professional assistance are of great importance to secure justice to an individual. Therefore, legal aid has become an important component of justice. The absence of it amounts to negation of justice because it would be difficult for poor litigant to enforce their fundamental rights. It is a well known fact that realization of justice is a costly affair. Because, of this the judiciary has interpreted the ‘procedure established by law’ of Article 21 in such way that denial of free legal aid to poor persons would not be called a fair and just procedure.10 Thus, the Supreme Court’s interpretation that Article 21 includes right to free legal aid has given justice to millions of under privileged people to enforce their fundamental rights under Article 32 of the Constitution. Further, the Supreme Court has extended the scope of free legal aid even to administrative proceedings.11 The Court’s refusal to accept the State Government’s defense of lack of financial resources for legal aid is appreciable and laudable.12 The Court has gone one step ahead by observing that the free legal aid must be qualitative.13 The Apex Court has strengthened legal aid by imposing an obligation on

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9 See, Chapter 6, pp. 216-18.
11 Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, (1980) 1 SCC 98.
12 Khatri and Ors. v State of Bihar AIR 1981 SC 928.
the Magistrates to provide legal aid at the cost of State.\textsuperscript{14}

Another important dimension added to processual justice in the area of awarding compensation. Earlier the claim of compensation was allowed only in private law but not in public law. The Supreme Court has obliterated this dichotomy by awarding compensation under writ jurisdiction for violation of fundamental rights. The judiciary has further strengthened the award of compensation by developing public tort law jurisprudence.\textsuperscript{15} It is to be noted that compensation is also awarded while disposing off the special leave petitions and criminal appeals.

As a result of its quest to attain procedural fairness, it is by now an accepted that the Supreme Court has attained considerable success in transforming the notion of ‘procedure established by law’ into ‘due process of law’ and in turn fortify the bastion of liberty and facilitate remedy whenever it is invaded. It has been aptly said that judicial review is always a function, so to speak, of the viable constitutional law of a particular period. The viable constitutional law of India since 1978 has been the concept of due process of law.\textsuperscript{16}

The expression ‘due process of law’ is not used in any provisions of the Indian Constitution. However, the due process can be inferred through the Articles 14, 19, 20, 21 and 22 together. The judiciary has played a creative role in this regard. It has interpreted the ‘procedure established by law’ in Article 21 to be equivalent of the ‘due process of law. The Supreme Court of India in \textit{A.K. Goplan v. Union of India} held that Article 21 is a complete code; procedure established by law need not comply with the

\textsuperscript{14} \textit{Khatri (III) v. State of Bihar}, (1981) 1 SCC 635.
\textsuperscript{15} \textit{See}, Chapter 7, pp. 254-55.
\textsuperscript{16} \textit{Supra} note 5, pp. 123-24.
principles of natural justice and reasonableness under Article 19. The transition from ‘procedure established by law’ to ‘due process of law’ was facilitated by the initiation of reading of the fundamental rights together which culminated in Maneka Gandhi which is by now accepted as the starting point of the introduction of due process clause in India after incorporating the concept of non-arbitrariness articulated in Royappa under Article 21. The Supreme Court has held that it was axiomatic that a law prescribing a procedure for deprivation of life and personal liberty under Article 21 could not be any sort of procedure but it has to be one that is neither arbitrary nor unfair or unreasonable. Thus, the Court emphatically rejected the theory of original intent and embraced a more generic and contemporaneous value of Indian Constitution. Even Articles 19 (2) to (6), 20, and 22 also strengthen the content of due process in the Indian legal system. Thus, Supreme Court has held that adversary procedure, adequate of notice of hearing to accused, neutral adjudicators, and presumption of innocence until the guilt is beyond reasonable doubt are essential parts of fair procedure. Further, it has observed that speedy and public trial, opportunity to produce evidence, cross examination of adversary witnesses, compulsory process to witnesses and production of documents are inevitable ingredients of just procedure. Further, the Supreme Court has held that accused has right to know the evidence in his own languages, not to have excessive bail conditions, right to be represented by a lawyer of his choice and reasoned decisions. Indeed these judgments are delivered by the Supreme Court to protect and uphold the dignity of individuals by

17 AIR 1950 SC 27.
18 Supra note 2.
22 Supra note 2, See, Chapter -2, pp. 46-74.
transforming procedure established by law into procedural due process under Article 21. All this goes to prove the first hypothesis that ‘the Supreme Court through a series of decisions has changed the contours of ‘procedural due process’ and has enriched it for the benefit of the individuals is proved.’

