CHAPTER-I

INTRODUCTION

Liberty is the quality of a man. It is man, as distinguished from other living beings, who demands freedoms and evolves institutions to secure it. Animals, birds and insects are governed by the rule of the 'struggle for existence and survival of the fittest-the fittest is the one physically strongest and cleverest.' They have no aim of life beyond mere existence. Man as Homo Spines has distinguished himself from other living beings as he claims to have an aim in his life; he has created the whole complex of institutions civilization and culture- in pursuance of this aim. Animals are mere slaves of nature; man has largely learnt to tame, control and harness nature to serve his purpose of life. Freedom is the distinctive quality of man.

'Man is born free, but everywhere he is in chains' observed Rousseau. The Cannon of this observation has been reflected and translated as a global phenomenon and has been incorporated as a necessary, essential and sacrosanct conditions of all human lives. The nature has given not a life to all human beings but as well as freedom to act according to their choice and to flourish as a human being. Freedom which is sine-qua non for the physical, mental, psychological, spiritual etc. development of all human beings without which the human personality would be incomplete. The rationale behind such freedom is not only an individual empowerment but the pathology of it lays the foundation for the collective, universal development of the society at large.

The struggle for liberty has furnished the noblest, the most thrilling and the most inspiring saga in human history. If there it one cause for which men would fight and die willingly, for which they would undergo the severest of

1 See, Charles Darwin, The Origin of Species, (1859).
hardships, for which they would face the firing squad and kiss the gallows with resolute heart and beaming face, it is that of liberty for they look upon it as the very quintessence of a civilized and decent existence, something bereft of which life would be without putting and dignity, something without which life would loose all significance and meanings. The rule of law is the very main spring of democracies but it is an error to emphasize law without putting a proper stress on liberty. Law and liberty are counterparts of each other, law draws attention to the duties and obligations of the citizen, liberty-the freedom which the citizen enjoys upon which the State can make no encroachment.

On 26\textsuperscript{th} November 1949, ‘we the people resolve to constitute India into 'Sovereign Democratic Republic.' Since the country after considerable period and struggle, relieved from the British rule, assertion of sovereignty had the first priority: Like wise indication of future pattern of governance of the Nation and its Sovereign people as democratic republic, was utmost necessary. Further, inter-alia, it has been resolved to secure for citizens: ‘Justice, social, economic, and political; liberty of belief, faith and worship and dignity of individual. This was also all the more necessary to have justice, liberty and dignity since ‘we the people’ had been deprived of these precious rights for a considerable period. The Constitution of India is a paramount instrument with democratic import and political portent. The power processes it prescribes, the checks and balances it inscribes, the destination and direction of governance it sanctions and the tryst with destiny of Indian humanity it spells out transform it from a legal parchment of ponderous punditry into a socialist catalyst to fashion a new

\textsuperscript{5} M.C. Chagla, (1950), \textit{Law, Liberty and Life}, p.5.
\textsuperscript{6} Words "Socialist Secular" were inserted by the \textit{Constitution (42nd Amendment) Act}, 1976 (w.e.f. 3-1-1977)
\textsuperscript{7} See, the Preamble to the Constitution of India.
human order.¹⁰ This living engineering instrument is designed to navigate the nation towards the salvation, social, material, cultural and spiritual of have not and the humble invisibles the alienated, desperate and the radical activists who seek redemption, through self sacrifice, those vast segments of ignored and exploited people who are real India.¹¹

The constitutional command of right to life and personal liberty under Article 21 the Indian Constitution pervades not only Part III which encompasses the fundamental rights but it transcends Part IV¹². This all pervasiveness of right of life has been occurred and occupied a prominent place during last two decades in India.¹³ The total transformation witnessed by this, was a result of several challenges and hazards faced by it. The horizons of right to life have been broadened to the extent that other fundamental rights are not only linked or forged with it, but at the same time new brand or variety of rights have been read into it. The Supreme Court in India has fashioned a lip service but it has become a forum of articulating, remoulding and reinventing the mechanism and the right to deliver justice to millions of starved and shackled Indians.

Numerous social scientists support the idea that only an independent and strong judiciary can be custodian of human life and dignity. Most of the works on the subject was done in early 80’s particularly after Maneka Gandhi’s case.¹⁴ Instead of playing their traditional role of mechanical interpreters and appliers of law, the judges have assumed the role of policy makers. As a result of judicial activism of the Supreme Court, the concept of life embodied in Article 21 of the Constitution has gradually broadened. The real meaning of judicial activism has rightly been explained by R.R. Vadodaira¹⁵ as, 'there

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¹⁰ Ibid.
¹¹ Ibid.
¹² Part IV (Arts 35-51) of Constitution of India provides Directive Principles of State Policy.
¹³ Part IV-A (Article 51-A) provides Fundamental Duties - Ins. By The Constitution (44th Amendment) Act, 1976, S.11 (w.e.f. 3-1-977).
¹⁴ Maneka Gandhi v. Union of India, AIR 1978 SC 597.
cannot be and there is no judicial activism *per se*. Judiciary has always remained active. It cannot afford to be passive. While other two wings of the Government i.e. executive and legislature sometimes remain passive and sometimes become overactive, but judiciary functions within its framework and is bound to work within its parameter because of constitutional device of division of powers. The main and prior function of the judiciary is to deliver justice to all without fear or favour. The judiciary endeavours to protect oppressed, powerless, poor and helpless people against the injustice committed by omnipotent persons, authority or body. Judiciary protects the weakest persons from the oppressive acts of either executive or legislature. When judiciary protects and provides justice to the poorest people against oppressive acts of private persons, authority or body, there is no hue and cry but when it protects against tyranny of the Government everyone thinks about judicial activism. Indian Supreme Court is probably the only Court in the history of human kind to have asserted the power of judicial review over amendments to the Constitution e.g. *Golak Nath* and *Kesavananda* cases. Hon'ble Justice P.N. Bhagwati has rightly explained judicial activism as under:

The Indian judiciary has adopted an activist goal-oriented approach in the matter of interpretation of fundamental right. The judiciary has expanded the frontiers of fundamental rights and in the process rewritten some parts of the Constitution through a variety of techniques of judicial activism. The Supreme Court

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16 Ibid.
17 Judicial review is power of higher judiciary to judge the constitutional validity of any legislative and executive action; first time laid down by U.S. Supreme Court Chief Justice Johan Marshall in the 1803 case of *Marbury v. Madison* by observing, "It is emphatically the province and duty of the judicial department to say what the law is".
20 *Kesavananda Bharati v. State of Kerela*, AIR 1973 SC 1461, in which Supreme Court has held by a majority of 6:5 that the power of amendment under Article 368 is subject to certain implied and inherent limitations, and that in the exercise of amending power parliament cannot amend the basic structure or framework of the Constitution.
judiciary in India has undergone a radical change in the last few years and it is now increasingly being identical by justices as well as by people as the last resort for the purpose of the bewildered.\textsuperscript{22}

**Human Rights**

66 years after independence the system of bonded labour continues. Reports about under trial prisoners, ill-treatment of juvenile offenders and women prisoners, tortured convicts, neglected children, environmental pollution etc. are published in newspapers, magazines and journals. It looks that our long and sorry history of exploiting the poor and weak has not changed yet social justice. The signature of our Constitution, is not confined to a fortunate few but takes within its sphere large number of people who are living a life of want and destitution and the new judicial activism where judges evolve the rules according to the changed circumstances and meet the ever increasing demands of the people is a timely right step in right direction. The analytical jurists defended this law-making of judges on such spurious and untenable grounds as one stated by the celebrated US Jurist Benjamin N. Cardozo:

Nine-tenths, perhaps more, of the cases that come before a Court are predetermined in the sense that they are predestined their fate pre-established by inevitable laws that follow from birth to death.\textsuperscript{23}

And also these rights as life, liberty and pursuit of happiness are inalienable rights. Right to life and liberty are twins. They are inseparable as if people are deprived of their right to liberty, automatically. Right to life becomes meaningless. Henry George has rightly said:

Where liberty arises there virtue grows, wealth increases, knowledge expands, invention multiplies human powers and in strength and spirit the free nation rises among her neighbour as soul amid his

\textsuperscript{22} Ibid.
brethren taller and fairer. Where liberty shrinks, there virtue fades, wealth diminishes, knowledge is forgotten, invention ceases and empires once mighty in arms of arts become a helpless prey to barbarians.\textsuperscript{24}

Everyone is unique in his individuality and personality. He wants to think his own thoughts, dream his own dreams and tread his own path. To satisfy such needs, every democratic Government must safeguard the path. The history of human civilization is the history of struggle of people against organized power, national or international, for liberty.

