CHAPTER VI

PERSONAL LIBERTY AND THE TWILIGHT OF 'DUE PROCESS' -

THE MANEKA DECISION

The Background of Maneka:

The aftermath of emergency¹ has witnessed a new constitutional renaissance in India both politically and judicially. The massive popular wrath and resentment against the eclipse of the rights and personal liberties of the people during the emergency regime was reflected in the outcome of the sixth General Election of 1977 and in the Forty-Fourth Constitutional Amendment of 1978.² The

1. For a detailed discussion about the emergency and post-emergency scenario, see H.M. Seervai, Constitutional Law of India, pp.979 et seq; Seervai, The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism; U. Baxi, The Indian Supreme Court and Politics, pp.121-126.

2. In the 1977 Election, the Party which was responsible for the emergency and the denial of the rights and liberties of the people was thrown out of power and the coalition of opposition groups was given a massive mandate to restore democracy, rule of law and the liberties of the people. The 44th Amendment, among other things, ensured that the fundamental right would not be restricted or taken away by a transient majority in Parliament; that the power to proclaim an emergency would not be misused for personal or partisan ends; that the right to life and personal liberty in Art.21 and the safeguards in Art.20 would not be suspended by the President even during the emergency; and that the basic features of the Constitution would not be lightly interfered with by Parliament in exercise of its amending power under Art.368.
judicial acquiscence in the negation of the rights to life and liberty during the emergency, as manifested by the Supreme Court's decisions in Shivkant and Bhanudas by taking refuge under the Presidential Proclamation under Art.359 has made the new Parliament to amend Art.359 itself. Thus, after the 44th Amendment even during the proclamation of a national emergency the enforcement of the right to personal liberty guaranteed by Art.21 cannot be suspended by the Presidential Proclamation under Art.359. This resurgence of liberalism as regards the right to personal liberty has been reflected in the judicial process as well by the Supreme Court which appears to have been anxiously waiting for an opportunity to "bury its emergency past by an astonishing range of judicial activism" and thereby to revive its image, as the protector and guarantor of the liberty of the individuals, from the dark shadows of Shivkant and Bhanudas. Such an opportunity seems to have been provided to the Court by Maneka Gandhi's Case - a case, which, by any account, has signalled the beginning of a new era in the liberty jurisprudence in India. What follows in this part is a close scrutiny and analysis of this new era.

5. U.Baxi, The Indian Supreme Court and Politics, p.123.

388
In Maneka\textsuperscript{7} the Supreme Court has for the first time openly and directly reconsidered Gopalan\textsuperscript{8} on the interpretation of Art.21 in all its comprehensiveness. Maneka has also made a clear departure from the Gopalan era which had been marked by an asymmetry between the liberal approach towards the interpretation of the expression "personal liberty" and the restrictive approach towards the protection of personal liberty.\textsuperscript{9} Besides, Maneka has signified a grand shift in judicial activism from the field of property rights to that of personal liberty, conferring, in effect, a position of 'preferred freedom'\textsuperscript{10} on the right to personal liberty in Art.21, through a new mode of constitutional interpretation. Perhaps, the most significant aspect of Maneka seems to lie in the changed attitude and approach of the Court towards the interpretation of the right to personal liberty rather than in what the Court has actually held in the case. And what really makes Maneka a landmark seems to be the historic setting of Maneka – a setting which appears to have had the effect of magnifying the glimmer of hope raised by the

9. See supra, Part II.
10. For this notion, see the opinion of Justice Stone in United States V. Carolene Products Co., 304 U.S.144, 152 (1938).
decision into a beam of light — as well as the vigourous and skilful use of the Maneka framework in a series of cases that immediately followed Maneka by a group of 'activist' judges, treating Maneka as a source radiating the rays of 'due process'.

The Case:

The petitioner, Mrs. Maneka Gandhi's passport was impounded 'in public interest' by an order dated July 2, 1977 under Sec.10(3)(C) of the Indian Passport Act, 1967. The Government of India declined 'in the interest of the general public' to furnish the reasons for its decision. Thereupon the petitioner filed a writ petition under Art.32 of the Constitution, challenging the validity of the order as well as Sec.10 (3) (C) of the Act under which the order was passed. The challenge was founded inter alia on the ground that the governmental action was mala fide (not pressed before the Court during the hearing of the arguments); that Sec.10(3) (C) of the Act, in so far as it empowered the Passport Authority to impound a passport "in the interest of the general public" was violative of Art.14.

11. This Act itself was enacted by Parliament as a result of Satwant Singh's Case A.I.R. 1967 SC 1836 wherein the Court held that the right to travel abroad was an aspect of "personal liberty" and that it can only be regulated by a law establishing procedure and not by executive fiat or discretion.
of the Constitution since it conferred vague and undefined power on the Passport Authority; and that Sec.10(3)(C) of the Act was void as conferring an arbitrary power since it did not provide for a hearing of the holder of the passport before the passport was impounded. Then five weeks later the petitioner urged, with the permission of the Court, two further grounds. One ground was that Sec. 10(3) (C) was ultra vires Art.21 since it provided for impounding of passport without any procedure as required by that Article, or, even if it could be said that there was some procedure prescribed under the Passport Act, it was wholly arbitrary and unreasonable and, therefore, not in compliance with the requirements of that Article. The other ground urged was that Sec. 10(3) (C) offended against Art. 19(1)(a) and (g), since it permitted restrictions to be imposed on the rights guaranteed by those provisions even though the restrictions were such as could not be imposed under Art. 19(2) or (6).12

Perhaps, in the absence of these additional grounds, raised later by the petitioner, on second thoughts, Maneka would have remained only as yet another passport case, without much constitutional significance. For, as Prof.Baxi rightly observes, 'the petitioner's additional pleas served high constitutional purposes by giving the

Court the opportunity to pronounce firmly on the ambit of Art.21 and its relations with the rights in Arts.14 and 19.13

In view of the great importance of the issues raised in the case it was heard by a Bench of seven judges who delivered five separate opinions. The leading judgement in the case was delivered by Bhagwati J. on behalf of himself, Untwalia and Fazl Ali JJ. Beg C.J. and Chandrachud and Krishna Iyer JJ. in separate opinions concurred with Bhagwati J., and Kailasam J. dissented. Hence a detailed and critical appraisal of the elaborate and comprehensive judgement of Bhagwati J.14 appears to be essential in order to expound the meaning and message of Maneka.