The Indian Constitution is based upon the British Parliamentary form of Government which is founded on co-ordination of the Executive and the Legislature. The parliamentary form of government does not adopt separation of powers in its strict sense. When executive fails to discharge its function which leads to injustice, the people obviously look towards judiciary for vindication of justice. Under such circumstances the judiciary cannot abdicate its responsibility by sticking to doctrine of separation of powers. Therefore, it becomes inevitable to judiciary to surfeit into the domain of executive and issue appropriate directions to the executive to meet the needs justice. People like convicted prisoners, women in protective custody, children in juvenile institutions, bonded and migrant laborers, unorganized laborers, untouchables and scheduled tribes, landless agricultural laborers, women who are bought and sold, slum-dwellers and pavement dwellers, environment pollution problems, kin of victims of extra judicial executions come with unusual problems to the Supreme Court seeking justice.\(^{23}\)

They seek extraordinary remedies, transcending the traditionally received notions of separation of powers and the inherited distinctions between adjudication and legislation on the one hand and administration and adjudication on the other. This necessitated the judiciary to initiate and evolve creeping jurisdiction by issuing myriad directions in appropriate cases. This kind of creeping jurisdiction typically consists in taking over the

direction of administration in a particular arena from the executive.\textsuperscript{24} In
\textit{Bhagalpur Blinding} case the Supreme Court issued many directions in respect of prison
inmate's health, treatment, place of treatment, stay of their relative and compensation
which were administrative in nature. The Court has sometime even obliterated the
distinction between law and policy. In \textit{T.N. Godavarman},\textsuperscript{25} the Court constituted an
expert committee to examine the issue of depletion of forest cover and to consider
questions such as who could be permitted to use forest produce and in what
circumstances this is permissible. The more recent trend, however, is for the Court to
assert its new role as policy-maker, as the decision in \textit{Vishaka}\textsuperscript{26} demonstrates. The Courts
in the process transcend the division between the roles of the various organs of
government, and this has invited controversy. The Court has sometime even obliterated
the distinction between law and policy. For example in the \textit{Hawala case},\textsuperscript{27} the Court
concerned itself with establishing a mechanism for the supervision of the CBI and the
grant of statutory status to the office of the Central Vigilance Commissioner. In the case
of adoption of children by foreign nationals\textsuperscript{28} and custodial torture,\textsuperscript{29} similar guidelines
were laid down. Supreme Court while deciding the PIL matters related to poor and
disadvantaged people, to provide justice, has ventured into the domain of legislature and
executive.\textsuperscript{30}

The Indian Constitution has not indeed recognized the doctrine of separation of
powers in its absolute rigidity but the functions of the different parts or branches of the

\textsuperscript{24} \textit{Supra} note 8, at p. 181.
\textsuperscript{25} \textit{T.N. Godavarman Thirumulpad v. Union India}, (1997) 3 SCC 312.
\textsuperscript{27} \textit{Vineet Narain v. Union of India}, (1998) 2 SCC 199.
\textsuperscript{29} \textit{D.K. Basu v. Union of India}, (1997) 1 SCC 416.
\textsuperscript{30} \textit{Supra} note 8, pp. 1183-89.
government have been sufficiently differentiated and consequently it can very well be said that Indian Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. Further, there is a Constitutional mandate to the Court to do all the possible things to deliver justice even though it may be inevitable to offend the separation of powers. Thus it can be inferred that in Indian legal system there is separation of functions but not separation of powers. Therefore, the second hypothesis that ‘in the quest to infuse procedural fairness, the court has done violence to the concept of separation of powers’ is proved.

Justice delivery should be accessible to the aggrieved and at the same time busy bodies and meddlesome interlopers should be kept out of the court lest the precious judicial time which deserved to be rationed go waste. The principle of locus standi is a traditional principle adopted by the judiciary to provide access only to deserving. The Supreme Court under the Constitution is the guardian and protector of Fundamental Rights and final interpreter of the Constitution. Indeed the Court is more concerned about the poor, deprived, illiterate, urban and rural unorganized labour sector, women, children and handicapped, who by ignorance had no access to justice or had been denied justice. Speedy and affordable Justice is a part of dignified life under Article 21. The Supreme Court under Article 32(1) can devise any procedure appropriate for the particular purpose of the proceedings, namely, enforcement of fundamental rights. Therefore, Supreme Court has the incidental and ancillary powers to evolve new remedies and strategies to enforce the fundamental rights. The Directives Principles of State Policy obligate States