In the Vedas three civil liberties were included that is, of body, dwelling house and life. The dignity given to human existence by the Vedantic thought and by the thought of classical sages of Indian culture exceeded anything conceived by the Western idea of humanity.\textsuperscript{25}

There was so much hue and cry in the ancient India. Medieval India, where the Right to Life was very vital. When Indian was undergoing through the trauma of being slave to Britain, this right lost its flavour. After British went away this Right to Life was crystallized in the supreme law of the land, that is the Constitution of India by the Constituent Assembly. What we lost during the British advent, we attempted to regain it but we forgot at about it. Article 21 was meager in front of what we had enjoyed in past. Judiciary came to the rescue and whisked Article 21 in every pit and corner of the aspects of life which we live as life is not a passing by. It should be a place of fulfillment and pleasure.

The Constitution of this country is a living organism and it is the duty of Courts to interpret the same to fulfill the needs and aspirations of the people depending on the needs of the time.\textsuperscript{26} The panorama of right to life invented

\textsuperscript{24} Henry George, Milestone to American Liberty: The Foundation of Republic, (1958).
\textsuperscript{26} As per N. Santosh Hedge J., for himself, B.P. Singh and H.K. Seema 1.1. in Zee. Telefilms Ltd. v. U.O.I., (2005) 4 SCC 649.
and accorded by the judiciary has passed various phases of its interpretation. Right to life and personal liberty guaranteed under Article 21 of the Indian Constitution came to be incorporated in it after detailed debate took place in the Constituent Assembly. Following traditional view, the constitutional framers have rejected the U.S. concept of ‘due process’ as a part of Article 21 of the Indian Constitution.27

The question of reasonability of a ‘procedure established according to law’ has come for a scrutiny in A.K. Gopalan v. State of Madras28 where the validity of the Preventive Detention Act, 1950 was challenged. The principal question arose for consideration before the Supreme Court was, whether Article 21 envisaged any procedure laid down by a law enacted by competent sovereign legislative body or whether the procedure should be fair and reasonable. It was argued on behalf of Gopalan that the word ‘law’ in Article 21 does not mean merely enacted law but also incorporates principles of natural justice. Similarly, the expression ‘procedure established of law’ is equivalent to the ‘due process’ clause of the American Constitution. Due process clause of 5th Amendment of United States Constitution has been the most significant single source of judicial review in the USA, it connotes a process which is just, proper and reasonable. Due process has otherwise two facets, one is, substantive provisions of a law should be reasonable and not arbitrary. The other is procedural due process, indicates a reasonable or fair procedure viz., principles of natural justice. However, the Supreme Court had refused to read due process clause or due process of law in to the words 'procedure established by law' in Article 21 of the Constitution. Gopalan had reached two major conclusions in relation to Article 21. One, Articles 19, 21 and 22 were mutually exclusive and Article 19 was not applicable to a law affecting personal liberty. Secondly, a ‘law’ affecting personal liberty could not be declared unconstitutional merely because it lacked natural justice or due procedure. Gopalan’s decision had

27 See, for detail, infra Ch 2, Sec. II (b)
28 AIR, 1950 SC 27.
narrowed down the scope and ambit of Article 21 and did not accord any protection or immunity from sovereign legislative or executive action which is otherwise an arbitrary one.

This approach (Gopalan’s case) was reiterated by the Supreme Court again in *A.D.M. Jabalpur v. Shivkant Shukla*\(^{29}\) when the national emergency was imposed in the year 1975, fundamental rights came to be suspended by Presidential order under Article 359 (2) of the Constitution. The Supreme Court had accorded the literal interpretation and held that no person has any locus standi to challenge his detention, since fundamental rights are suspended, including right to go to the Court to be read, if at all, under Article 21 of the Constitution. Suspension of Article 21 barred the right to go to the Court to challenge the detention. The view adopted by the majority is counter to the notion of rule of law.

Emergency period had witnessed tortures, abuses and violations of basic fundamental freedoms including personal liberty. It could be perhaps due to this reason the Supreme Court must have realized the value and importance of right to life and hazards of interpretation accorded to it earlier by the Court. The judicial attitude hence shifted dynamically in *Maneka Gandhi v. Union of India*\(^{30}\) which has overruled Gopalan’s case. Maneka had filed a writ petition under Article 32 challenging impounding of her passport as violative to Articles 21,19(1) (a) and 14 of the Constitution. One of the main grounds of challenge was that an impugned order was made without giving an opportunity of being heard and hence violated right to life and personal liberty.

The Supreme Court had propounded various propositions making Article 21 more meaningful and expansive. The Court had accepted the contention that ‘procedure established by law’ under Article 21 necessarily includes the due process clause of the US Constitution. It said that Article 14, 19 and 21 are not mutually exclusive, but there is a clear link or nexus between

\(^{29}\) AIR 1976 SC 1207.  
\(^{30}\) AIR 1970 SC 597.
them. Krishna Iyer J. has said that no Article in Part III of the Constitution is an island. Just as a man is not dissectible into separate limbs, cardinal rights in an organic Constitution have a synthesis while according a wider meaning to right to life he said, 'the attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction.' The spirit of man is at the root of Article 21 and personal liberty makes for the worth of the human person. Travel makes liberty worthwhile. The dynamic and progressive interpretation of Article 21 given by the Court sensitized the human right jurisprudence and role of judiciary as an activist or creationist in India. Procedure established or prescribed by law never could be equated or characterized as reasonable or due it if is an arbitrary or fanciful. Maneka’s multidimensional decision has acquired a supreme constitutional importance and value in a democratic India, which has been nourished further by the judiciary, vis-à-vis right to life and personal liberty.

The emergence of the Indian Supreme Court as a custodian of people’s rights and a democratic, functional institution is the most significant and important development in the judicial history of independent India. It is being envisaged not as a redressal forum of elite class in the society preoccupied with rendering merely lip service to the people. Instead, it is seen and perceived as a forum for raising, redressing and articulating the problems of the have-nots, deprived, oppressed, the downtrodden, women and children, environmental groups, consumer forums, victims of bureaucratic exploitations and abuse of powers and positions by persons holding high public offices. It has become a representation, articulation and protection of the basic human rights of the people vis-a-vis society.31

The dynamism of Maneka paved the way for a sensitized judiciary to take note of an infringement or violation of right to life at large scale and either

inaccessibility or incapacity to take recourse to the judicial process by injured parties. The orthodox doctrine of locus standi, which enabled only victims or injured party to go to the Court for violation or deprivation of rights, was thought to be a hurdle to open the gates of judicial recourse to anybody on behalf of others. However, the Supreme Court had adopted the new and vibrant route diluting locus standi and conferring a right to go to the Court on third person. Krishna Iyer J. said that ‘we have no doubt that in competition between Courts and streets as dispenser of justice, the rule of law must with the aggrieved person for the law Court and wean him from the lawless street. In simple terms locus standi must be liberalized to meet the challenges of the times’.32

It is true, that rule of law and democracy are inter-wined with each other and they together constitute the guarantee of human rights through legal mechanism in those societies. The governance of such societies is not only a matter of governance by law but is to be a matter of governance by just law encompassing in it, fair and reasonable procedures for implementation and protection of rights. Denial of basic right to life and liberty jeopardizes such established notions of rule of law and democratic governance.33

In post Maneka era the Indian Supreme Court in its activist zeal had accorded very dynamic meaning and interpretation to right to life and personal liberty guaranteed under the Constitution and broadened its content and scope.34 Moreover, it has now become a judicial strategy to read Fundamental Rights along with Directive Principle with a view to define scope and ambit of the former. Mostly directive principles have been used to broaden and to give depth to some fundamental rights and to imply some more rights there from for the people over and above what was expressly stated in the fundamental rights.

