CHAPTER–III

RIGHT TO LIFE AND PERSONAL LIBERTY:
CONTENT, MEANING, NATURE AND SCOPE

1. Judicial articulation of 'life' and 'personal liberty'

In *Munn v. Illinois*,¹ Field J. spoke of the right of life in the following words:

By the term life as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs facilities by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an aye or the destruction of any other organ of the body through which the soul communicates with the outer world.

This statement has been repeatedly quoted with approval by the Supreme Court of India in many cases.² In *Francis Coralie v. Union Territory of Delhi*,³ the Supreme Court further expanded Field’s statement ‘that any act which damages or injures or interferes with the use of any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21.

Human being possesses various organs and each organ has particular function to do in the body. Every human being thinks, talks, understands, walks, listens and feels. All these range of activity is what is meant by life of a human being. So the life means any creature who has power to think, talk, understand, feel, etc. that is human being. When the human being looses such

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¹ (1876) 94 U.S. 113, at p.142.
³ AIR 1981 SC 746.
power like thinking, talking etc. then it is considered the end of life and called a
dearth of human being.

Article 21 has two facets, substantive and procedural. The substantive facets guarantees that fundamental right to life person liberty and while the
procedural facets guarantees that deprivation of the substantive right shall be
only in accordance with the procedure established by law.

‘Liberty’ is generally assumed to have three forms - the personal or civil liberty of the individual, the political liberty of the citizen economic liberty of
the workers. We are here concerned by personal or civil liberty i.e. the liberty
of a man in capacity of an individual person. According to Ernest Barker⁴
‘Civil Liberty' consists of three somewhat differently expressed articles
physical freedom from injury or threat to the life, health and movement of the
body, intellectual freedom from the expression of thought and belief and
practical freedom for the play of will and the exercise of choice in the general
field of contractual action and relations with other persons. Similarly Lord
Justice Denning of the Court of Appeal in England observes by 'personal freedom'⁵ I mean the freedom of every law abiding citizen to think what he
will, to say that he will and to go where he will on his lawful occasion with let
her or hindrance from any other persons. It must be matched of course with
social security, by which I mean the peace and good order of the community in
which we live.⁶ In all above definition in which the essence of personal liberty
is the same, the scope of personal liberty is very wide. In our country, the
judges of the Supreme Court has been guided by the interpretation of personal
liberty taken by the American Supreme Court.

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⁶ Ibid
a) Life and Liberty As Interpreted by American Supreme Court

The first attempt to secure constitutionally for Fundamental Rights in the U.S was made when the first ten Amendments were added to U.S. Constitution in 1789. The Amendments secured for the people the freedom of religion, speech, press and peaceful assembly and the 5th Amendment guaranteed the right to life and property to the people although ‘liberty’ in the amendment mean as in England ‘liberty of person’ or ‘personal freedom’ only.

The American Supreme Court has interpreted the terms ‘life and property’ liberally so as to include all freedoms of expression, assembly, association, movement and profession. Though it never defined liberty, it repeatedly emphasized that liberty was ‘not confined to mere freedom from bodily restraint’ and that it extended to the full range of conduct of the individual.

The above interpretation of liberty enhanced the dignity of judiciary and ensured constitutional guarantees to personal liberty application of this interpretation was retrogressive, particularly in the field of social legislation because it structured progressive social legislation in for our of the individual liberty. Now these kinds of decisions are thought as untenable and are sharply criticized. Actually the conservative judges misconceived the court’s proper role and used the ‘due process clause to judge of the policy of the other two branches of the government and afterwards understood that when the broad limits of their powers are transferred by the executive and the legislative and the rights of the citizens are improved, does the judiciary intervene. However the ‘due’ process’ clause in the U.S. Constitution continues to have a substantive and procedural significance and the right of judiciary to exercise its power reserved in the ‘due process’ clause is an important power which is central in the scheme of American Constitution. It has only chosen to use it judicially and with restraint in social justice.

The word ‘life’ however does not mean animal existence. The observations of Field, J. in *Munn v. Illinois*\(^9\) while dealing with the purpose of word ‘life’ in the 5\(^{th}\) and 14\(^{th}\) Amendments of the U.S. Constitution, the first of which reads ‘No person shall be deprived of his life, liberty and property, without due process of law’ and the second ‘No State shall deprive any person of life, liberty and property without due process of law’ have come to be accepted by the Supreme Court of India.

U.S. Supreme Court has interpreted the word ‘life’ very broadly liberally and widely as to constitute himself the ‘right to privacy’ as founded in the 14\(^{th}\) Amendment concept of personal liberty and further own is broad enough to encompass the woman’s decision whether or not to terminate the pregnancy.\(^{10}\) Right to travel either from state to state outside the country, and the state can’t deny the right without judgments standard of procedural fairness.\(^{11}\) The right of the people, to be secure in their houses, persons, papers and effects against unreasonable searches and seizures shall not be violated.\(^{12}\) Use of death penalties is also only on procedural sufficiency of the trial as the cruel and inhuman punishments are prohibited by Human Rights Government, the humanitarian voluntary organization called 'Amnesty International' and various Constitutions of the world.

b) Life and Personal Liberty as interpreted by the Supreme Court of India
liberty, equality and fraternity are words of passions and power. They were the watch words of the French revolutions: they inspired the unforgettable words of Abraham Lincoln’s Gettysburg Address, The foundation of Indian political and social democracy, as envisaged in the preamble of Constitution rest on justice, equality, liberty and fraternity in secular and socialist republic in which every individual has equal opportunities to strive towards excellence and of his

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\(^{9}\) See, Supra Note 1.
\(^{10}\) *Jane Roe v. Henry Wade*, 410 US 113 (1973)
dignity of person in an integrated equalitarian Bharat. Right of justice and equality are stated liberties, which include freedom of expression, belief and movement for excellence. The right to life with human dignity of a person is a fundamental right of every citizen of pursuit of excellence and happiness. Personal freedom is the basic condition of full development of human personality. Article 21 protects rights to life, which is most precious right in a civilized society. The trinity i.e. liberty, equality and fraternity always blossom and en-lives the flower of human dignity. One of the gifts of democracy is right to personal liberty.