The argument of the petitioner that the right to go abroad was part of 'personal liberty' in Art.21 and that no procedure was prescribed by the Passport Act for impounding the passport and even if some procedure could be traced in the Act it was unreasonable and arbitrary, straightaway led the Court to the interpretation of Art.21.15 And Bhagwati J., for the first time ever since

14. Of course, the other concurring as well as the dissenting judgements will also be referred to and discussed in appropriate places.
Gopalan, raised all the relevant questions pertaining to the 'true interpretation' of Art.21 such as 'what is the meaning and content of 'personal liberty', what is the inter-relation between that Article and Arts.14 and 19?; and most importantly, does Art.21 merely require that there must be some semblance of procedure, however arbitrary or fanciful, prescribed by law before a person can be deprived of his personal liberty or that the procedure must satisfy certain requisites in the sense that it must be fair and reasonable?16

In seeking the answers to the above questions, Bhagwati J. rightly referred to, and acknowledged the relevance of, the historical, philosophical and human rights perspectives of the fundamental rights in Part III where Art.21 finds a prominent place. Thus His Lordship said:

"Article 21 occurs in Part III of the Constitution which confers certain fundamental rights. These fundamental rights had their roots deep in the struggle for independence.... They were indelibly written in the subconscious memory of the race which fought for well-nigh thirty years for securing freedom from British rule and they found expression in the form of fundamental rights when the Constitution was enacted. These fundamental

16. Ibid.
rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a 'pattern of guarantees on the basic structure of human rights' and impose negative obligations on the State not to encroach on individual liberty in its various dimensions...."\(^{17}\)

Having thus set out the relevant questions as well as the parameters within which those questions are to answered, the learned Judge proceeded, first, to deal with the meaning and content of 'personal liberty' in Art.21. But, before going into the detailed analysis of the decision, it is worthwhile to remember that while appreciating the humanist buoyancy and the futuristic impacts of \textit{Maneka}, one should not be oblivious of the fact that the actual decision in \textit{Maneka} is not free from certain apparent conceptual obscurities and inner contradictions.\(^{18}\)

\begin{enumerate}
\item[Ibid., at pp. 619-20. ] It may be noted that all these aspects have been elaborately discussed in Part I of this study. The relevance of that discussion stands fortified further by its judicial approval in this case.
\item[Prof. Baxi tries to gloss over this aspect of \textit{Maneka} by saying thus: "As happens to all seminal decisions, the decision in \textit{Maneka} is not without its meanderings and miseries". U.Baxi, \textit{op.cit.}, p.151.]
\end{enumerate}
After making a brief survey of the leading cases on personal liberty, Bhagwati J. held:

"It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression 'personal liberty' as used in Art.21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Art.19.... The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction".20

Referring to R.C. Cooper's Case, the learned Judge held the view that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression 'personal liberty' in Art.21 must be so interpreted as to avoid overlapping between that Article and


And then he held: "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 Art.19".  

Bhagwati J. also approvingly referred to Satwant Singh and accepted the claim that the right to go abroad was a part of the right to personal liberty in Art.21.  

Beg C.J., in his concurring opinion, seems to have added further dimensions to the concept of 'personal liberty' in Art.21 by resorting to the theory of natural law as propounded by Blackstone. According to the learned Judge the idea of natural law is a morally inescapable postulate of a just order, recognizing the inalienable and inherent rights of all men and that idea is very much embodied in our Constitution. He referred to the Blackstonian notion of "personal security" which meant 'a person's legal and
uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation'; and "personal liberty" which meant a person's 'power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct without imprisonment or restraint, unless by due course of law'. He then held: "I think that both the rights of "personal security" and of "personal liberty", recognized by what Blackstone termed "natural law", are embodied in Article 21 of the Constitution." In order to derive further support for his view, Beg C.J. referred to the decisions in Golak Nath and Shivakant where the Supreme Court declared that 'fundamental rights were natural rights embodied in the Constitution'. And he said: "To take a contrary view would involve a conflict between natural law and our Constitutional law. I am emphatically of the opinion that a divorce between natural law and our Constitutional law will be disastrous. It will defeat one of the basic purposes of our Constitution".

26. Ibid., at p.608.
27. Ibid.
31. Ibid., at p.609.
Thus in construing the expression 'personal liberty', Court appears to have adopted a purposive and policy-making kind of constitutional interpretation. Bhagwati J. gave to that expression the 'widest amplitude', covering 'a variety of rights which go to constitute the personal liberty of man'. The concept has come to acquire an added lustre through the natural law dimensions attributed to it by Beg C.J. Such a liberal interpretation of 'personal liberty' in Art.21 is not only desirable but also is consistent with the scheme and spirit of the Constitution as well as with the previous decisions of the Court on this issue.

But, the crucial question in this context is that whether such a liberal conceptualisation of 'personal liberty' should necessarily lead to the conclusion that the expression 'personal liberty' in Art.21 subsumes all other fundamental rights in Part III of the constitution, including the distinct rights that are separately dealt with in Art.19(1). As the discussion on the issue made earlier in this study would indicate, the answer to the above question must have been in the negative. But unfortunately the Court in Maneka appears to have ruled the other way.

32. See supra, Chs.II and III.
34. See, supra, Chs.III and V
According to Bhagwati J. there was no justification for giving a restrictive interpretation to the expression "personal liberty" so as to exclude from its scope "all those attributes of personal liberty which are specifically dealt with in Art.19". The learned Judge seems to have arrived at this conclusion on the basis of his review of the previous decisions of the Court. But it is respectfully submitted that his review of the previous cases appears to have been afflicted with two apparent infirmities. Firstly, the inference which Bhagwati J. seems to have drawn from the cases that are relevant to the issue is plainly incorrect. While referring to Gopalan the learned Judge claimed that 'the observations made by Sastri, Mukherjee and Das, JJ. seemed to place a narrow interpretation on the words 'personal liberty' so as to confine the protection of Art.21 to freedom of the person against unlawful detention'. But a close scrutiny of the individual judgements in Gopalan, as has been made earlier in this study, does not seem to support this claim. Similarly, Bhagwati J.'s reading of the majority and the minority opinions in Kharak Singh, and his attempt to