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32 *Fertiliser Kamgar Corporation Union v. Union of India*, AIR 1981 SC 344; Doctrine of locus standi has been further relaxed by the Supreme Court in *S.P. Gupta v. Union of India*, AIR 1982 SC 149, and in *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.


34 See, Ch.4.
The biggest beneficiary of this approach has been Article 21. By reading with Directive Principles, the Supreme Court has derived there from a bundle of rights.

Apples always used to fall from the tree to the ground. Everything which went up came down. This did not happen after Issac Newton came up with the law of gravitation. Likewise life has always been from the times immemorial, a thing to be enjoyed, to its full extent. It was not a novice idea which came up with the founding fathers but a repetition. Making it is black and white matter does not solve the problem. The rampant practice witnesses such instances which by no means is human. Most of them are discussed here.

Human rights are the rights which are possessed by every human being, irrespective of his or her nationality, race, religion, sex, etc., simply because he or she is a human being. Human rights are inherent in our nature. They are based on mankind’s increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection. Human rights are sometimes called fundamental rights or basic rights or natural rights. Fundamental or basic rights are the rights which cannot, rather must not, be taken away by any legislature or any Act of the Government and which are often set out in a Constitution. As stated in its preamble, the declaration reflects the member states’ common understanding of the human rights and fundamental freedom referred to in the charter of the United Nations. The Declaration lays down civil, political, economic social and cultural rights, declaring them in every terms without indicating the restrictions that could be imposed on their exercise in the interests of social control. Though the Declaration is not a treaty and is treated as no more than a recommendation of the General Assembly, it has come to wield a great moral force in the international community as a whole. To give legal form to the provisions of the

universal Declaration of Human Rights, The United Nations adopted in December 1966, The International Covenant on Economic, Social and Cultural Rights and The International Covenant on Civil and Political Rights. The latter covenant has an optional protocol.\(^{37}\) India acceded to the two covenants (but not the optional protocol) on 27th March, 1979, subject to certain declarations that set out as to how it would apply certain provisions of the covenants as also reservation of its right to apply its own municipal law in certain fields covered by the covenants.\(^{38}\) India is also a party to a number of other human rights conventions, dealing with subjects such as prevention and punishment of genocide, the rights of refugees, the rights of the child, stateless persons, the political rights of women, elimination or racial discrimination, slavery, apartheid among others. ‘International covenants’ means the International covenant on Civil and Political Rights and the International covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16\(^{\text{th}}\) December, 1966.\(^ {39}\) One of the initial question is what is meant by Human Rights.

According to Mr. Justice V.R. Krishna Iyer:

Philosophers have tried to define them. Men and women have sacrificed their lives for them. Wars have been fought over them, Leaders and Constitution have promised them to people. Today they have emerged as an issue that can serve to bring the world together or tear it apart.\(^ {40}\)

‘Human Rights’ means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International covenants and enforceable by Courts in India.\(^ {41}\)


\(^{39}\) Protection of Human Rights Act, 1993, Section 2(1).


\(^{41}\) Protection of Human Rights Act, 1993, Section 2(d).
Human Rights—Meaning and Scope

Human beings are rational beings. They by virtue of their being human possess certain basic and inalienable rights which are commonly known as human rights. Human rights, inherent in all the individuals irrespective of their caste, creed, religion, sex and nationality. These rights are essential for all the individuals as they are consonant with their freedom and dignity and are conducive to physical, moral, social and spiritual welfare. They are necessary as they create an environment in which people can develop their full potential and lead productive and creative lives in accordance with their needs and provide suitable conditions for the material and moral uplift of the people.

Presently, the vast majority of legal scholars and philosophers agree that every human being is entitled to some basic rights. Thus, there is universal acceptance of human rights in principle in domestic and international plane. ‘Human rights’ is a generic term and it embraces civil rights, civil liberties and social, economic and cultural right.42

Rights being immunities denote that there is a guarantee that certain things cannot or ought not to be done to a person against his will. According to this concept, human beings, by virtue of their humanity, ought to be protected against unjust and degrading treatment. In other words, human rights are exemptions from the operation of arbitrary power. An individual can seek human rights only in an organized community, i.e. a State. No one can imagine to invoke them in a state of anarchy where there is hardly any power to which a citizen can appeal against the violations of rights. Thus, the principle of the protection of human rights is derived from the concept of man as a person and his relationship with an organized society which cannot be separated from universal human nature.

Human rights being essential for all-round development of the personality of the individuals in the society be necessarily protected and be

42 H.O. Agarwal, Human Rights, p.2.
made available to all the individuals. They must be preserved, cherished and defended if peace and prosperity are to be achieved. Human rights are the very essence of a meaningful life and to maintain human dignity is the ultimate purpose of the Government. The need for the protection has arisen because of inevitable increase in the control over men’s action by the Governments which by no means can be regarded as desirable. There are several States where fundamental standards of human behaviour are not observed. The consciousness on the part of the human beings as to their rights has also necessitated the protection by the States.43

One of the achievements of the contemporary International law is to recognize human dignity and honour. A number of declarations adopted by the United Nations and its specialized agencies go to prove that their members have pledged themselves to achieve the promotion of universal respect for and observance of human rights and fundamental freedoms. States themselves are conscious of the rights of the human beings. They, in order to protect the rights, have made regional arrangements by making conventions. On national level too, they have taken measures to protect the rights of the individuals by incorporating the provisions relating to it in their Constitutions. Non-Governmental organizations on national, regional and international level are also devoted in bringing the cases of violations of human rights in lime light and finding out ways and means to prevent their occurrence.

Presently, there is a widespread acceptance of the importance of human rights in the international structure because it has legal, moral and political bearing. Human rights are legal because it involves the implementation of rights and obligations mentioned in international treaties. It is moral because human rights are a value-based system to preserve human dignity and it is

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43 Ibid., p.3
political in the larger sense of the word. They also operate to limit the power of Governments over individuals.\textsuperscript{44}

**Evolution of the Concept of Human Rights**

The roots for the protection of the rights of man may be traced as far back as in the Babylonian law.

Human rights are also rooted in ancient thought and in the philosophical concepts of ‘natural law’ and ‘natural rights’. A few Greek and Roman philosophers recognized the idea of natural rights. Plato (427-348 B.C.) was one of the earliest writers to advocate a universal standard of ethical conduct. The Roman jurist Ulpian stated that according to law of nature, all men are equal and by the same law all are born free. This meant that foreigners are required to be dealt in the same way as one deals with one’s compatriots. It also implied conducting of wars in a civilized fashion. The Republic (C. 400 B.C.) proposed the idea of universal truths that all must be recognized. People were to work for the common good. Aristotle (384-322 B.C.) wrote in politics that justice, virtue and rights change in accordance with different kinds of Constitutions and circumstances. Cicero (106-43 B.C.), a Roman statesman laid down the foundations of natural law and human rights in his work, The Laws (52 B.C.) Cicero believed that there should be universal human rights laws that would transcend customary and civil laws. Sophocles (495-406 B.C.) was one of the first to promote the idea of freedom of expression against the State. Stoics employed the ethical concept of natural law to refer to a higher order of law that corresponded to nature and which was to serve as a standard for the laws of civil society and Government. Later Christianity, especially St. Thomas Aquinas (1225-1274) rooted this ‘natural law’ in a divine law which was revealed to man in part discoverable by man through his God-given right reason.\textsuperscript{45} The city-State of Greece gave equal freedom of speech, equality

\textsuperscript{44} Ibid, p.4.
before law, right to vote, right to be elected to public office, right to trade and the right of access to justice to their citizens. Similar rights were secured to the Romans by the *jus civile* of the Roman law. Thus, the origins of the concept of human rights are usually agreed to be found in the Greco-Roman natural law doctrines of Stoicism (the school of philosophy founded by Zeno and Citium) which held that a universal force pervades all creation and that human conduct should therefore be judged according to the law of nature.