Liberty aims at freedom not only from arbitrary restraint but also to secure such condition which are essential for the full development of human personality. Liberty is the essential concomitant for other rights without which a man cannot be at his best. Liberty must be controlled in the interest of the society but the social interest must never be overbearing to justify total deprivation if individual liberty. Liberty can not stand alone but must be paired with a companion virtue; liberty and morality, liberty and law; liberty and justice; liberty and common good; liberty and responsibility; which are concomitant for orderly progress and social stability.

The Supreme Court of India defined the scope of personal liberty in A.K. Gopalan's case. The Court took a highly conservation view. Reflecting the British interpretation of liberty, it viewed personal liberty only an antithesis of physical restraint or coercion.

Justice Mukherjee adopted Dicey’s definition of personal liberty and observed that it was ‘a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification.’ It was in his opinion, this negative right of not being subjected to any torn, of physical restraint or coercion without the sanction of law that

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14 Ibid, at p. 262.
constituted the essence of personal liberty and not mere freedom to move to any part of Indian Territory.\textsuperscript{15}

On reading this strange judgment, the thoughts of Tolstoy that slavery has been abolished, Rome has abolished it, America has abolished it, Russia has abolished it- on paper, must have coursed through the mind of A.K. Gopalan and it is possible that he may have concurred with Tolstoy that India had abolished it- but on paper.\textsuperscript{16}

But in \textit{Kharak Singh v. State of U.P.},\textsuperscript{17} the Supreme Court again reviewed the term ‘personal liberty’ and freed it from the restricted interpretation given to it in ‘Gopalan’s case. Kharak Singh was arrested in a case of dacoity and acquitted by the Courts. The police did not know the meaning of human dignity, kept Kharak Singh under surveillance even after his acquittal, in terms of the police rules. He was forced to inform the police whenever he went out and his whereabouts and when he would return. They had the inhuman habit of knocking at the door of Kharak Singh’s house at night almost every day to ascertain if he was at home, which affected the personal liberty, dignity and privacy of Kharak Singh. The domiciliary visits were done under regulations 236 of the U.P. Police Regulations, which authorized policeman to visit the house of the any former accused at night to make sure that he was at home. Kharak Singh had challenged the U.P. Police Regulations on the ground that the domiciliary visits by the police to his house at Nights interfered with his personal liberty and was violative of the fundamental rights enshrined in the constitution. The Supreme Court upheld the contention of the petitioner that domiciliary visits violated his personal liberty. The Supreme Court observed:

\begin{quote}
Having regard to the terms of Article 19(1), we must take it that the expression is used as not to include the right to more about
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\begin{itemize}
\item \textsuperscript{15} Ibid.
\item \textsuperscript{16} \textit{P. Krishnaswamy, V.R. Krishna Iyer -A living legend}, (2002), Universal, p. 189.
\item \textsuperscript{17} AIR 1963 SC 1295.
\end{itemize}
being excluded, its narrowest interpretation would be Article 21 which comprehensives nothing more than freedom from physical restraint of freedom from confinement within the bounds of a prison. We do not hold that the term was intended to bear only this narrow interpretation, but on the other hand consider that ‘Personal liberty’ is used in the Article as a compendious term to include within itself all varieties of rights which go to make up the personal liberties of man, other than those deals within the several clauses of Article 19(1)\(^{18}\)

The minority view expressed by Subha Rao, J. adopted a much wider concept of personal liberty. He differed from the majority view that Article 21 excluded what was guaranteed by Article 19. He pleaded for an overlapping approach. i.e. both Articles 21 and 19 not excluding, but overlapping, each other. The learned Judge observed thus: \(^{19}\)

> Psychological restraints are more effective than the physical ones. As such any interference with the right to privacy would also be a preach of personal liberty. Right of an individual to be free from restriction and encroachments are directly imposed or indirectly brought about by calculated measures.

In *Bank Nationalization* case\(^{20}\) it was held that under Article 21 a person is denied the right of personal liberty in accordance with the procedure established by law which was affirmed and strengthened by the Supreme Court in *Sambu Nath Sankar v. State of West Bengal*,\(^{21}\) *Hardan Saha v. State of West Bengal*\(^{22}\) and *Khudram Das v. State of West Bengal*.\(^{23}\)

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18 Ibid at 1300.
19 Ibid at 1305.
21 AIR 1973 SC 1425.
22 AIR 1974 SC 2154.
23 AIR 1975 SC 552.
This concept was further exemplified in the celebrated case of Menaka Gandhi. Maneka Gandhi was issued a passport on June 1, 1976, under the Passport Act, 1967. On the 4th of July 1977, Maneka Gandhi received a letter dated 2nd July, 1977, from the Regional Passport Officer, Delhi intimating to her that it was decided by the Government of India to impound her passport under section 10(3) of the Act 'in public interest' Maneka Gandhi was required to surrender her passport within seven days from the receipt of the letter. Maneka Gandhi immediately addressed a letter to the Regional Passport Officer requesting him to furnish a copy of the statement of reasons for making the order as provided in section 10(5) of the Act. A reply was sent by the Government of India, Ministry of External Affairs on 6th July, 1971 stating, inter alia that the Government has decided ‘in the interest of the general public’ not to furnish her a copy of the statement of reasons for the making of the order. Maneka Gandhi then filed the writ petition challenging the action of the Government in impounding her passport and declining to give reasons for doing so.