35. Maneka, p.621.
36. Ibid., at pp.620-21.
37. AIR 1950 SC 27.
derive support for his conclusion from the minority opinion of Subba Rao J. in that case are difficult to be accepted without reservation. For, the majority in Kharak Singh, while construing the words 'personal liberty' as "a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Art. 19(1)";

did not rule that Arts. 19(1) and 21 are mutually exclusive in the sense that Art.19 is totally inapplicable to test the validity of a law which deprives a person of his personal liberty within the meaning of Art.21, even if such law infringes any of the distinct freedoms conferred by Art.19. Likewise, Subba Rao J., in his minority opinion, while emphasising the fact that a law which deprives a person of his personal liberty, to be valid, should stand the test not only of Art.21 but also of Art.19 in so far as such law infringes the attributes covered by Art.19 (1), he did not rule that all the distinct freedoms that are separately dealt with in Art.19 were...
(1) should be read into the expression 'personal liberty' in Art.21. 43 Therefore it is wrong to surmise that there is any real contradiction between the majority and the minority opinions in Kharak Singh on the meaning and contents of 'personal liberty' in Art.21. 44 And consequently it is equally wrong to assume, as Bhagwati J. seems to have done, 45 that the acceptance of the minority opinion of Subba Rao J. (that a law which sought to affect more than one fundamental right, in order to be valid, would have to fulfil the requirements of all the rights affected) by the Court in R.C. Cooper's Case tantamounts to the overruling of the majority opinion in Kharak Singh for the simple reason that the majority did not rule what has been allegedly overruled. As a matter of fact, while dealing with the fundamental rights in Arts.19 and 21, Subba Rao J., instead of reading one into the other, has clearly maintained that both are "independent fundamental rights, though there is overlapping. 46 Moreover, it may be noted that Subba Rao J. himself has made the position abundantly clear while

43. See supra, Ch.6.
44. See supra, Ch.4.
speaking for the Court in Satwant Singh in this context. Referring to Kharak Singh Subba Rao J. held that decision was a clear authority for the position that "liberty" in our constitution bears the same comprehensive meaning as is given to the expression "liberty" in the U.S. Constitution; and that the expression 'personal liberty' in Art.21 only excludes the ingredients of "liberty" enshrined in Art.19 of the Constitution. Therefore it is submitted that the attempt of Bhagwati J. to derive support from Subba Rao J. for the proposition that 'personal liberty' in Art.21 should be construed so as to include all the distinct freedoms in Art. 19(1) appears to be misconceived.

Secondly, pursuing the avowed goal of expanding the 'reach and ambit of the fundamental rights', Bhagwati J. seems to have slipped into a wrong track. As a result, the learned judge appears to have heavily relied on the decisions of the court in Cooper, Sarkar and Saha in

47. AIR 1967 SC 1836.
48. Ibid., at p.1844. This aspect has also been discussed in Ch.III, supra.
49. See Errabi, op.cit., p.308.
51. R.C.Cooper V. Union of India, AIR 1970 SC 564.
52. S.N.Sarkar V. West Bengal, AIR 1973 SC 1425.

402
order to support his conclusion as regards the contents of 'personal liberty' in Art.21. But it is submitted that the Cooper line of cases do not seem to be relevant to the determination of the meaning and content of 'personal liberty' in Art.21 since the question before the Court in those cases was not so much the interpretation of the words 'personal liberty' as the inter-relation between Arts.19 and 21. It is true that the Court in Cooper, Sarkar and Saha has rightly adopted an integral approach towards construing the different fundamental rights in Part III and has rejected the theory that Arts.19 and 21 are mutually exclusive and held that Art.19 is applicable to test the validity of a law in Art.21 if such law is violative of any of the freedoms in Art.19(1). But such a liberal approach and the rejection of the theory of exclusiveness do not seem to afford any justification for the conclusion that the expression 'personal liberty' in Art.21 absorbs into itself all the rights guaranteed in Art.19(1) or any other right in Part III of the Constitution. For, it is one thing to say that the law which sought to affect more than one fundamental right, in order to be valid, would have to satisfy the requirements all the rights that are violated,

54. This aspect has been fully discussed in Ch.V, supra.
55. See, ibid.
56. See Errabi, op.cit., p.308.
it is entirely a different thing to say that the right to personal liberty is wide enough to comprehend all the other rights in Part III, including the rights in Art.19(1). But Bhagwati J. appears to have failed to appreciate the subtle distinction between these two delicate but different aspects of the inter-relation between Arts.19 and 21.

Thus, it is clear that the total assimilation of all Art.19(1) freedoms into the concept of 'personal liberty' in Art.21, as advocated by Bhagwati J., does not seem to be supported by any of the pre-Maneka decisions of the Court. Besides, such an assimilation can neither be consistent with the schematic framework of the fundamental rights in Part III of the Constitution, nor can it be in conformity with what was contemplated by the Framers of the Constitution.57 It may be noted that while Art.21 secures to all persons the rights to life and personal liberty, Art.19(1) confers certain fundamental freedoms only on the citizens.58 The different attributes of liberty covered by Art.19(1) are dealt with separately in consideration of their relative importance, distinct contents and the different implications involved in their exercise by the citizens. They are subjected to differential treatment both

57. See, supra, Ch.V. Also, Errabi, ibid., at pp.308-309.
58. See the text of Arts. 19 and 21; see also Louis De Roldt V. Union of India, AIR 1991 SC 1886.
in terms of the nature and extent of protection secured to
them as well as the purposes for, and the grounds on, which
those rights could be restricted or curtailed. Therefore,
in view of the wide range and variety of rights that are
elevated to the status of fundamental rights in Part III,
and the differential treatments given to them by the
separate provisions on the basis of sound practical
considerations, any attempt to subsume all the other rights
and freedoms under the single rubric of 'personal liberty'
in Art.21 appears to be unrealistic and unwise. Moreover,
the inclusion of Art.19 freedoms into Art.21 does not and
cannot in any way confer a better protection to those
freedoms which are already well articulated and protected.
And such an inclusion can only have the effect of rendering
Art.19 redundant - a consequence which obviously appears to
be unjustifiable. As a matter of fact, it was precisely for
the purpose of avoiding such an interpretative integration
of the distinct attributes of liberty covered by Art.19(1)
into Art.21 that the Constituent Assembly had inserted the
word "personal" before the word "liberty" in Art.21.
Further, the reading of Art.19(1) freedoms into the concept