The Magna Carta (also called Magna Charta) or the Great Charter of the Liberties of England granted by King John of England to the English barons on June 15, 1215 was in response to the heavy taxation burden created by the third Crusade and the ransom of Richard I, captured by the holy Emperor Henry VI. The English barons protested the heavy taxes and were unwilling to let King John rule again without some concessions in their rights. The overreaching theme of Magna Carta was protection against arbitrary acts by the King. Land and property could no longer be seized, judges had to know and respect laws, taxes could not be imposed without common council, there could be no imprisonment without a trial and merchants were granted the right to travel freely within England and outside. The Magna Carta also introduced the concept of jury trial in clause 39, which protects against arbitrary arrest and imprisonment. Thus, the Carta set forth the principle that the power of the King was not absolute. In 1216-17, during the reign of John’s son, Henry III, the Magna Carta was confirmed by Parliament and in 1297 Edward I confirmed it in a modified form. Although the Charter applied to privileged elite, gradually the concept was broadened to include all Englishmen in the Bill of Rights in 1689 and even eventually all citizens.

46 See Inaugural address of Justice EN. Bhagwati, Supreme Court of India in the seminar on 'Human Rights', op. cit.
47 Ibid.
48 The original Carta was in Latin consisted of 70 clauses.
49 The Bill of Rights was officially entitled as an Act for Declaring the Rights and Liberties of the Subject and for Setting the Succession of the Crown. It was enacted by Charles II on the occasion of the accession of William of Orange and Mary Stuart to the throne of England.
The Carta was buttressed in 1628 by the Petition of Rights which asserted the rights of citizens to be free from unrepresentative taxation and arbitrary imprisonment. The Bill of Rights of 1689 which formed the platform for parliamentary superiority over the Crown and to give documentary authority for the rule of laws in England. It also declared that the Parliamentary elections should be free and binding and it condemned excessive bail as well as cruel and unusual punishments. In addition to the above, the writings of St. Thomas Aquinas and Grotius also reflected the view that human beings are endowed with certain eternal and inalienable rights.

The expression ‘fundamental rights of man’ was stated in the declarations and constitutional instruments of many States. For instance, the Declaration of Independence of the Thirteen United States of America in 1776. (The Virginia Declaration, 1776); the Constitution of the United States of 1787 with amendments in 1789, 1865, 1869 and 1919 specified a number of rights of man. The Virginia Declaration of Rights affirmed that all men are by nature equally free and independent and have certain inherent rights. The French Declaration of the Rights of Man and the Citizen of 1789 stipulated that men are born and remain free and equal in rights, the aim of all political association is the conservation of the natural and inalienable rights of man: these rights are liberty, property, security and resistance to oppression. The French Declaration led other European countries to include the provisions in their laws for the protection of human rights. Since the beginning of the nineteenth century it was recognized by the constitutional law of many States that human beings possess certain rights. Worth of the human personality began to be realized.

50 The American Constitution drawn up in Philadelphia made few references to individual freedoms. While it contained no bill of rights, some safeguards of personal liberty were scattered throughout its brief seven articles: a guarantee of personal liberty supported by the writ of habeas corpus and an assurance of jury trial. Bills of attainder and ex post facto laws are forbidden, as are religious test oaths.

51 Sweden in 1809, Spain in 1812, Norway in 1814, Belgium in 1831, Denmark in 1849, Prussia in 1850 and Switzerland and Italy in 1848 made a provision for the fundamental rights of man.
Thus, the term ‘human rights’ came somewhat late in the vocabulary of mankind. It is a twentieth century name for what has been traditionally known as natural rights or the rights of man. It was first used by Thomas Paine in the English translation of the French Declaration of the Rights of Man and Citizen. The term ‘natural law’ was replaced because the concept of natural law had become a matter of great controversy and the phrase ‘the rights of man’ was found unsuitable as it was not universally understood to include the rights of women.

The question arises as to whether the Courts in India can take these international instruments on human rights into account in appropriate cases while interpreting statute of law. Of relevance to this question is the observation of Orissa High Court in *Bishwambhar Singh v. State of Orissa*,\(^{52}\) where the Court observed that in the absence of a contrary provision in the municipal law, the provisions of the charter of the United Nations, and the Universal Declaration of Human Rights might possibly be invoked in favour of the petitioners on the doctrine of wise use of public policy.

In *Kesavanand Bharti v. State of Kerala*,\(^{53}\) Chief Justice Sikri of the Supreme Court, while referring to the provisions of the charter of the United Nations on human rights observed:

> In view of Article 51 of the Constitution this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declarations subscribed to by India.

It is, however, worth mentioning here how customary international law plays its role and how it is understood in different jurisdictions. A national Court generally obliges whenever called upon to do so, its own version of what the rule of international law is, and its views will inevitably be influenced by

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\(^{52}\) AIR 1957 Orissa 247,255-256.  
national factors.\textsuperscript{54} Being creatures of the Constitution, the Indian Courts are required to enforce the provisions of the Constitution and of other laws enacted consistent therewith. Thus what cannot be so done merely by the force of a principle of customary international law. As a matter of fact, notwithstanding some obiter statements of the Supreme Court on the application of customary international law by it, there is perhaps not a single case the fate of which has been decided by the Supreme Court on the basis of a principle of customary international law and in the face of controlling statute, executive decision, judicial precedent or treaty to which India is a partner.\textsuperscript{55}

The position of customary international law is somewhat different. It is well established in India that the principles of customary international law cannot be enforced by Courts if they are in conflict with statutes. Another question is whether Indian Courts would give effect to or as stated in some cases, bound by\textsuperscript{56} principles of customary international law if they are not in conflict with the Constitution and laws of India.

Thus the Courts in India have while interpreting individual given to such constitutional or statutory rights internationally or even in other Constitutions by analogy. In \textit{Randhir Singh v. Union of India}, the Court, while reading into Article 14 of the Constitution, the concept of equal pay for equal work incorporated in clause (2) of Article 23 of the Universal Declaration of Human Rights, relief on analogous provisions of the Hungarian Democratic Republic code, the Romanian code and the preamble to the Constitution of the International Labour Organization besides Article 39 (d) of the Indian

\textsuperscript{54} PC Rao, \textit{The Indian Constitution and International Law}, p. 184.

\textsuperscript{55} \textit{Vellore citizens welfare forum v. Union of India}, AIR 1996 SC 2715, where Kuldip Singh, J. Speaking for the Court, expressed the view that once the “Precautionary principles” and “Polluter Pays Principle” are accepted as parts of customary International Law, there would be no difficulty in accepting them as part of the domestic law. It is almost an accepted proposition of law that the rules of customary international law not contrary to municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts in India. Here the learned judge relied upon Justice Khanna’s minority opinion in ADM, \textit{Jabalpur v. Shivakant Shukla}, Jolly George Varghese case and Gramophone Co. of India Case.

\textsuperscript{56} AIR 1984 SC 667.
Constitution. So long as no provision of Constitution or of law is violated, there is nothing which prevents the Courts in India from considering themselves to be permitted to read into the constitutional or any statutory rights meanings given to such rights internationally or even in other Constitutions by analogy.

However, such discretions are available with Courts only where there is no conflict. If there is conflict between municipal law and international law which cannot be resolved by harmonious construction or where there is no ambiguity in the municipal law, municipal law must prevail notwithstanding the conflict between municipal and international law which results. As stated in *Gramaphone Co. of India Ltd. v. Birendra Bahadur Pandey*.

National Courts cannot say 'Yes' if parliament has said no to a principle of international law. National Courts being organs of the National State and not organs of international law must per-force apply national law if international law conflicts with it.

The study does not purpose to examine here whether it is the legitimate function of a Court of law, even if it be the highest Court of the land, to transcend the text of the Constitution for the purpose of advancing any jurisprudence and whether in that process the cause of human rights is in fact advanced. Rather the study attempts to find out how the international human rights philosophy has permeated into Indian law, the constitutional provisions dealing with the subject and more importantly how the Courts in India have understood these provisions and the role that they have played in the process.