The leading opinion in Maneka's case was pronounced by Justice Bhagwati. The expression ‘personal liberty’ in Article 21 was given an expansive interpretation. Bhagwati, J. concluded:

The expression ‘personal liberty’ in Art 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19.

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25 The case was heard by a Bench of Seven Judge who delivered fire separate opinions. Bhagwati J., delivered an opinion on behalf of himself, Untwalia and Fazl Ali, J1., Chandrachud, Krishna Iyer. JJ, And Beg, C.1., in separate judgments concurred with Bhagwati, J, Kailasam.,1, dissented.
26 Ibid at 622 (Para 54)
Krishna Iyer J. observed:

Let me first define my terms. By ‘personal freedom’ I mean the freedom of every law abiding citizen to think what he will, to say what he will, and to go where he will on his lawful avocations without let or hindrance from any other persons. Despite all the great changes that have come about in the other freedoms, this freedom has in our country remained intact.\(^{27}\)

The freedom of movement is the very essence of our free society setting up apart. Like the right to assembly and right to association, it often made all other rights meaningful - knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffers, just as when curfew or home detention is placed on a person.\(^{28}\)

….restraints are permissible only to the extent they have nexus with the approved object. For instance, in a wide sense, the interests of the general public are served by a family planning programme but it may be constitutional impertinence to insist that passport may be refused if sterilization certificates were not produced. Restraints are necessary and validity made by statute, but to paint with an over-broad brush power to blanket-ban travel abroad is to sweep overly and invade illicitly. The law of fear cannot reign where the proportionate danger is containable. It is a balancing process, not over weighted one way or the other.\(^{29}\)

Maneka’s case completely overrides the Gopalan's view which had held the field for nearly three decades. The term life has been given a very


\(^{29}\) Stated by Krishan Iyer J. in Maneka Gandhi v. Union of India, AIR 1978 SC 597, 662 (Para 132).
expansive meaning. The term personal liberty has been given a very wide amplitude covering a variety of rights which go to constitute personal liberty of a citizen.

In post Maneka era, the Court has been giving an expansive interpretation to ‘life’. The Court has often quoted the observation of Field. J., in *Munn v. Illinois*. The expression 'personal liberty' used in Article 21 has been given a liberal interpretation. The term ‘personal liberty’ is not used in a narrow’ sense but has been used in Article 21 as a compendious term to include within if all those variety of rights of a person which go to make up the personal liberty of a man.

In *Francis Coralie v. Union territory of Delhi*, Bhagwati, J. held:

> We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

Thus, the inhibition against deprivation of ‘life’ would extend to all those faculties by which life is enjoyed.

In *Bandhua Mukti Morcha v. Union of India*, where the question of bondage and rehabilitation of some labourers was involved, Bhagwati, J. relied on *Francis Coralie* as:

> It is the fundamental right of everyone in this country ... to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State policy and particularly

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30 Supra, Note 1.
31 AIR 1981 SC 746.
32 AIR 1984 SC 802.
33 Supra, Note 31.
clauses (e) and (f) of Article 39 and Articles 41 and 42 and at least, therefore, it must include protection of the health and strength of the workers men and women and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and no state has the right to take any action which will deprive a person of the enjoyments of these essentials.

In *Olga Tellis*, the Supreme Court of India has emphasized that the term life in Article 21 is not only restricted to the mere animal existence of a person. It means something more and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. The ambit and sweep of the ‘right to life’ embodied in Article 21 is wide and far reaching. It does not mean only that life cannot be extinguished as taken away but much more than that.”

The importance of life and liberty was recognized in the following words by Pathak, C.J. in *Kehar Singh v. Union of India*. To any civilized Society there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the Courts to Article 21 of the constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of daily existence.

In *P. Rathinam v. Union of India* the Supreme Court defined life in following words: The right to live with human dignity and the same does not connote continued drudgery. It takes within its fold some of the fine graces of civilization which makes life

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35 Ibid at 194.
36 *AIR 1989 SC 653* (Para 7).
37 *AIR 1994 SC 1844*.
worth living and that the expanded concept of life would mean the tradition culture and heritage of the person concerned.

The right to life given under Article 21 also include the quality of life. In *Chameli Singh v. State of Uttar Pradesh*, Supreme Court while dealing with Article 21 has held that the need for a decent and civilized life includes the right to food, water and decent environment. The Court has observed in this connection that in any organized society, right to life as a human being is not ensured by meeting only the animal needs of man.

In the law’s evolution we find that many a facets of human personality emerged as prominent aspects with the march of history, change of human thought and priorities which now demand immediate human attention. Since *Maneka Gandhi* Article 21 has been interpreted liberally and broadly in order to create more sights. They are not only ancillary or bids to the basic right to life but are the inalienable limbs of life itself without which man will not be able to achieve his best self.

Right to life were there when man took birth on earth. The laws of gravitation were not formed on the day Newton saw an apple falling on the ground, but it was always there. Man recognized it after that event. Same is the case with right to life. It was always there but man is slowly recognizing the same. Thus the liberal interpretation given to the word ‘right to life and personal liberty’ has great impact on social life of human being.