59. Note the distinct rights enumerated in Sub.cls (a) to
(g) of Cl.(1) of Art.19 as well as the permissible
restrictions under Cls.(2) to (b) of Art.19. 60.
60. For, Art.19 guarantees the standard of 'reasonableness'
as a protection for those freedoms.
61. See, the discussion on the C.A.Deb. in Ch.II, supra.
of 'personal liberty' in Art.21 appears to lead to yet another anamolous consequence during the subsistence of an emergency proclaimed under Art.352, especially in view of the Constitution (Forty-Fourth Amendment) Act, 1978. According to that Amendment the right to enforce Art.21 cannot be suspended even during the emergency by the Presidential Proclamation under Art.359, whereas Art.19 can still be suspended. Therefore, if the freedoms under Art.19 are read into Art.21, the result would be that those freedoms would still continue to be in force despite the suspension of Art.19 under Arts.358 and 359. This is, again, to render Art.358 and 359 as otiose and meaningless.

It is submitted that it is always desirable as well as appropriate to give the 'widest amplitude' to the expression 'personal liberty' in Art.21, and to treat that expression as a 'compendious' concept capable of accommodating into itself the 'new and emerging rights competing for constitutional recognition as society progresses, so that the Bill of Rights in the Constitution may ever remain as 'the pledge with our own people and the pact with the civilized world'. But there does not seem

62. The Constitution of India.
63. Ibid.
64. 'Per Dr. Radhakrishnan, C.A.Deb., Vol.I, p.273.
to be any justification for reading into that concept the rights and freedoms that are enumerated and protected by separate and independent provisions in the Constitution on the basis of certain important constitutional principles and practical considerations.

Further, it may be appreciated that the above critique of Maneka on the meaning of 'personal liberty' is neither to urge for an inflexible judicial adherence to stare decisis and conceptualism nor is it to decry judicial policy-making in constitutional adjudication; but it is only to point out that any constitutional policy-making through judicial process must be guided by reason and principle as well as by practical considerations, rather than by mere emotional urge to 'expand the reach and ambit of the fundamental rights'. Any constitutional policy-making sans reason and principles which are ultimately traceable to the textual scheme and spirit of the constitution is likely to affect the very legitimacy of constitutional policy-making. For, after all, the power of

legitimacy is the only sceptre which the judiciary wields and not the power of purse or sword.

Maneka on the Protection of 'Personal Liberty': The Twilight of 'Due Process'.

In dealing with the protection of 'personal liberty', Bhagwati, J. appears to have proceeded on the belief that Art.21 by itself affords only a limited protection as against the executive interference with personal liberty without the authority of law. And as a result, he pursued the course of the 'alternate strategy' of securing the elements of 'due process' as a protection for 'personal liberty' through the linkage of Art.21 with the other fundamental rights in Arts.14 and 19.

Thus, after recognizing the right to go abroad as an integral part of 'personal liberty', following Satwant Singh, Bhagwati J. said: "It will be seen at once from the language of Article 21 that the protection it secures is a limited one. If safeguards the right to go abroad against executive interference which is not supported by law; and

68. See, Cox, The Role of the Supreme Court, op.cit., pp.103-118.

69. Ibid., See also generally, Alexander Bickel, The Least Dangerous Branch, Indianapolis, New York (1962).

70. This aspect is fully discussed in Ch.V, supra.

71. Supra., no.19 of this chapter.

408
law here means 'enacted law' or 'State-law'. vide A.K. Gopalan's case".  He pointed out that the Passport Act, 1967 was such a State-law, prescribing a procedure for the deprivation of the right to go abroad. He, then, raised the crucial question whether the prescription of some sort of procedure was enough or the procedure must comply with any particular requirements; and held: "obviously, the procedure cannot be arbitrary, unfair or unreasonable". In support of this claim the learned judge referred to the concession made in this regard by the Attorney - General, and also to certain observations made by some of the judges in Gopalan's Case. Then, probably, realising the folly in relying on Gopalan for the proposition that 'procedure' in Art.21 must be fair and reasonable, Bhagwati, J. hastened to add thus: "But apart altogether from these observations in A.K.Gopalan's case, which have great weight, we find that even on principle the concept of reasonableness must be

72. Maneka, op.cit., p.622.
73. Ibid.
74. Ibid.
75. Ibid., It seems to be rather incredible that such vital propositions of constitutional law are founded on such 'concessions'.
76. Ibid. It is equally incredible that Gopalan could be relied upon as a justification for the proposition that 'procedure' within the meaning of Art.21 must be fair and reasonable. See, the analysis of Gopalan in Chs.IV of V, supra.
projected in the procedure contemplated by Art.21 having regard to the impact of Art.14 on Art.21".  

Thus, by recognizing Art.14 as the surer and safer source of the requirements of 'reasonableness' for the 'procedure' in Art.21, the learned judge appears to have cleared his way to the 'alternate strategy' of gathering the requirements of 'due process' as a protection for 'personal liberty' from outside Art.21. And this 'alternate strategy' has mainly been founded on the inter-relationship between Arts.14, 19 and 21. Beg C.J. and Chandrachud J. also in their respective opinions toed the same line as regards the protection of personal liberty.

Inter-relationship between Arts.14, 19 and 21

In considering this issue, Bhagwati J. has first delineated the theoretical basis for the inter-relationship

77. Ibid.

78. This aspect has been fully discussed with reference to all the pre - Maneka cases decided by the Supreme Court in Ch.V of this study. In Maneka, the Court has added an additional dimension to the alternate strategy by linking the 'procedure' in Art.21 with the requirement of the principles of natural justice.

79. Ibid., at pp.606, 609, 610.

80. Ibid., at pp.613, 614. Only Krishna Iyer J. has adopted a different approach towards Art.21, independently of this 'alternate strategy'; and so his judgement, will be separately dealt with a little later.
of Art.21 with Arts.14 and 19. He referred to the exclusionary theory laid down in Gopalan; to the rejection of that theory by the court in Cooper; and to the approval of Cooper and the reiteration of the rejection of theory of exclusivity by the Court in S.N.Sarkar, Saha and Khudiram. Thus having reviewed briefly all the previous decisions of the Court on this issue, Bhagwati J. held:

"The law must, therefore, now be taken to be well settled that Art.21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right under Article 19, would have to meet the challenge of that article". 