**Concept of Life:**

In common parlance life means animation or period from birth to death of every living being, but in the broad sense life means activeness, liveliness, physical or intellectual force, energy, and the vitality etc. The notion of life means the principle of animation and has to be understood as an antithesis of lifeless.
Human life is the consequence of the combination of body and soul. When the body is deserted by the soul; life comes to an end. It means that without the soul there is no life of human being. The aggregate of their organs constitutes the whole human self. Human beings are the most meticulously designed creatures on the earth and universe.

There are certain vital rights common to all human beings without any distinction on any ground that constitutes the very foundation of the fundamental rights. The right to life and personal liberty for example is at the root of all these ideas. The right to life and personal liberty does not merely mean the sanctity as life. It means the fullest opportunity to develop one’s personality and potentiality to all the highest possible level in the exist will have little value, if it is to be left of any opportunity to develop or to bring out what to develop or to bring out what is in every man or woman. Human being has various organs and each organs has a particular function to do in the body. Each human being thinks, talks, understands, walks, listens and feels. Every human being undergoes many behavioral changes depending on the situation he is put in. All the above range of activity is what is meant by life of a human being. When a human being loses is such power like thinking, talking etc., it is considered the end of life and called a death of human being.

**Right to life**

Right means a claim or entitlement and right to life signifies a claim to one’s life. Right to life is most precious right amongst the fundamental rights. Other rights even though fundamental, without right to life there is no value. The right to life undoubtedly is an initial claim and all other claims emanate from this basic claim. The claim to one’s life is inherent in every man by virtues of the law and nature.

Right to life means that life includes bodily health and freedom from the pain and injury.
Austin, Pallock and Vinogradoff etc. assert that rights emerge from the human will. But Inhering said that right is ‘legally protected interest’. The right to life is not only important but also necessary for the human dignity. The right to life is fundamental basic and Supreme Court has observed:

The concept of the notion of rights is neither individual choice her individual benefit but basic or fundamental individual needs.

It is clear therefore, that the right to life does not only mean the right to exist but also means a right to exist. Every person has certain basic integrity like an engine of any machine which needs oil or fuel for its working.

Justice Mathew rightly explains the point:

Everyone has the right to standard of living adequately for the health and well being of himself and his family, including food, clothing necessary medical care and the necessary social services, and right to security in the event of unemployment sickness, disability old age and other lack of livelihood in circumstances beyond one’s control.57

So right to life includes certain requirements which is necessary for the standard of living of the human being, food, clothing, shelter, medical aid and care etc. The right to life is basically a natural right and has been found in all the Constitutions of the world like Japan, America, India etc. There is no value of all the fundamental rights without the right to life. Thus the right to life means to live with human dignity, free from exploitation.

Justice Bhagwati while explaining the right to life held:

We think that the right to life includes the right to live with human dignity and all that goes of one with its namely the bare necessaries of life such as adequate nutrition clothing and shelter over the head and facilities for reading, writing and expressing

57 K.K., Mathew Democracy Equality and Freedom (1978) at p. 230
oneself in diverse form’s truly moving about and mixing and coming with fellow human beings.

Hon’ble Justice concluded that the magnitude and content of the components as this right would depend upon the extent of life an economic development of the country but emphasized that it must in any view of the matter include the rights to the basic necessities of life and also the right to carry on such function and activities as constitute the bare minimum expression at the human being.

**Genesis of Right to Life**

The right to life of a human being is as old as mankind. The nature creates the life and right to it is essentially natural. In prelegal stage man was living more or less like any other animal and the jungle law applied which means might was right. The survival of the strongest was the order of the society. But in legal stage when the process of civilization began, a human being became conscious of his rights, particularly his right to exist. The most important fact of the society is the independence of man. In the present day society man exists by his membership of the society and a man cannot manufacture and procure the necessities of life himself. The realization of interdependence culminates into his living as a responsible member of the group of human being called society.

In Ancient India, there were small units joined together for the protection of their lives and property. There is ample evidence to show the existence of a political superior who was in charge of those small unions and was under an obligation to preserve the lives and property of the individual members.

In Vedic India, the individuals regulated their lives and conduct according to the custom which were supposed to be the dictates of All Mighty. It can be safely said that the small communities in ancient India were united together under a reorganized superior for the protection of their property.
Hence the life and individual liberty in ancient India was subject to only one qualification i.e. its curtailments to the extent to protect the life and property and no more.

Another important feature of ancient India was cast division. Hindu society was divided into four castes i.e. Brahmins, Kshatriyas, Vaishyas and Sudras. There are various opinions about the basis of cast division.

It is quite evident that the Brahmins were superior to all other three castes, kshatriyas, were superior to Vaishyas and sudras and so on and so forth. It is also settled that each one was labeled to be belonging to a particular caste on the basis of his birth. Thus, the caste division clearly shows that there was no concept of equality in ancient India and consequently there was lesser scope for the growth of political individualism. The cast system can definitely be termed as a greatest impediment in growth and development of protection of life and individual liberty in ancient India. In medieval India was under the grip as Monarchy. The authority of the ruler increased to a great extent. People did not have any right to raise their voice or to participate in the decision making by the ruler. This period witnessed foreign invasions and also the operation tyranny of the rulers.

In Paramananda Katara v. Union of India, it has been held that it is the professional obligation of all doctors, whether Government or private to extend medical aid to the injured immediately to preserve life without waiting legal formalities to be complied with by the police. Article 21 of the Constitution casts an obligation on the State to preserve life.

The scope of Article 21 of the Constitution of India was a bit narrow till 50’s, as it was held by the Supreme Court in A.K Gopalan v. State of Madras that the contents and subject matter of Articles 21 and 19(1)(d) are not identical and they proceed on total principles. In this case the word deprivation was

58 AIR 1989 SC 2039.
59 AIR 1950 SC 27.
construed in a narrow sense and it was held that deprivation was not restricted upon the right to move freely which came under Article 19(1)(d). At that time *A.K Gopalan v. State of Madras*\(^{60}\) was leading in respect of Article 21.

Along with some other Articles of the Constitution but post *A.K Gopalan v. State of Madras*\(^{61}\) case, the scenario in respect of Article 21 has been expanded or modified gradually through different decisions of the Supreme Court and it was held that interference with the freedom of a person while in jail would require authority of law. Whether the reasonableness of an Indian Penal law can be examined with reference to Article 21 was the point in issue after *A.K Gopalan's case*.

In *Meneka Gandhi v. Union of India*,\(^{62}\) the Supreme Court opened up a new dimension and laid down that the procedure cannot be arbitrary, unfair or unreasonable one. Article 21 imposed a restriction upon the state where it prescribed a procedure for depriving a person of his life or personal liberty. This view has been further fortified in case of *Francis Coralie v. The Administrator, Union Territory of Delhi and other*\(^{63}\) as:

Article 21 requires that no one shall be deprived of his life or personal liberty except by procedure established by law. And this procedure must be reasonable, fair and just and not whimsical or fanciful. The law of preventive detention has therefore now to pass the test not only for Article 22 but also of Article 14 and if the constitutional validity of any such law is challenged the Court would have to decide whether the procedure laid down by such for depriving a person of his liberty is reasonable, fair and just. In another case of *Oliga Tellis and others v. Bombay Municipal Corporation and others*\(^{64}\). It was further observed just as a

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\(^{60}\) Ibid.

\(^{61}\) Ibid.

\(^{62}\) AIR 1978 SC 597.

\(^{63}\) AIR 1981 SC 746.

\(^{64}\) AIR 1986 SC 180.
malafide act has no existence in the eye of law even so unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure by law for depriving a person of his fundamental right must conform the norms of justice and fair play. Procedure which is just or unfair in the circumstances of a case, attract the vice of unreasonableness there by vitiating the law which prescribes that procedure and consequently the action taken under it as stated earlier, the protection of Article 21 is wide enough and it was further winded in the case of Bandhua Mukti Morcha v. Union of India and others in respect of bonded labour and weaker section of society.