II Relationship amongst Articles 14, 19, 21 and 22 in context of Right to Life and Personal Liberty

The impression of exclusiveness among different Fundamental Rights, particularly between Articles 19 and 21, which *Gopalan* had left has been removed by *Maneka Gandhi* through *R.C. Cooper*. By establishing a

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38 AIR 1996 SC 1051.
40 Maneka Gandhi v. Union of India, AIR 1978 SC 597.
41 R.C. Cooper v. Union of India, AIR 1970 SC 564.
relationship among Articles 14, 19 and 21, particularly between Articles 14 and 21, a requirement of reasonableness of law providing for deprivation of life or liberty has been created.

a)  A. K. Gopalan to Maneka Gandhi case -

The Era of Literal Interpretation (1950 to 1977)

In *Gopalan*, the petitioner contended that his detention under the Preventive Detention Act, 1950 was invalid as it violated his right to move freely throughout the territory of India which is the essence of personal liberty guaranteed in Article 19. The detention under this Act was not a reasonable detention under clause 5 of Article 19 and hence the Act was void. Rejecting the argument, the court pointed out that the word ‘personal liberty’ in Article 21 in itself had a comprehensive content and ordinarily, if left alone would include not only freedom from arrest or detention, but also various freedoms guaranteed by Article 19. Article 19 deals only with a few specific freedoms mentioned there in and not with freedom from detention whether punitive or preventive.

The Court ruled that Articles 20 to 22 constituted a comprehensive code and embodied the entire constitutional protection in relation to life and personal liberty and was not controlled by Article 19. Thus, a law depriving personal liberty had to conform with Articles 20 to 22 and not with Article 19, which covered a separate and distinct ground. Article 19 could be involved only by a free man and not one under arrest.

Fazl Ali, J. differing with the majority, held that Article 19(1) (d) did control Articles 21 and 22, because juridically freedom of movement was an essential requisite of personal liberty and, therefore, the reasonableness of the Preventive Detention Act should be justiciable under Art. 19(5).

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42 *Supra* Note 39.
As interpreted in Gopalan, Article 21 provided no protection or immunity against competent legislative action. Article 21 gave a carte blanche to a legislature to enact a law to provide for arrest of a person without much procedural safeguard.

The view of exclusiveness of Articles 19 and 21 held the field for quite some time. At time this view even led to anomalous results.

In course of time, this rigid judicial view came to be softened somewhat. The beginning of the new trend is to be found in the Bank Nationalization case\(^{43}\) Prior to this case, Articles 19(1) (F) and 31 (2) were regarded as unrelated and mutually exclusive on the analogy of the Gopalan view. In the Bank Nationalization case,\(^{44}\) Articles 19(1) (f) was applied to a law enacted under Article 31 (2). This case was the precursor of the trend to link Articles 19, 21 and 22.

Following Bank Nationalization case, the Supreme Court in Bennett Coleman & Co. v. Union of India,\(^{45}\) overruled the argument that Article 19(1) (a) could not apply the law affecting freedom of speech but not enacted directly with respect to Article 19(1)(a). The Court declared that if a law affected freedom of speech, its reasonableness became assessable with reference to Article 19(2) even though it was not enacted directly to control the freedom of speech. This completely knocked out the court’s earlier argument in Gopalan.

At last, the Supreme Court moved to link Articles 19, 21 and 22 in State of West Bengal v. Ashok Dey\(^{46}\) It held the West Bengal law of preventive detention valid with reference to Article 19(1) (d) because in the disturbed law and order situation prevailing in the State, the law was enacted in the interest of the general public. In Khudiram Das v. State of West Bengal,\(^{47}\) Bhagwati, J., asserted, ‘It is not open to anyone now to contend that a law of preventive

\(^{43}\) R.C. Coooper v. Union of India, AIR 1970 SC 564.

\(^{44}\) Ibid.

\(^{45}\) AIR, 1973 SC 106.

\(^{46}\) AIR 1972 SC 1660.

\(^{47}\) AIR 1975 SC 550.
detention, which falls with Article 22, does not have to meet the requirement of Article 14 and Article 19.' Thus the above cases diluted somewhat the rigorous statutory approach to Article 21 as depicted in *Gopalan*.

**b) Since Maneka Gandhi Case**


*Maneka Gandhi v. Union of India*[^48] is a landmark case of post-emergency period. This case shows how liberal tendencies have influenced the Supreme Court in the matter of interpreting Fundamental Rights, particularly, Article 21. This case showed that Article 21 as interpreted in *Gopalan* could not play any role in providing any protection against any harsh law seeding to deprive a person of his life or personal liberty. In fact, this case has acted as a catalytic agent for transformation of the judicial view on Article 21. Since *Maneka*, the Supreme Court has given to Article 21, liberal and broader interpretation. So as to imply many more fundamental rights. In course of time, Article 21 has proved to be a very fruitful source of rights of the people. The leading opinion in *Maneka* was pronounced by Justice Bhagwati. The majority has held that Articles 14, 19 and 21 are not mutually exclusive. A nexus has been established between these three articles. This means that a law prescribing a procedure for depriving a person of ‘personal liberty’ has to meet the requirements of Article 19. Also the procedure established by law in Article 21 must answer the requirement of Article 14 as well. According to Krishna Iyer J. ‘No Article in the Constitution pertaining to a Fundamental Right is an island in itself. Just as a man is not dissect-able into separate limbs, cardinal rights in an organic constitution have a synthesis.’[^49]

*Maneka* completely overrides the *Gopalan* view which had held the field for nearly three decades. Since *Maneka*, the Supreme Court has again and

[^48]: Supra, note 40.
[^49]: Ibid at 662 (Para 1310).
again underlined the theme that Articles 14, 19 and 21 are not mutually exclusive, but they ‘sustain, strengthen and nourish each other.’