32 Supra note 8, at pp. 177-89.
34 Supra note 6, at pp. 125-26, at pp. 125-26.
to provide equal justice and free legal aid.\textsuperscript{35} Further, the Supreme Court has authority to pass any such order or decree to do complete justice which is enforceable in the territory of India.\textsuperscript{36} To achieve this role, the Supreme Court has liberalized the traditional principle of \textit{locus standi} to make justice accessible to people of India particularly to those who are disadvantage people. Even it has provided legal assistance in the form of free legal aid to those who are unable to knock at the doors of courts of justice. Further, the Court has adopted the non-adversary methods to provide speedy justice. Further, the Court has ventured into the domain of executive and legislative where the inaction of executive and legislature resulted in gross injustice. The Supreme Court has done all these things to discharge its obligation to do justice under the Constitution. Therefore, these innovative measure adopted by the Supreme Court might have offended the doctrine of separation of powers; nevertheless it is in the interest of Justice. Thus, the third hypothesis that ‘the innovative measures adopted by the Supreme Court can be justified by straining the provisions in the constitution is proved.’

The process adopted by the higher courts in various decisions to deal with PIL and other cases in recent years marks a significant deviation from conventional judicial proceedings; nevertheless this was not a sudden phenomenon. The Court is now seen as an institution not only reaching out to provide relief to citizens but even venturing into formulating policy which the State must follow.

Procedure of Indian Judiciary is much influenced by the Anglo-Saxon system of

\textsuperscript{35} Article 39A provides that The State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

\textsuperscript{36} See, Article 142 of the Constitution.
jurisprudence during the independence era. The bulk of citizens were unaware of their legal rights, and much less in a position to assert them. The Preamble of Constitution which assures social, economic and political justice, and guarantees of fundamental rights described as the ‘conscience of the Constitution’, would have remained empty promises for the majority of illiterate and indigent citizens under the traditional adversarial proceedings. The changed processual dimensions at the hands of the higher judiciary are a successful attempt to transform that promise into reality. Supreme Court’s judgments in respect of liberalization of *locus standi*, adoption of non-adversarial procedure, providing legal aid to needy people, and awarding compensation in writ petitions in appropriate cases are worthy to be appreciated. Thus, these judgments of Supreme Court in respect of procedural laws have made justice more access oriented to all aggrieved. The study to the endeavor of the Supreme Court’s to provide justice by inventing means and methods to mould the procedural due process however reveals certain shortcomings. The address these shortcomings the researcher humbly submits the the following suggestions.

9.2 Suggestions

1. The Supreme Court’s interpretation of ‘procedure established by law under Article 21 in the *A.K.Goplan v. State of Madras*, has been sidelined by a series of subsequent judgments of and it is finally expressly overruled in the *M. Nagaraj v. Union of India*. In *Maneka Gandi v. Union of India* the Apex Court has held that ‘procedure established by law’, under Article 21 is synonymous to ‘procedural due

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39 AIR 1950 SC 27.
41 AIR 1978 SC 597.
process’. Further, the Supreme Court in *Sunil Batra v. Dehli Adminstration*\(^{42}\) has expressly stated that after *Cooper* and *Maneka Gandhi* the procedure established by law under Article 21 is equivalent to its counterpart of the procedural due process in the United States Constitution. The interpretation and re-interpretation of Constitution is an endless process. So far the ratio of *Maneka Gandhi* has stood the ground. In order to constitutionally entrench the fruits of interpretation which are so important for the cause of liberty, the phrase ‘without due procedural law’ may be substituted in the place of the phrase ‘except according to the procedure established by law’ in Article 21 of the Constitution.

2. Award of compensation at the hands of the courts for constitutional violation is creative jurisprudence evolved by the courts. Thus, much progress has been made in remedying the violation of the fundamental rights from *Rudul Sah* to *Challa Ramkrishna Reddy* through *Nilabati Behera*. However, it is not a happy state of affair in the absence of concrete and clear principles. It is desired that without leaving it to the discretion of judiciary, an express enforceable right to compensation for violation of fundamental rights be incorporated in the Constitution.\(^{43}\) Not only the Supreme Court but also the High Courts have awarded compensation under the writ jurisdiction. Moreover, the High Court writ jurisdiction is more accessible and affordable. Therefore the clauses may be inserted under Article 32 and Article 226 of the Constitution respectively:

> Article 32(2A): The Supreme Court shall have power to award compensation to the victims of violation of Fundamental Rights.