Enumeration of Rights in the Declaration:

The Universal Declaration contains 30 Articles. It enumerated therein the basic postulates and principles of human rights in a most comprehensive manner. Out of 30 Articles, while 21 Articles enumerated civil and political rights, 6 Articles cover economic and social rights, which are follows:

Civil and Political Rights

Articles 2 to 21 deal with those civil and political rights which have been generally recognized throughout the world. These are as follows:

1. Right to life, liberty and security of persons (Article 3).
2. Freedom from slavery or servitude (Article 4).
3. Prohibition against torture, inhuman or degrading treatment or punishment (Article 5).
4. Recognition as a person before the law (Article 6).
5. Equality before the law and equal protection of the law without any discrimination (Article 7).

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65 AIR 1984 SC 802.
66 H.O. Agarwal, Human Rights, p.41.
6. Effective remedy before the national tribunals (Article 8).
7. Freedom from arbitrary arrest, detention or exile (Article 9).
8. Right to a fair and public hearing by an independent and impartial tribunal (Article 10).
9. Presumption of innocence until proved guilty in a public trial with all guarantees necessary for defence in criminal cases (Article 11, Para 1).
10. Freedom from ex-post facto laws (Article 11, Para 2).
11. Right to privacy, family, home and correspondence (Article 12).
12. Right to freedom of movement and residence within the borders of a State. (Article 13, Para 1).
13. Right to leave any country, including his own and to return to his country (Article 13, Para 2).
14. Right to seek and to enjoy in other countries asylum from persecution (Article 14, Para 1).
15. Right to a nationality (Article 15).
16. Right to marry and to found a family (Article 16).
17. Right to own property (Article 17).
18. Right to freedom of thought, conscience and religion (Article 18).
19. Right to freedom of opinion and expression (Article 19).
20. Right to freedom of peaceful assembly and association (Article 20).
21. Right to participate in the Government of his country (Article 21).67

**Economic and Social Rights**

Articles 22 to 27 of the Declaration deal with economic and social rights which are as follows:

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67 Dr. H.O. Agarwal, *Human Rights*, pp. 41-42.
1. Right to social security (Article 22).
2. Right to work and free choice of employment (Article 23).
3. Right to rest and leisure (Article 24).
4. Right to a standard of living adequate for the health of himself and of his family (Article 25).
5. Right to education (Article 26).
6. Right to participate in cultural life (Article 27).
7. Right to good social and international order (Article 28).

It is to be noted that the Declaration does not permit a State to derogate from their obligations in public emergency which threatens the life of the nation. Thus, even in such cases the above rights cannot be suspended. However, the Declaration laid down under Article 29 certain limitations to these rights and freedoms, by providing that everyone has duties to the community in which alone the final and full development of his personality is possible. Para 2 of Article 29 provided that the rights shall be provided to the individuals subject to just requirements of morality, public order and the general welfare in a democratic society. The above may mean that rights provided in the Declaration are not absolute.  

The view that the *Universal Declaration* in toto has acquired the insufficient State practice. However, one will agree with the view that some provisions of the Declaration do reflect customary international law which are as follows:

1. **Right to Equality**

   Articles 1, 2 and 7 express the fundamental right of equal treatment and non-discrimination with respect to guaranteed human rights without distinction of any kind. The above has been widely accepted. In *Namibia* case, Judge

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68 Dr. H.O. Agarwal, Human Rights, p.42.
Ammoun in his separate opinion has stated that one right which must certainly be considered a pre-existing binding customary norm which the Universal Declaration of Human Rights codified is the right to equality, which by common consent has ever since the remotest times been deemed inherent in human nature.\(^{69}\)

2. **Prohibition Against Slavery**

Article 4 of the Declaration provided that no one shall be held in slavery or servitude; slavery and slave trade shall be prohibited in all their forms. The prohibition against slavery is universally held to form part of customary law. It has been prohibited by a number of widely ratified conventions.\(^ {70}\)

Although slavery conventions cannot be invoked against Saudi Arabia and Yemen which abstained or were absent when the General Assembly adopted the Universal Declaration of Human Rights, it nevertheless remains that slavery is prohibited under the general principles of the Charter relating to fundamental human rights.

International Court of Justice has regarded protection from slavery as included in the basic rights of the human person which give rise to obligations which States owe *erga omnes*.\(^ {71}\)

3. **Prohibition against Torture**

The prohibition against 'torture or cruel, inhuman or degrading treatment or punishment' provided under Article 5 of the Declaration has been widely regarded as a customary rule of international law. In *Filartiga v. Pena-Irala*,\(^ {72}\) the issue was whether torture was a breach of international law. The United States Court of Appeals for the Second Circuit found that there is at present no

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69 See ICJ Reports (1971), p. 16 at p. 76.
70 See Slavery Convention of 1926, entered into force on March 9, 1927; Protocol Amending the Slavery Convention, signed and entered into force December 7, 1953; Supplementary Convention on the Abolition of Slavery the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. (entered into force on April 30, 1957).
71 See Barcelona Traction case, ICJ Reports (1970) p. 32.
dissent from the view that guarantees include, at a bare minimum, the right to be free from torture. The prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights.... which states in the plainest of terms 'no one shall be subjected to torture.'

In *Pinochet case,* Lord Millet observed that the systematic use of torture on a large scale and as an instrument of State policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction. It was observed by Lord Hope in the above case that Pinochet was guilty of what would now (viz. 1999), without doubt, be regarded by customary international law as an international crime.

4. **Prohibition against Arbitrary Arrest and Detention**

Article 9 of the Declaration stipulated that no one shall be subjected to arbitrary arrest, detention or exile. International Court of Justice in *United States Diplomatic and Consular Staff in Tehran* observed that 'wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.'

In addition to the above, a number of rights referred to in the Universal Declaration such as right to privacy (Article 12); right to a fair trial (Articles 10 and 11); freedom of movement and the right to leave from and to return any country (Article 13); right to nationality (Article 15); right to property (Article 17) have been recognized as such by a large number of States. But the legal status of these rights will be known clearly when the International Court of Justice shall make a binding judgment based on the Universal Declaration. Presently, it cannot be said with firmness that they have acquired the status of

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74 ICJ Reports 1980, p.3 at 42.
customary rule of International law due to lack of consistency in the State practice. A wide research is required to be done through the comprehensive survey of State practice of each and every right stated in the Universal Declaration to draw a conclusion as to which of them have acquired the status of customary rule of International Law.\(^7\)

Indian Judiciary has evolved itself as savior of humanity by applying its judicial activism. The present study is humble effort to throw focus on how the Supreme Court by invoking powers under Article 32 of the Constitution of India by taking resort to Article 21 of the Constitution of India, evolved itself as savior of mankind. It is an effort to discuss expanding horizons of right to life and personal liberty from traditional approach to the current trend of Indian Judiciary in interpreting Article 21 of the Constitution of India. It examines the reason for judicial creativity and the role played by the Supreme Court in protecting fundamental rights of citizens when legislative and executive failed in performing their duties. Right to life and personal liberty are the most cherished fundamental rights around which other rights of citizens revolve and accordingly study assumes great importance. Article 21 of the Constitution of India is celebrity provision and occupies unique place as a fundamental right. Article 21 of the Constitution of India reads as under:

'Protection of life and personal liberty-No person shall be deprived of his life or personal liberty except according to procedure established by law.'

Article 21 of the Constitution of India guarantees right to life and personal liberty to citizens of India and aliens and is enforceable against State. After view of Gopalan's case, which will be discussed in Chapter III, the Supreme Court in Menka Gandhi's case by giving new interpretation to Article 21 of the Constitution of India ushered a new era of expansion of horizons of right to life and personal liberty. The wide dimension given to this right now

\(^7\) Dr. H.O. Aggarwal, Human Rights, p.49.
covers various aspects which founding fathers of the Constitution might not had visualized.