Reiterating Maneka Gandhi, the Supreme Court in District Registrar and Collector Hyderabad v. Canara Bank, has held that- Any law interfering with personal liberty of a person must satisfy a triple test: i) it must prescribe a procedure; ii) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorizing interference with personal liberty and right of privacy must also be right, just and fair and not arbitrary, fancifful or oppressive. It the procedure prescribed does not satisfy the requirement of Article 14 it would be no procedure at all within the meaning of Article 21.

III. Judicial Articulation of 'Procedure established by law'

Article 21 makes it is clear that a person can be deprived of his life or personal liberty only according to ‘procedure established by law.’ This expression in Article 21 is the result of deliberate choice by the constituent Assembly in place of phrase ‘due process of law.’ The expression ‘due process of law’ was not accepted because basically the words ‘due process’ had come not be interrupted by the Supreme Court of United States as meaning fundamental principles of liberty and justice which brought in the conception of substantive reasonableness as well as procedural reasonableness, whether as particular statue satisfied these requirements depended on the view of the judge deciding the case. The legislative enactments, therefore became subject - matter

51 Supra, note 40.
52 (2005) 1 SCC 496.
53 Ibid at p. 524 (Para 56).
of review because of the small word ‘due’ in the aforesaid expression regarding which it was stated that it means ‘What is just and proper.’ This introduced great uncertainty and gave wide power to the judiciary. Many of the members of the Constituent Assembly as Mr. K.M. Munshi supported because there is no fear of abuse and further observed that ‘Legislature may pass legislation in a hurry which sweeping powers to the executive and the police.’ So there must be some agency to strike the balance.54 But most of them also thought that it may prove ‘a great handicap for all social legislation.’ Two questions were before the Constituent Assembly as: (1) To give judiciary the authority to sit the judgment of over the will of the legislature on the ground that it is not a good law ..? and second was the legislative ought to be trusted not to make bad laws?55 There were dangers on both sides.

The views put forward were various, ranging in so many shades. The view put forward by Dr. Ambedkar is worth listening as:

'Due process' clause would give the judiciary power to judge the law by asking the question whether the law is in keeping with certain fundamental principles relating to the rights of the individual. Which principles may be abrogated by the legislative, being led away by person by party prejudice, by party considerations. As evident he also saw dangers on both sides.

The final shape which the Article took has a very broad sweep. It knows of no exception and is not subject to any provision, unlike the freedoms of Article 19. It opens with an emphatic ‘No’. The use of the word ‘shall’ and ‘except’ makes the command of the people of India, the sovereign, absolute. It is absolutely fundamental to the governance of the country for all times.56

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56 For detail, See, Supra, Ch.2, Sec. II (b).
Now it was all the matter of interpretation as to take into account the changed condition and circumstances and purpose so as to constitutional provisions does not get atrophied or fossilized, but remain flexible enough to meet the newly emerging problems and challenges.\textsuperscript{57} There was a time when it was thought that it is the most indecent to suggest that judges makes the law. But now the time is when everyone is out of the fairy tales and the childish fiction. \textit{Raghubir Singh}'s case.\textsuperscript{58} Judges make laws is no longer in doubt.

a) ‘\textbf{Procedure established by Law’}-Judicially Interpreted as Procedure enacted by Legislature (1950 to 1977)

The expression 'procedure established by law' came for judicial scrutiny in \textit{A.K. Gopalan}'s case.\textsuperscript{59} The Supreme Court was divided on the meaning of this word. The majority was of the view that 'procedure established by law' must mean the procedure prescribed or enacted by the States which included the Parliament and Legislatures.\textsuperscript{60}

That means any procedure whether arbitrary or oppressive was to be upheld if it had a legislative sanction there simply reiterating the Austinian concept of law.\textsuperscript{61} Article 21 was interpreted as protective umbrella only against executive action unless it was shown that the legislature, in depriving a person of his life or personal liberty, has transgressed any other relevant mandatory provision of the Constitution.

The minority opinion delivered by Fazal Ali J. was that it is exactly as ‘due process established by law'. He insisted in his dissenting view that principle of natural justice applicable to American ‘due process’ clause must be followed while interpreting Article 21 of the Indian Constitution.

\textsuperscript{59} AIR 1950 SC 27.
\textsuperscript{60} Article 12 according to which state includes the Parliament and Legislatures.
\textsuperscript{61} Austin (positive school), Law is the command of the sovereign; See, R.W.M. Dias, \textit{Jurisprudence}, (1985), Butherword, eh. 16 p. 331-358.
In the case of *Kharak Singh*\(^{62}\) and *Satwant Singh*\(^{63}\), the Supreme Court of India gave somewhat wider interpretation to the expression of personal liberty, but it gave the same interpretation to the expression ‘procedure established by the law’ as was given in *Gopalan*.


It was only in *Maneka’s*\(^{64}\) case that mere prescription of some kind of procedure can not ever meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable.

The Supreme Court constantly introduced the principles of natural justice in the procedural protection under Article 21 must be ‘reasonable law’. In case the law is not reasonable, its validity can be questioned before the courts in the context of Article 21.