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\(^{42}\) (1978) 4 SCC 494.
\(^{43}\) See, Chapter 8, pp. 287-90.
Article 226(5): The High Court shall have power to award compensation to the victims of violation of Fundamental Rights.

3. The President of India is empowered to grant pardons, suspend, remit or commute sentences of death convicts. However, the Constitution has not expressly provided any time frame for disposing of mercy petitions. Many of convicts have escaped the noose due to dilatory disposal of mercy petitions. To overcome this situation, a new clause (4) may be added to Article 72 as under:

   Article 72 (4). The President shall exercise the power under this Article within six months from the date of receipt of the petition.

   A Similar clause may be added to Article 161 as under after renumbering the existing Article 161 as Article 161(1):

   Article 161 (2). The President shall exercise the power under this Article within six months from the date of receipt of the petition.

4. The Supreme Court recently in *Shatrughan Chauhan and Anr. v. Union of India* has held that undue delay in execution of death sentence may be the ground to commute death sentence into life imprisonment including offenders of terrorist offences. The Apex Court judgment has put all the offenders into one basket are not rational because the terrorist offences are heinous and need to be treated differently. Therefore, the offenders of terrorist activities should not be eligible for any commuting of death sentence and benefits of probation when sentenced to imprisonment.

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44 Supra note 5, pp. 115-17.
45 Writ Petition (Criminal No. 55 of 2013), (2014) 3 SCC 1.
5. The *Legal Services Authorities Act, 1987* provides legal aid to certain categories of persons in legal proceedings. However, the person who wants to seek legal aid has to make an application before the concerned authority. But, disadvantaged persons are unaware of their rights and do not know the procedure of making application. It is better if the obligation is put on state to provide legal aid to needy persons. Section 304 of the *Code of Criminal Procedure, 1973* puts statutory obligation on judge of Session Court only to provide legal aid to those accused whose trial is conducted before a Sessions Court. Thus, obligation to provide legal aid should be made available in all the criminal courts. Therefore, the words “of Session” may be deleted from Sec.304.

6. It has been noted that the Supreme Court has rejected to convert anonymous letters as writ petitions for PIL simply because they do not reveal the name of the letter writer. This is not rational. As long as the grievance is genuine, it should be redressed irrespective of the disclosure of the identity of the writer. Therefore, it is suggested that even anonymous letters may be accepted as writ petition if they reveal substance of violation of Fundamental Rights.

7. The Supreme Court has adopted the non-adversary methods in PIL matters. Obviously, the Court appoints Commissions to find out the truth and even it asks to collect the evidence to substantiate the allegations in PIL. Therefore, such work can be done by only professional people but Supreme Court appoints generally senior advocates or sometime other professionals as the members of commission on ad-hoc basis which is not ideal. Therefore, it is suggested that the Supreme Court

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47 No. 2 of 1974.
must have a panel of professionals to be appointed as members of commission and they must be of high integrity.

8. The Supreme Court is discharging the role of investigator in PIL matter to find out the truth. Under such circumstance it has to appoint the executive of either state or central government to investigate the matter. Moreover, the investigation is against the state agencies themselves. Hence the investigation may not be fair unless the officers are of high integrity.

9. Most of the PIL matters are related to the corruption in top echelons of executives and politicians, which may expose the public activists or letter writers’ life and liberty to danger. Indeed there is a need to protect the whistle blower. Parliament has passed the Whistle Blowers Protection Act, 2011\(^ {49} \) which does not include a judge of the Supreme Court and High Court as competent authority before whom the complainant can disclose the corruption and abuse of power by the public servant. The PIL cases are filed before the Supreme Court or High Court against the abuse of power by higher executive or politicians. Therefore, the whistle blower requires protection even in the case of PIL. Therefore, it is better to include the Judge of the Supreme Court and High Court as Competent Authority to give protection to whistle blowers. Therefore, the words in brackets “(except a Judge of the Supreme Court or of a High Court)’’ be deleted.

\(^ {48} \) Devine Retreat Centre v. State of Kerala and Others, 2008 (3) SCC 542.

\(^ {49} \) Act No. 17 of 2014.