81. The different exclusionary theories laid down by the majority judges in Gopalan and their implications are fully discussed in Ch.V, supra.

82. For the analysis of Cooper and the rejection of the Gopalan thesis, see Ch.V, supra.

83. Ibid. In these cases the Court extended to Arts.21 and 19 the integral theory of Cooper, according to which the different rights in Part III are to be construed harmoniously.

84. Maneka, op.cit., p.623.
Extending the logic of the above proposition to Art.14, the learned judge further held that if a law within the meaning of Art.21 had to stand the test of one or more of the fundamental rights conferred under Art.19 which might be applicable in a given situation, ex-hypothesi it must also be liable to be tested with reference to Art.14. In support of this view, Bhagwati J. referred to the observation made by Mukherjea J. in Gopalan that Art.21 "presupposes that the law is a valid and binding law" in the sense that law must have been made by a competent legislature and it must not infringe any of the fundamental rights in Part III of the Constitution, including Art.14. He further referred to two earlier decisions of the Court in Anwar Ali Sarkar and Kathi Raning where Art.14 was applied to test the validity of the laws providing for special procedures for the speedier trial of certain offences, though that procedure satisfied the requirements of Art.21. Having noted that in both these cases it was held that the procedure established by the special law must not be violative of the equality clause, Bhagwati J declared

---

85. Ibid.
86. Ibid., at pp.623-24.

412
that the "procedure must satisfy the requirement of Article 14". 89

Now, having established unequivocally the linkage of Art.21 with Arts.14 and 19, through an integral constructional process, Bhagwati J. proceeded to distil out of that linkage the essence of 'due process' as a protection for 'personal liberty'. And it is this strategy to infuse the essence of 'due process' into the procedural requirement of Art.21 from outside that Article that has come to be the most crucial facet of Maneka.

The 'Due Process' Facet of Maneka

In considering the specific question about "the nature and requirement of the procedure under Art.21," 90 in the context as discussed above, Bhagwati J. appears to have adopted a three-pronged strategy to evolve and to engraft the elements of 'due process' onto the 'procedure' under Art.21. Thus, he referred to and analysed the requirements of Art.14; the requirements of natural justice; and the requirements of Art.19 and their respective as well as cumulative impact on 'the procedure established by law' under Art.21.

89. Maneka, op.cit, p.624.
90. Ibid., at p.624.
Referring to the requirements of Art.14 and to the content and reach of the equality principle therein, Bhagwati J. held the view that 'equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits'. Following E.P. Royappa's Case where it was held that both according to political logic and constitutional law inequality was implicit in an arbitrary act. His Lordship held:

"Art. 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied".

91. Ibid.
93. Maneka, ibid., at p.624.
Then the learned judge considered the question as to 'how far natural justice was an essential element of procedure established by law', independently of Arts.14 and 19 of the Constitution. Thus he appears to have opened up a new source of support and sustenance for a fair and just standard of protection for personal liberty in Art.21 from the vantage point of the principles of administrative law. Dealing with this new dimension, Bhagwati J. pointed out at the outset the increasing importance of natural justice in the field of administrative law, and said: "Natural justice is a great humanising principle intended to invest law with fairness and to secure justice...." Elaborating on 'the test of applicability of the doctrine of natural justice', the learned judge referred to the orthodox view that the rules of natural justice have application only to quasi-judicial proceeding as distinguished from an administrative proceeding; and to the gradual transformation of that view into the modern conception which recognizes that 'fair play in action required that in administrative proceeding also the doctrine of natural justice must be held to be applicable'. Thus,

94. Ibid.
95. Ibid., at p.625.
96. Ibid., at p.626.
97. Ibid., at pp.626-27.
after a thorough and scholarly review of the judicial and juristic views on the subject-matter, he said: "The law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable". Then, referring to the relevant provisions of the Passport Act, 1967, Bhagwati J. held that the power conferred on the Passport Authority by the Act to impound a passport was quasi-judicial power and therefore the rules of natural justice would be applicable in the exercise of the power of impounding a passport even on the orthodox view. He proceeded to add further that the 'same result must follow.... even if the power to impound a passport were regarded as administrative in character, because it seriously interfered with the constitutional right of the holder of the passport to go abroad and entailed adverse civil consequences'.

Adverting to the fact, as was contended by the petitioner, that there was no express provision in the Passport Act, 1967 which required that the audi alteram partem rule should be followed before impounding a passport, Bhagwati J. held:

98. Ibid., at p.628.

99. Ibid., at p.628.
"... that is not conclusive of the question, if the statute makes itself clear on this point, then no more question arises. But even when the statute is silent, the law may in a given case make an implication and apply the principle stated by Byles, J., in *Cooper v. Wandsworth Board of Works*, (1863) 14 C.B.N.S. 180: "A long course of decisions, beginning with Dr. Bentley's case (1723) 1 Str 557 and ending with some very recent cases, establish that 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". 100

Thus, applying the principles of administrative law it was held that the procedure prescribed by the Act, as required by Art.21, for the impounding of passport and the consequent deprivation of the right to go abroad must comply with the rules of natural justice, particularly the rule of *audi alteram partem*: no decision shall be given against a party without affording him a reasonable hearing. That is to say, the rule of fair hearing is an essential aspect of the 'procedure established by law' in Art.21; the procedure must be fair and just.

100. Ibid., at pp.624-25.
And, finally, as regards the requirement of Art.19 and its impact on Art.21, Bhagwati J. already held, while discussing the inter-relation between Arts.19 and 21, thus: "... a law prescribing a procedure for depriving a person of 'personal liberty' ... in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that Article." That is to say, the procedure established by law authorising the deprivation of 'personal liberty' in Art.21 should conform to the standard of reasonableness if and in so far as such law takes away or abridges any of the freedoms conferred by Art.19(1).

Thus as a result of the cumulative impact of the requirements of Art.14, Art.19 and the principles of natural justice on Art.21, the 'procedure established by law' in that Article has come to acquire a new meaning and a new vitality as a standard of projection for 'personal liberty'. The procedure, as declared by Bhagwati J., "cannot be arbitrary, unfair or unreasonable". It must be just, fair and reasonable. And a just, fair and reasonable procedure established by law is the quintessence of 'due

---

101. Ibid., at p.623.
102. Ibid.
103. Ibid., at p.622.
process of law'. Thus emerges in Maneka the twilight of 'due process'. It is this facet of Maneka decision that has been hailed in many quarters as the advent of 'due process' as a protection for 'personal liberty' in the Indian Constitution.