Krishna Iyer J. said that the compulsion of constitutional humanism and assumption of full faith in life and liberty can’t be so futile or fragmentary that any transient legislative majority in tantrums against any minority, by their quick readings of a bill with the requisite quorum, can prescribe any unreasonably modality and thereby sterilize the grandiloquent mandate. ‘Procedure established by law’, with its lethal potentially, will reduce life and liberty to a precarious play thing if we do not by necessity import into those weighty words on a adjectival rule of law: civilized in its soul fair in its heart and fixing those imperatives of procedural protection without which the procession tail will wag the substantive head. Procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental within Article 21 has to be fair not foolish and carefully designed to effectuate, not to subvert, the substantive right itself. This procedure must rule out anything arbitrary, freakish or bizarre. The quality of fairness in the process is

\(^{62}\) AIR 1963 SC 1295.
\(^{63}\) AIR 1967 SC 1836.
\(^{64}\) *Supra*, note 40.
emphasized by the strong word ‘established’, which means’ settled firmly’, not whimsically. If procedure is rooted in the legal consciousness of the community, it becomes established procedure and ‘law’ leaves little doubt that it is normally regarded as just since law is the means and the justice is the end:

According to him ‘procedure in Article 21 means fair, not formals, procedure.’ ‘Law’ is a reasonable law not any enacted piece. He further laid down that let us not forget about that Article 21 clubs life with liberty and when interrupt the colour and content of ‘procedure established bylaw’. We must be alive to the deadly peril of life being deprived without minimum procedural justice, legislative callousness and despising hearing fair opportunities of defence.

Maneka’s case has energized Article 21. The potent interpretation given in this case has helped in determining the future case. With the help of this decision number of new aspects have been brought within the ambit of Article 21 e.g. natural justice\textsuperscript{65} frees legal services\textsuperscript{66} Public interest litigation,\textsuperscript{67} life\textsuperscript{68} etc. which are very few in the large pond of judicial activism.

In Sunil Batra v. Delhi Adm\textsuperscript{69} while dealing with the question as to whether a person awaiting death sentence can be kept in a solitary confinement. Justice Iyer held that although our constitution does not have a ‘due process’ clause as it is in the U.S. counterpart, the same consequences would follow after Maneka. He held:

For what is primitively outrageous scandalizing unusual or cruel and rehabilitative counter- productive is Unarguably unreasonable and arbitrary and is shot down by Article 14 and 19 and (inflicted with procedure Unfairness, fails foul of Article 21.

\textsuperscript{67} Ratlam Municipality v. Varidhichand and others, AIR 1980 SC 1622.
\textsuperscript{68} See, Supra, Note 31.
\textsuperscript{69} AIR 1978 SC 1675.
In *Jolly Varghese v. Bank of Cocbill*,\(^{70}\) the procedure of putting a poor person in prison for failure to pay his debts.\(^{71}\) Was held to be violative of Article 21, unless there is proof of the minimal fairness of his willful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means. Justice Krishna Iyer said:

'The high value of human dignity and the worth of the human person enshrined in Article 21, read with Articles 14 and 19, obligates the state not to incarcerate except under law which is fair, just and reasonable in its procedural essence.'

In *Mithu v. State of Punjab*,\(^{72}\) a constitutional bench, for the first time and unanimously invalidated a substantive law - section 303 of the Indian Penal Code - which provided for the mandatory death sentence for murder committed by a life convict. Questing form *Mankea, Sunil Batra and Bachan Singh* the Court observed:\(^{73}\)

These decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe and for the courts to follow it: that it is for the legislature to provide the punishment and for the courts to follow it: that it is for the legislature to provide the punishment and for the courts to impose it... the last word on the question of Justice and fairness does not rest with the legislature. Thus not merely procedure but a substantive law was invalidated under Article 21.

In *Olga Tellis v. Bombay Muncipal Corporation*,\(^{74}\) the Supreme Court has emphasized that the procedure established by law for the deprivation of the right conferred by Article 21 must be fair, just and reasonable. Procedure which

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70 AIR 1980 SC 470.
71 Under Section 51 and order 21, rule 27 of the Civil Procedure Code
74 AIR 1986 SC 180.
is unjust or unfair in the circumstances of a case, attracts the voice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it.

Recently, in *State of Maharashtra v. Dr. Praful B. Desai*\(^75\) recording of evidence by video conferencing was held to satisfy requirements of section 273 C.P.C, so long as the accused and/or his pleader were present when the evidence was being recorded. Hence, recording of such evidence was held to be as per the 'procedure established by law' under Article 21.

*Maneka’s* case has been a turning point and a spark thrower of a new resolution in the sphere of personal liberty. Post *Maneka* era has been the most fertile period in which the concept of personal liberty acquired newer heights and experienced all side growth. Thus Article 21 whose potential was never discovered in the Article was ultimately pulled out of its deep slumbers and harnessed to engineer social justice which is one of the goals proposed to be attains by the Constitution.

**IV Emergency provisions viz-a-viz Right to Life and Personal Liberty.**

After the partition of the country the Constituent Assembly decided to provide a federation with strong centre in order to overcome the emergencies and difficulties which may be encountered in future.

Part XVIII of the constitution, thus, makes provision for three kinds of emergencies which have different incidents.

- Proclamation of Emergency (Article 352)
- Failure of constitutional Machinery in State (Article 356)
- Financial Emergency (Article 360)

The expression ‘proclamation of emergency’ (which is popularly known as National Emergency) means only a Proclamation issued under clause (i) of

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\(^{75}\) (2003) 4 SCC 601.
Article 352. Accordingly, wherever the expression “proclamation of emergency” occurs, it should not include the two other emergencies, namely, the emergency arising out of the failure of the constitutional machinery in a state\textsuperscript{76} or the financial emergency.\textsuperscript{77}

Article 352 provides if the president is satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened, either by war or external aggression or armed rebellion,\textsuperscript{78} he may, by proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory\textsuperscript{79} thereof as may be specified in the proclamation.

The president is empowered to proclaim emergency before the actual occurrence of war or external aggression of armed rebellion, if he is satisfied’ that there is imminence danger thereof.