The Supreme Court as arbiter and interpreter of Constitution serves not merely the negative purpose of checking excesses in judicial practice but also the vital and dynamic function of modulating the life of the nation. The Supreme Court is the guardian of the Constitution, under whose protective wings the nation has prospered and grown to greatness. Thus the law as seen in the wordings of the enactment gets a dynamic and wider scope in day to day events by the legal process advanced by judicial creativity.

Right to life and personal liberty is one of the rights of people of India, preserved by Constitution of India and enforced by Supreme Court under High Courts Articles 32 and 226 of the Constitution of India respectively. In this study we will discuss the modern and liberal interpretation given to the concept of right to life and personal liberty by the Indian Judiciary.

Ever since after the Constitution of India came into force, the Supreme Court came across many constitutional questions of law on Article 21. The first such question came in A.K. Gopalan’s case and it was held that the test of due process of law with regard to such laws are to be found in Article 22 of the Constitution of India and they constitute self combined Code. There was no scope to contend that the laws which prescribed the process for deprivation of persons’ life or liberty must also satisfy the test of reasonableness. But thereafter, after lapse of more than one quarter of century 1978 the Supreme Court over ruled the Gopalan’s case and opened up new dimensions in Menka Gandhi’s case and a limitation is imposed upon law making itself by holding that the procedure established by law must also satisfy the test of reasonableness, fairness and justness. In the words of his Lordship P.N Bhagwati:- Although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the

omission of the legislature. The principle of *audi alteram partem*, which mandates that no one shall be condemned unheard, is part of rules of natural justice. Natural justice is a great humanizing principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule of acting large area of administrative action. The inquiry must always be does fairness in action demand that an opportunity to be heard should be given to the person effected?

The law must now be taken to be well settled that in an administrative proceedings which involve civil consequences the doctrine of natural justice must be held to be applicable.\textsuperscript{77}

In *Menka Gandhi*’s case a new definition was given to the words 'procedure established by law’. This leads to further inference that notwithstanding Article 21, it is open to challenge the constitutionality of the law which deprives a person of his life or personal liberty on various grounds like, the law having suffered from vice of excessive delegation, that it contravenes any of the fundamental rights other than Article 21 i.e. Article 14 (*A.R.Antule’s case*),\textsuperscript{78} that it does not offer to the prisoner a right to legal assistance (*Hussainara* case),\textsuperscript{79} that it is unfair and unreasonable (*Menka Gandhi’s case*) and it violates natural justice.

During this transitional phase of judicial interpretation number of questions have been raised on the power of Supreme Court and High Courts raising the issue of separation of powers and the same has been called as judicial intervention on the powers of legislative and executive by judiciary. Supreme Court has answered those questions by holding that any decision by the Supreme Court and the High Courts under Articles 32 and 226 respectively to uphold Constitution and maintain rule of law cannot be violative of fundamental structure. Supreme Court held thus ‘separation of power is a

\textsuperscript{77} *Menka Gandhi v. Union of India*, AIR 1978 (SC) 597.
\textsuperscript{78} *AR Anutle v. Naik*, AIR 1988 (SC) 1531.
\textsuperscript{79} *Hussainara v. State of Bihar*, AIR 1979 (SC) 1369.
favorite topic for us. Each organ of the State in terms of constitutional Scheme performs one or the other function which has been assigned to the other organs. Although drafting of legislature and its implementation by and large are functions of the legislatures and the executive respectively, it is too late in the day to say that constitutional Courts roll in that behalf is non existent. The judge made law is now well recognized throughout the world. If one is to put the doctrine of separation of power to such a rigidity it would not have been possible for any superior Court of any country whether developed or developing, to create new rights through interpretative process.  

Recently in a case, the Supreme Court defined nature of Constitution of India as 'it is supreme and all organs of the State drive power, authority and jurisdiction from it - It is living, organic and dynamic and must grow with the nation It’s provisions should be construed broadly and liberally.'

The present study is a humble effort to study judicial innovations, constitutionalisation of new values and meaning of words life and personal liberty in Article 21 of the Constitution of India, with expanded horizons of scope of Article 21. The study has been divided into five chapters. Chapter II deals with Legislative History of Article 21 of the Constitution of India. Chapter III deals with study of different landmark cases which expanded the horizons of Article 21. This chapter is in three parts, first part deals with expanded scope of right to life, whereas Chapters II and III deal with expanding horizons of personal liberty and procedure established by law. Chapter IV is an effort to trace all the decisions vide which directive principles have been enforced as rights vide various judgments and public interest litigations. Chapter V is an effort to reach to logical conclusion on the basis of the aforementioned studies and contains humble suggestions.

81  State of West Bengal v. Committee for Protection of Democratic Rights SCC (Criminal) 2010.
Difference between freedom and Liberty

Liberty is the value of individuals to control over their own actions. Different conceptions of liberty articulate the relationship of individual to society in different ways. These conceptions relate to life under a social contract, existence in an imagined state of nature and relate to the active exercise of freedom and rights as essential to liberty. Understanding liberty involves how we imagine the individual’s roles and responsibilities in society in relation to concepts of free will and determinism, which involves the larger domain of metaphysics. Individualist and classical liberal conceptions of liberty typically consist of the freedom of individuals from outside compulsion or coercion also known as negative liberty. This conception of liberty, which coincides with the liberation point of view, suggest that people should and ought to behave according to their own free will and take responsibility for their actions, while in contrast, social liberal conceptions of positive liberty place an emphasis upon social structure and agency and is therefore directed towards ensuring egalitarianism. In feudal societies a liberty was an area of all ordeal land where the rights of the ruler or monarch were waived.

The correlation of Article 21 to Article 19 on the one hand and Articles 20 and 22 on the other presents difficult problems of exposition, because several Supreme Court decisions have left the subject in some confusion. The correlation of Article 21 to Article 19 was one of the central issues in A.K. Gopalan v. The State\(^{82}\) where it was contended that ‘personal liberty’ in Article 21 included all the freedoms conferred by Article 19(I) (a) to (q) and that, in any event, it included the right to free movement conferred by Article 19 (1) (d). As preventive detention in times of peace is repugnant to civilized societies - a repugnance which the Judges shared - the Supreme Court Judges considered the matter in great detail and with great care. The correctness of the law laid down in Gopalan was never seriously doubted by any judgment of the Supreme

Court till in *R.C. Cooper v. Union*\(^{83}\) The *Bank Nationalization* case, a Bench of 11 Judges, by a majority of 10:1 'reconsidered' *Gopalan* and held that it was wrongly decided because, according to the Court, its main premise namely, that Article 22 was a complete code was wrong and also because the majority in *Gopalan* treated the fundamental rights conferred by various Articles as mutually exclusive. It may be added that three majority Judges in *Gopalan* held that Article 22 was not a complete code and they did not hold that fundamental rights conferred by different Articles were mutually exclusive, as will appear hereafter.\(^{84}\) The reason given for such 'reconsideration' was that in two Supreme Court decisions a different view had been taken from that taken in *Gopalan* and in several Supreme Court decisions which had followed *Gopalan*. Reliance was placed on the observations of Subba Rao, J. in *Kavalappara Kottrathil Kochuni v. Madras*\(^{85}\) where he observed that 'the decision of this Court in *Bhanji Munji’s case*\(^{86}\) no longer holds the field after the Constitution (4\(^{th}\) Amendment) Act, 1955.\(^{87}\) These observations were unnecessarily wide and they were soon corrected in *Sitabati Devi v. W.E.*\(^{88}\) The second decision was the decision in *M.P. v. Ranoji Rao*\(^{89}\) but that was a judgment *per incuriam* because the relevant Supreme Court judgments were not considered. The *Bank Nationalization* case, in so far as it dealt with *Gopalan* was followed in *S.N. Sarkar v. W.E.*\(^{90}\) and in *Khudiram v. W.E.*\(^{91}\) both of which repeated the observations in the *Bank Nationalization* case that the majority of Judges in *Gopalan* held that Article 22 was a complete code. These cases were also relied on in *A.D.M. Jabalpur v. Shivkant Shukla*\(^{92}\) (The Habeas Corpus case). However, in the Habeas Corpus Case, the correlation of Article 19 to Article 21


\(^{84}\) See para 11.14 below.