To transform the 'procedure established by law' into 'just, fair and reasonable procedure established by law' is apparently to import the requirements of 'due process' into Art.21. And this transformation has undoubtedly been the outcome of the activist concern of


106. See supra, n.104.
the post-emergency Supreme Court for human rights and personal liberty, as has unmistakably been evinced by Bhagwati J. and his brother judges in Maneka. So far so good — good for the human rights and 'personal liberty' in India, where the standard of 'due process' protection for those human freedoms under the leadership of a 'dynamic human rights oriented Supreme Court' seems only to be pre-eminently, desirable. But that is not the journey's end. To have a correct assessment of the meaning and message of Maneka, a few more crucial questions are to be asked and answered. And that can be accomplished, it is submitted, only through a close and critical scrutiny of Maneka; and not through any attempt to romanticise Maneka and the judicial craft and activism of Bhagwati J. therein. Hence a constructive criticism of Maneka seems to be imperative.

A Critique of Maneka:

The questions that loom large in the constitutional horizon in the light of what has been said and done by the judges in Maneka are many and complex. A


108. As is evident from the exaggerated claims made about Maneka in different quarters.
few of them are: Does Maneka establish unequivocally the doctrine of 'due process of law' as a protection for 'personal liberty' in Art.21? Is the "fortress" of 'due process' claimed to have been erected around Art.21 strong and stable? How far Maneka liberates Art.21 from Gopalan? Does Maneka render Art.21 as a limitation on the legislature? An objective analysis of Maneka from the standpoint of these questions would bring to surface certain disturbing features which are of grave implications and far-reaching consequences.

At the outset, it may be noticed that while considering the extent of protection for 'personal liberty' in Art.21, Bhagwati, J. appears to have evaded a fresh and forthright interpretation of the expression "procedure established by law" which Art.21 itself secures as the standard of protection for personal liberty.109 Instead, he has attempted to secure the protection of a 'just, fair and reasonable' procedure from outside Art.21.110 This has been so, it is submitted, evidently because of his obsession with Gopalan on the interpretation of the standard of protection in Art.21: "the procedure established by law". The inner tension between the activist urge of Bhagwati, J. to 'expand the reach and ambit' of the right to personal liberty and

110. Supra, n. 78 of this Chapter.
his obsession with Gopalan on the interpretation of Art.21 seems to be apparent in his judgement. On the one hand, though incredible it may seem, he has adopted the positivist interpretation of the expression "procedure established by law" as laid down by the Court in Gopalan; and, on the other, he ventures to declare that the 'procedure' in Art.21 must be "just, fair and reasonable". Why the 'procedure' must be so? Here again the learned judge appears to be ambivalent. He does not seem to have made any attempt to gather those requirements of fairness and reasonableness from within Art.21 itself through a liberal and purposive interpretation of the expression "procedure established by law". Instead, he has, first, tried to draw support for those requirements from the "observations in A.K.Gopalan's Case, which have great weight". And, in the next moment he appears to disown those 'observations' in Gopalan, and seeks to project the 'concept of reasonableness' in the procedure contemplated by Art.21 "having regard to the impact of Art.14 on Art.21". Thus, haunted by the ghost of Gopalan, Bhagwati, J. appears to have assumed Art.21 to be infertile to bear the child of 'due process' and, then, resorted to the technique of 'surrogate motherhood' for

111. See, supra, Ch.IV.
112. Maneka, op.cit., p.622.
113. Ibid.

422
fabricating 'due process' through Arts.14, 19 and the rules of natural justice. Thus, it is submitted that even after Maneka, Art.21, by itself, appears to be bereft of 'due process of law' as a standard of protection for 'personal liberty'. The "creative exuberence" of Bhagwati, J. appears to have failed to penetrate the 'iron curtain' of Gopalan in this regard. Further, it may be amazing to note that Bhagwati, J. appears to have scrupulously avoided even the very use of the expression "due process of law" in his lengthy and leading judgement, though the concept of 'just, fair and reasonable procedure' which he has forged through the alternate strategy unwittingly begets 'due process'.

Now, even the "just, fair and reasonable procedure" formula evolved by Bhagwati J. through the alternate strategy seems to suffer from certain serious drawbacks and limitations. And those limitations in turn


115. Chandrachud, J. while agreeing with Bhagwati, J.'s formulation of 'just, fair and reasonable procedure' specifically cautions thus: "Our constitution too strides in its majesty but, may it be remembered, without a due process clause". Maneka, op.cit., p.613. But Beg C.J. appears to have acknowledged the 'just, fair and reasonable procedure' formula as equivalent to 'due process' requirements; and he has openly and freely used the expression 'due process' in his judgement, Maneka, at pp.605-606.

116. Supra, n.104 of this Chapter.
seem to be inherent in the very alternate strategy and the argumentations adopted by him with reference to Arts.14, 19 and the rules of natural justice in order to sustain that formula.

First as regards the arguments with reference to Art.14, it is submitted that there can hardly be any objection to the view held by Bhagwati, J. that a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Art.21 has to stand the test of Arts.14 and 19 in so far as such law abridges or takes away any of the fundamental rights conferred under those Articles. 117 In fact, there is nothing new or revolutionary in involving Art.14 to test the validity of the procedure established by law within the meaning of Art.21. 118 But, Bhagwati, J. appears to have gone a step further by holding that 'the concept of reasonableness must be projected in the procedure contemplated by Art.21 having regard to the impact of Art.14 on Art.21'. 119 And according to His Lordship, "The principle of reasonableness, which legally as well as


118. The Supreme Court applied Art.14 to test the validity the special procedures established by law for the trial of certain special offences in Anwar Ali's Case and Kathi Raning's Case, See supra, ns. 87 and 88.

philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14".120

It is respectfully submitted that the above argument of Bhagwati, J. does not seem to be tenable for more than one reason. The argument seems to proceed on the assumption (or it at least creates an impression to the effect) that in all cases of deprivation of personal liberty under Art.21, Art.14 would be applicable automatically to test the validity of the law authorising of such deprivation irrespective of the fact whether such law infringes any right conferred by Art.14 or not. And this assumption does not seem to have any justification.121 Further, the argument that the 'procedure' in Art.21 must be reasonable "in order to be in conformity with Article 14" leads to an anomalous inference that the requirement of a reasonable procedure for the deprivation of 'personal liberty' comes not from Art.21; but it comes from Art.14. Thus Art.21 has been made dependent upon Art.14, so far as the requirement of a reasonable procedure is concerned, with the possible

120. Ibid., at p.624.


425
consequence that if, for some reason, Art.14 is not available in a given case of deprivation of personal liberty, Art.21 would not require a 'reasonable' procedure. Moreover, the above argument indicates that even in cases where Art.14 is applicable, the availability of a 'reasonable' procedure or 'due process' as a protection for 'personal liberty' in Art.21 would depend on the meaning and interpretation of the requirements of Art.14. So, in this respect also the 'due process' projected into Art.21 through Art.14 appears to be conditional and unstable. Perhaps, the most perplexing aspect of Bhagwati J.'s argument with reference to Art.14 appears to be his interpretation of Art.14 itself. According to him 'Art.14 strikes at arbitrariness in State action'; and the 'principle of reasonableness is an essential element of equality'.

His Lordship appears to have failed to appreciate the fact that the arbitrariness arising out of discriminatory treatment in State action -- i.e. treating equals as unequals or unequals as equals -- is not the same as arbitrariness or unreasonableness per se in State action, and that Art.14 embodies the guarantee only against the former and not the latter. As one eminent Professor has rightly remarked, "As read by the Court, the Article incorporates not the equal protection guarantee but

122. Ibid.
123. Maneka, p.624.
the guarantee of due process for which there seems to be no warrant.\textsuperscript{124} Prof. Tripathi also questions the tenability of the view taken by Bhagwati, J. He says:

"... the arbitrariness which Article 14 inhibits is not the same as the arbitrariness that Article 19 inhibits. The arbitrariness inhibited by Article 14 is the arbitrariness or unreasonableness in discriminating between one person and another: if there is no discrimination there is no arbitrariness in the sense of Article 14, although there may still be arbitrariness in the sense in which it is prohibited by Article 19. To put it differently, the arbitrariness prohibited by Article 19 concerns the intrinsic quality of the action taken by the State, whereas that prohibited by Article 14 concerns the distributive aspect of that action.\textsuperscript{125}

Thus, it is reasonably clear that the interpretation of Art. 14 and the invention of a 'due process' clause in the equality provisions in that Article seem to stand on a shaky foundation, supported only by incorrect assumptions. If that is so, it is submitted, it

\textsuperscript{124} Prof. Rama Rao, \textit{op.cit.}, p.191.

\textsuperscript{125} P.K. Tripathi, "The Fiasco of Overruling A.K. Gopapalan", \textit{op.cit.}, pp.6-7.
would be naive to expect Art.14 to furnish an uninterrupted supply of 'due process' to Art.21 in order to project 'personal liberty'. For, even admitting that there is a symbiotic inter-relation between Arts.14 and 21, Art.14 can give only what it possesses.

Further, Bhagwati, J.'s resort to 'political logic' and 'constitutional law' as a justification for his invention of 'due process' also seems to be unconvincing. If a 'due process' clause could be discovered and located in the 'equality' clause, then the framers of our Constitution had only vainly attempted to exclude 'due process of law' in Art.21, without realising that 'due process' was, without their knowledge, already incorporated in the 'equality' clause in Art.14. And similarly, the authors of the Fourteenth Amendment to the U.S. Constitution had also failed to realise that a 'due process' clause therein was not necessary as they were incorporating the 'equality' clause also in that Amendment.

There appears to be yet another amazing constitutional implication, though may not have been intended by Bhagwati, J., which ensues from this new invention of 'due process'. If 'reasonableness' is an "essential element" of 'equality',

---


pervading Art.14 "like a brooding omnipresence", then all laws which are required to be consistent with Art.14, as mandated by Art.13, must be 'reasonable' by themselves and must conform to the standard of 'due process'.

Finally, while 'projecting the concept of reasonableness into Art.21, having regard to Art.14', Bhagwati, J, without assigning any reason or explanation, appears to have truncated that concept by confining it only to the 'procedure' in Art.21. It is respectfully submitted that once 'reasonableness' is held to be at the core of Art.14 to which Art.21 should conform, it is difficult to understand on what principle the learned judge could maintain that Art.14 requires only procedural reasonableness in Art.21 and not substantive reasonableness. But throughout his judgement His Lordship seems to have been concerned only with the reasonableness of the 'procedure' and not with the reasonableness of the 'law' in Art.21. Further, this view may lead to yet another anomaly, especially in view of the simultaneous applicability of Arts.14 and 19 to test the validity of the deprivation of 'personal liberty' in Art.21. That is to say, whereas the concept of reasonableness projected from Art.14 would

128. See, ibid., at pp.279-80.
130. Maneka, op.cit., p.624.
require only the 'procedure' to be 'reasonable', the concept of reasonableness that proceeds from Art.19 would require both the 'procedure' as well as the 'law' to be reasonable. For, 'reasonableness' in Art.19 knows no such limitations and so cannot be confined to 'procedure' alone as Bhagwati, J. would like to maintain. Here, it is worthwhile to refer, to the views expressed by Beg, C.J. on this aspect. He said:

"In order to apply the tests contained in Articles 14 and 19 of the Constitution, we have to consider the objects for which the exercise of inherent rights recognised by Article 21 of the Constitution are restricted as well as the procedure by which these restrictions are sought to be imposed. Both substantive and procedural laws and actions taken under them will have to pass tests imposed by Articles 14 and 19 whenever facts justifying the invocation of either of these Articles may be disclosed."\(^\text{131}\) (emphasis added).

It is submitted that the above view held by Beg, C.J. appears to be more rational and realistic from the conceptual as well as functional standpoints.\(^\text{132}\)

\(^{131}\) Ibid., at p.610.