On the declaration of national emergency, the president is empowered to suspend any of or all fundamental rights (except those of Articles 20 and 21) under Article 359, conferred by part III of the Constitution. The emergency under Article 352 could be declared only when the president of India is ‘satisfied’. The word satisfied does not mean the ‘personal satisfaction’ of the president but it is the satisfaction of the council of ministers.\textsuperscript{80} The power to declare emergency can be exercised by the President only on the advice of the council of ministers.

Now\textsuperscript{81} it is clear that the president of India shall declare emergency on the written advice of the cabinet and not merely on the advice of Prime

\textsuperscript{76} See, Art 356.
\textsuperscript{77} See, Art 360.
\textsuperscript{78} Subs. By The Constitution (Forty-fourth Amendment). Act, 1978, Sec. 37, for “internal disturbance” (w.e.f. 20-06-1979).
\textsuperscript{79} Ins. By The Constitution (Forty-Second Amendment) Act 1976, Sec. 48 (w.e.f. 3-01-1977)
\textsuperscript{81} See, clause 3, Art 352 as amended by The Constitution (Forty -forth Amendment) Act, 1978 (w.e.f. 20-6-1979).
Proclamation of emergency under Article 352 have been issued thrice- in October, 1962 during Chinese aggression which was revoked in Jan, 1968, in December, 1971 in connection with external aggression from Pakistan and while this was in operation another in June 1975 on ground of internal disturbances both of which were revoked in March 1977.

a) **Position prior to The Constitution (44\(^{th}\) Amendment) Act, 1978**

Before the 44\(^{th}\) Amendment Act, 1978, during emergency all the fundamental rights under Part III of constitution could be suspended, even Articles 20 and 21.\(^{83}\)

In September 1962, China attacked India. On 26\(^{th}\) Oct. 1962, the President of India issued a proclamation of emergency under Article 352(1) declaring that a grave emergency exists whereby the security of India is threatened by ‘external aggression’. The first order as amended by the later order read.

In exercise of the powers conferred by clause (1) of Article 359 of the constitution, the President there by declares that the right of any person to move any court for the enforcement of the rights conferred by Articles 14, 21 and 22 of the constitution shall remain suspended for the period during which the proclamation of emergency issued under clause (1) of Article 352 on the 26\(^{th}\) Oct. 1962 is in force, if such person has been deprived of such rights under the Defence of India Ordinance, 1962 is in force, if such person has been deprived of such rights under the Defence of India Ordinance, 1962, rule or order made there under.

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82 As was done by Prime Minister Smt. Indira Gandhi in June, 1975. She had advised the President to proclaim emergency without consulting the council of minister.

83 After The Constitution (44th Amendment) Act, 1978, 21 and 22 can not suspended.
From October 26, 1962, till March 6, 1964 more than one thousand persons were arrested. This emergency continued till January 1968, when the President by another proclamation lifted it.

In *Makhan Singh v. State of Punjab*, 84 regarding the true scope and effect of Article 359(1), the Supreme Court held:

> Article 359, on the other hand, does not purport expressly to suspended any of the fundamental rights. It authorizes the President to issue an order declaring that the right to move any court for the enforcement of such of the rights in part III as may be mentioned in the order and all proceedings in any court for the enforcement of the right so mentioned shall remain suspended for the period during which proclamation is in-force or for such shorter period as may be specified in the order. The rights are not expressly suspended, but the citizen is deprived of his right to move any court for their enforcement. 85

Thus the Court held that the said rights are theoretically alive but right to seek remedy is suspended. The Supreme Court further held that it was impossible to accept the contention that by an order under Article 359(1) it is only the right to move the Supreme Court under Article 32(1), stand suspended for the enforcement of fundamental rights and a citizen would be free to seek relief from a High Court under Article 226. The court observed that Article 359 uses the words ‘any court’ which does not mean only the Supreme Court but must include all courts of competent jurisdiction.

The Court took the precaution of pointing out that as a result of the issue of proclamation of emergency and the Presidential Order, a citizen would not be deprived of his right to move the appropriate Court for a writ of habeas corpus on the ground that his detention has been ordered malafide. Similarly, if

84 AIR 1964 SC 381.
85 *Ibid* at 393.
the detenue contends that the provisions of Defence of India Act and the Ordinance under which he is detained suffer from excessive delegation his plea raised can not be barred by the Presidential Order because it is plea which does not relate to the fundamental rights mentioned in the order. 86

In Ram Manohar Lohia v. State of Bihar, 87 Dr. Ram Manohar Lohia was detained by an order of District magistrate to whom the power was delegated by the government under section 40(2) of the Defence of India Act, 1962. The Supreme Court held the order of detention under the Defence of India Rules to be illegal on the ground that the order of detention was inconsistent with the conditions laid down in the Defence of India Rules. The Court observed:

When the liberty of a citizen is put within the reach of authority and the scrutiny from courts is barred, the action must comply not only with the substantive requirements of the law but also with these forms which alone can indicate that the substance has been complied with. 88 The order of detention under the Defence of India Rules was held to be illegal because the actual order of detention in case was not in terms of the rules.

In Gulam Sarwar v. Union of India, 89 it was argued that the President under Article 359(I) could not make order suspending the right to move any Court in respect of different categories of persons for the enforcement of the same fundamental rights.