\(^{86}\) (1955) 1 SCR 777, (55) A.S.C. 41.

\(^{87}\) (1960) 3 S.C.R. Supra at p. 916.


\(^{89}\) (1968) 3 S.C.R. 481, (68) A.S.C. 1053.


was considered at a time when there was a proclamation of emergency on the ground of internal disturbance, and the right to move the Court, *inter alia*, for the enforcement of the fundamental right conferred by Article 21 was suspended, a fact which added a new dimension to the co-relation of Articles 19 and 22. All these cases were referred to in *Maneka Gandhi v. Union*\(^3\) and they will be considered in their appropriate places.

(i) What is the meaning of the expression 'personal liberty' used in Articles 21
(ii) Does 'personal liberty' include all or any of the freedoms conferred on citizens by Articles 19(1)(a) to (e) and (g)?

(iii) How is a fundamental right related to an ordinary legal right.

In the light of the various Supreme Court decisions mentioned earlier, the most satisfactory way of dealing with Article 21 is first to set out its legislative history' because it has not been fully set out in any decision and that history throws valuable light on the nature, scope and effect of Articles 19, 21 and 22.

The legislative history of Article 21 is this: Draft Article 15 as originally passed by the Constituent Assembly, provided that no person shall be deprived of his life or liberty without due process of law. The Drafting Committee suggested two changes in this Article: (i) the addition of the word 'personal' before the word 'liberty' and (ii) the substitution of the expression 'except according to procedure established by law' for the words 'without due process of law'. The reason given for the first change was that otherwise (liberty) might be construed very widely so as to include even the freedoms already dealt with in Article 13 (now Article 19). The reason given for the second change was that the substituted expression was more specific (*refer Article XXXI of the Japanese Constitution 1946*).\(^4\) The reason given for the first change was clearly right, for Draft Article 13 (now Article 19) conferred certain freedoms

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\(^4\) Note of the Drafting Committee in the Draft Constitution forwarded by Dr. Ambekdar to the President of the Constituent Assembly on 21 Feb., 1948.
only on citizens, whereas Draft Article 15 (now Article 21) applied to citizens and non-citizens alike and it was wise to foreclose the argument that the word 'liberty' included the freedoms which had been denied to non-citizens by draft Article 13. The reason given for the second change may be literally correct but was not candid. Both substantive and procedural 'due process' were well established in U.S.A. and though the concept of 'due process' was vague and flexible (or imprecise) it was used to enforce certain standards to which according to the majority of Judges of the U.S. Supreme Court substantive and procedural laws had to conform. However, the abuse of substantive due process by the U.S. Supreme Court produced second thoughts, and 'due process' was replaced by 'procedure established by law'. This change was the result of a discussion which the constitutional Adviser, Sir B. N. Rao had with Frankfurter J. of the U.S. Supreme Court by substituting for the words 'due process of law' the expression 'except according to procedure established by law' the Drafting Committee did not make the American concept of 'due process' more precise as a matter of drafting - the Committee gave up that concept altogether.

Although the Draft Constitution contained Article 15, it did not, in the first instance, contain any Article corresponding to Article 22 of the Constitution. When the proposal to delete 'due process' suggested by the Drafting Committee was debated in the Constituent Assembly on 8th December 1948 and then on 13th December 1948, there was strong opposition to the proposal; nevertheless the Drafting Committee’s suggestion was accepted by the Constituent Assembly. However, the Assembly’s vote did not finally settle the matter, for dissatisfaction with the deletion of 'due process' continued inside and outside the Assembly.

On 15th September 1949, Dr. Ambedkar moved that a new Article 15A (which, as amended, corresponds to Article 22 of our Constitution) be adopted. Speaking on the motion, he said:

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96 Ibid., pp. 999-1001.
We are, therefore, now, by introducing Article 15A, making, if I may say so, compensation for what was done then in passing Article 15. In other words, we are providing for the substance of the Law of ‘due process’ by the introduction of Article 15A. Article 15A merely lifts from the provisions of the Criminal Procedure Code two of the most fundamental principles which every civilized country follows as principles of international justice. It is quite true that these two provisions contained in clause (1) and clauses (2) are already to be found in the Code of Criminal Procedure and therefore, probably it might be said that we are really not making any fundamental change. But we are, as I contend, making a fundamental change because what we are doing by the introduction of Article 15A is to put a limitation upon the authority both of Parliament as well as of the Provincial Legislature not to abrogate these two provisions because they are now introduced in our Constitution itself. It is quite true that the enthusiasts for personal liberty are probably not content with the provisions of clause (1) and (2). They probably want something more by way of further safeguards against the inroads of the executive and the legislatures upon the personal liberty of the citizen. I personally think that while I sympathies with them that probably this Article might have been expanded to include some further safeguards, I am quite satisfied that the provisions contained are sufficient against illegal or arbitrary arrests.97

Article 15A, with certain amendments, was passed as it now stands in Article 22 of our Constitution. For the sake of convenience, Draft Articles 15 and 15A will hereafter be referred to by their present counterparts, Articles 21 and 22. In Gopalan the attention of the Supreme Court was drawn to the legislative history of Article 21 which showed why the expression 'due process of law' was replaced by the expression 'procedure established by law'. However, it is unfortunate that the legislative history of Article 22 and

particularly of clauses (1) and (2), whereby the substance of 'due process' was reintroduced, was not brought to the attention of the Supreme Court. Had this legislative history been brought to the Court’s attention, a number of problems which caused the judges grave concern in Gopalan would have been simplified. The Court could then have dealt with two aspects of Article 21, namely, the procedural due process available to every person (not preventively detainted) before he was deprived of his life or personal liberty and the attenuated procedural safeguards available to a person preventively detained, because Article 22(1) and (2) were expressly excluded in the case of preventive detention. The legislative history would also have led to simpler answers being given to the contentions urged on behalf of Gopalan. However, the full impact of Article 22(1) and (2) on Article 21 and on the contentions raised on behalf of Gopalan will be considered later in their appropriate place.

It is also unfortunate that Articles 21 and 22 were not taken up together in the Constituent Assembly and Article 21 re-drafted in the light of Article 22. If clauses (1) and (2) of Article 22 were meant to reintroduce the substance of 'due process', then those clauses ought to have been put in Article 21 from which 'due process' had been removed.

There would have been several advantages in renumbering Article 21 as Article 21 (1) and transferring to it, as sub-Articles (2) and (3), sub-Articles (1) and (2) of Article 22 and re-numbering the sub-Articles of Article 22 accordingly and by inserting a new marginal note. For one thing, the Supreme Court would have seen at a glance that procedural due process was a part of Article 21 itself. Articles 21 and 22 would then have been re-drafted as follows:

Article 21. Protection of Life and personal Liberty - (1) No person shall be deprived of his life or personal liberty except according to procedure established by law.

(2) No person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice.
Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

Article 22, Article 21(2) and (3) not to apply to enemy aliens and persons preventively detained; preventive detention.

(1) Nothing in Article 21(2) and (3) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(2) No law providing for preventive detention shall authorize the detention of a person for a period not longer than three months unless -

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to appointed as, judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention;

Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (5); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub clauses (a) and (b) of clause (5).

(3) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.
(4) Nothing in clause (3) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(5) Parliament may by law prescribe –

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause (2);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of Clause (2). 98

Recently, in a case Subhash Popatlal Dave v. Union of India 99, the Supreme Court has held that:

'Personal liberty is the most valuable fundamental right guaranteed under the Constitution. Deprivation of such liberty is made impermissible by the Constitution except as authorized under the provisions of Articles 20, 21 and 22. Deprivation of personal liberty by incarceration as a penalty for the commission of an offence is one of the recognized modes by which the State can abridge the fundamental right of personal liberty. Even in such case the authority of the State is circumscribed by the limitations contained under Article 20 and 21 of the Constitution in India.'

99 (2014) 1 SCC 280