In Mohd. Yaqub v. State of J & K 90 the Supreme Court held that an order by the President under Article 359(1) was not ‘law’ within the meaning of Article 13(2) and therefore, its validity could not be challenged with reference to the provisions of Part III. But in Ghulam Sarwar v. Union of India 91

86 Ibid (para 36, 37, 38)
87 AIR 1966 SC 740.
88 Ibid at 756.
89 AIR 1967 SC 1335.
90 AIR 1968 SC 765.
91 Supra, note 89.
Supreme Court overruled the decision of Mohd. Yaqub’s cases and held that the Presidential Order issued under Article 359 (1) could be challenged as being discriminatory. Bachawat. J., Observed:

The order does not operate as a bar to the application under Article 32 of the constitution asking for the issue of a writ of habeas corpus on the same fact the Petitioner has the fundamental right to move this court under Article 32 for the issue of a writ of habeas corpus for the protection of his right or liberty.93

In a present case Subba Rao, C.J. observed that the Presidential Order under Article 359 was subject to the restrictive provisions of Part III. He drew a distinction between Articles 358 and 359 and pointed out that Article 358 by itself takes away Article 19(1) but under Article 359 president has to make a valid order.

Again when Pakistan attached India, the emergency was proclaimed in 1971, and continued in operation upto March 1977. On June 27, 1975 the president issued order under Article 359(1) as follows:

In exercise of power conferred by clause (1) of Article 359 the President hereby declares that the right of any person to move any court for the enforcement of the rights conferred by Articles 14, 21 and 22 and all proceedings pending in any court for the enforcement of the above mentioned rights shall remain suspended for the period during which the proclamation of emergency made under clause (1) of Article 352 on the 3rd December and 25the June are both in force.

92 Supra, note 90.
93 Supra, note 89, at 1341.
In *Habeas Corpus* case, the respondents challenged the validity of the Proclamation of emergency by the President under Article 352 made on 25th June, 1975 and they prayed for their release from illegal preventive detention. The respondents were detained under section 3 of the Maintenance of Internal Security Act. They filed applications in different High courts for the issue of writ of habeas corpus. A preliminary objection was raised by the Union of India and the states that the President’s order was a bar to invoke writ jurisdiction of the High Courts.

The High Courts of Allahabad, Andhra Pradesh, Bombay, Delhi, Karnataka, Madras, Madhya Pradesh, Punjab and Haryana, and Rajasthan held that to enforce their fundamental rights under Articles 19, 21 and 22 the High Court could examine whether an order of detention was in accordance with the provisions of the Maintenance of Internal Security Act or whether the order was malafide or as made on the basis of relevant material which the detaining authority could have satisfied that the order was necessary. The state appealed to the Supreme Court.

The main question for the consideration of the Supreme Court was that whether in view of Presidential order dated 27th June, 1975, and 8th Jan’ 1976 made under Article 359(1), any writ-petition under Article 226 would be laid in a High court for habeas corpus to enforce the right to personal liberty of a person detained under the Maintenance of Internal Security Act on the ground that the order of detention or the continued detention, was not under or in compliance with the Maintenance of Internal Security Act. The Supreme Court held that:

> Article 21 is the sole repository of rights to life and personal liberty against the state. Any claim to writ of habeas corpus is enforcement of Article 21 and, is, therefore, barred by the

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95 The decision of this case was based on majority opinion of A.N. Ray, C.J., Beg, Chandrachud and Bhagwati, J.J.
presidential order. In view of the presidential order dated 27 June’ 1975 no person has any locus-standi to move any writ petition under Article 226 before a High Court for habeas Corpus or any writ or order or direction on the ground that the order is not in compliance with the Act. It is not competent for any court to go into questions of malafide of the order of detention of ultra-virus character of the order of detention of that the order was not passed on the satisfaction of the detaining authority.96

Justice Khanna delivered a remarkable dissent judgment, the learned judge emphatically observed:

Sanctity of life and liberty was not same thing when the Constitution was drafted. It represented a fact of higher values of which mankind began to cherish in its evolution from a state of tooth and claw to a civilized existence. Like-wise the principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution. It existed and was in force before the coming in to force of the Constitution.

The learned judge also observed that the High Court can issue writ of habeas corpus under Article 226 is an integral part of the Constitution. The learned judge said that the Constitution does not confer any power on the president to suspend the power of the High Court to issue writs in the nature of habeas corpus during the period of emergency.

b) The Constitution (44th Amendment) Act 197897

This amendment makes two changes in Article 359. First, it provides that the enforcement of the right to life and personal liberty cannot be

96 Supra, note 94.
97 w.e.f. 20-06-1979.
suspended by Presidential Order. Consequently in clauses (I) and (I-A) of
Article 359 for the words 'the rights conferred by Part III', the words 'the rights
conferred by Part III except Articles 20 and 21' have been substituted.
Secondly, it has added a new clause (I-A) to Article 359 which says that the
suspension of the enforcement of any right under Article 359 will not apply to
any law or executive order which does not contain a declaration to the effect
that such law is related to the proclamation of emergency. Thus laws
unconnected with emergency can be challenged in a Court of law even during
emergency.

However, after the 44th amendment the above ruling of the Supreme
Court in ADM, Jabalpur case has become meaningless as Articles 20 and 21
have been excluded from the ambit of Article 359 by virtue of the said
amendment. As such, now after the said amendment Articles 20 and 21 are not
to remain suspended during emergency. In view the 44th amendment the law
laid down in the 'habeas corpus' case is not longer a good law.

The words 'life' and 'personal liberty' are used in Article 21 as
compendious terms to include within themselves all the varieties of life which
go to make up the personal liberties of a man and not merely the right to the
continuance of a person's animal existence. All these aspects of life, which
make a person live with human dignity are included within the meaning of the
word 'life' as held in State of West Bengal v. Committee for Protection of
Democratic Rights. Moreover, dignity of individuals is one of the core
constitutional concept as held by the Supreme Court in Maharashtra University
of Health Sciences v. Satchikitsa Prasarak Mandal

98 Supra, note 94.
99 (2010) 3 SCC 571
100 (2010) 3 SCC 786