\(^{132}\) It may be noticed that Beg, C.J.'s opinion is free from some of the serious infirmities which afflict the arguments of Bhagwati J. with reference to Art.14.
Now, the arguments with reference to the rules of natural justice: Of course, there can be no doubt that Bhagwati J.'s strategy to adopt the doctrine of natural justice as an alternate source of 'due process' for protecting 'personal liberty' is novel and remarkable. But it is submitted that this new 'due process' strategy seems to have lost much of its functional efficacy as a standard of protection due to two major limitations that are inherent in the Judgement of His Lordship.

Firstly, as is evident from the judgement of Bhagwati J., the requirement of 'due process' as it emanates from 'natural justice' is confined only to the 'procedure' in Art.21, allowing the substantive aspects of 'law' in that Article to be immune from the test of 'due process' or 'reasonableness'. Thus despite the 'due process' emanations from Art.14 and the doctrine of natural justice, 'law' in Art.21 still continues to be 'State-made' law as laid down in Gopalan, without being required to comply with any standard of reasonableness or fairness.

And secondly, even this truncated version of 'due process' which requires only 'procedural fairness' appears to have been left at the mercy of the legislature. On the

133. See Maneka, op.cit., p.624 et seq.
134. Ibid., at p.624.
one hand Bhagwati J seems to have blown up the 'due process' formula by declaring valiently that the procedure prescribed by law for the deprivation of 'personal liberty' in Art. 21 must comply with the rule of fair hearing 135 which is "the soul of natural justice" 136 and that even if the statute is silent as to the requirement of 'fair hearing', "the justice of the common law will supply the omission of the legislature". 137 And on the other, the learned judge appears to have deflated the same formula by holding that if the statute itself provides for the exclusion of the audi alteram partem rule, then "no more question arises". 138 This simple-looking but dismal statement of Bhagwati J., it is submitted, clearly indicates that on the protection of 'personal liberty' the last say still remains with the legislature and not with the judiciary. Thus, if the requirement of a 'just, fair and reasonable procedure' is denied by the legislature by expressly providing for the exclusion of those 'due process' requirements in the

135. Ibid.
136. Ibid., at p.625.
137. Ibid.
138. Ibid., at p.624. For the criticism of this aspect, see Mohammad Ghouse, A.S.I.L., Vol. XIV: 1978, p.424. But Prof. Baxi appears to have tried to save Bhagwati J. by saying while making that observation the learned judge might have referred only to "question" of construction, and not "question" of validity of the statutory exclusion. U.Baxi, supra, n.1, p.159.
procedure which it establishes for the deprivations of personal liberty, the Court will not and cannot do anything but to see that the deprivation of 'personal liberty' is in accordance with the procedure established by law. And, in such an eventuality, Art. 21 would still remain devoid of 'due process', without having any safeguard against the legislature. For, with all the rhetorics of activism, the "truly noble sweep of Justice Bhagwati's opinion"\(^{139}\) reaches only to the extent of 'supplying the omission' of the legislature and not to the extent of correcting the commission of the legislature. It may be recalled that in the year of 1610 the great Chief Justice of England, Sir Edward Coke could assert and declare, in the absence of a written constitution and Bill of Rights and in the teeth of parliamentary supremacy, that "when an Act of Parliament is against common right and reason, . . . the common law will control it, adjudge such Act to be void".\(^{140}\) (emphasis added).

Further, the view held by Bhagwati J. on the issue of statutory exclusion of 'fair hearing' as well as the relative brevity of his view on the issue have, unfortunately, left unanswered the positivist argument of Kailasam J., in his dissenting opinion, that 'it cannot be

\(^{139}\) U.Baxi, ibid., at p.153.

\(^{140}\) Dr.Bonham's Case, 1609 8 Co. Rep. 107.
denied that the legislature in making an express provision may deny a person of the right to be heard' because the rules of natural justice 'cannot be equated with the fundamental right'. 141 (emphasis added). It is difficult to understand how Bhagwati J. could have agreed to the statutory exclusion of natural justice consistent with his duty under Art.13(2) and without the fear of self-contradiction. For, according to his own views the requirements of fair hearing and reasonableness are integral parts of Arts.14 and 19, pervading those Articles "like a brooding omnipresence"; and it is as a result of the impact of those Articles on Art.21 a "just, fair and reasonable procedure" becomes an essential element of the "procedure" contemplated in Art.21 for the deprivation of 'personal liberty'. 142 Obviously, therefore, any statutory exclusion of those requirements of 'reasonableness' would be inconsistent with Arts.14, 19 and 21, and must result only in the invalidity of that statute under Art.13(2). But unfortunately, it is here Bhagwati J. appears to have faltered and failed and ultimately surrendered his activist credentials to the positivist presentations of Kailasm J.

Lastly, a close look at the argumentative strategy adopted by Bhagwati J. to import the requirements of 'due

141. Maneka, op.cit., p. 689.
142. Ibid., at p.624.
process' into Art.21 from Art.19 would clearly show that even from Art.19 'personal liberty' in Art.21 cannot receive 'due process' protection all the time with any reasonable degree of certainty or stability. Based on the linkage of Art.21 with Art.19, the learned judge has rightly held that 'a law prescribing a procedure for the deprivation of personal liberty must meet the challenge of Art.19 in so far as such law infringes upon any of the freedoms conferred under that Article'. But it is submitted that it would be incorrect to infer from the above proposition an unqualified induction of 'due process' into Art.21.

As it is evident from that proposition, a law prescribing a procedure for the deprivation of 'personal liberty' would be required to meet the standard of reasonableness only if and in so far as the law takes away or abridges any of the distinct freedoms in 19(1). Perhaps, it may be for the purpose of overcoming this inherent limitation in this 'due process' strategy Bhagwati J. appears to have attempted to include all the distinct freedoms separately dealt with in Art.19(1) into the concept of 'personal liberty' in Art.21. For, in such an event, any act of deprivation of 'personal liberty' would also be construed as an infraction of the freedoms in Art.19(1); and

143. Ibid., at p.623.
144. Ibid., at pp.621-22.

435
therefore, a law prescribing a procedure for the deprivation of 'personal liberty' in Art.21 would invariably be required to comply with the standard of reasonableness as provided under cls.(2) to (6) of Art.19. But, as has already been pointed out, to read all Art.19(1) freedoms into Art.21, rendering Art.19 as redundant, is not to interpret the Constitution but to repeal it for which there does not seem to be any warrant. And, as a matter of fact, Bhagwati J. himself appears to have given up his initial attempt to integrate completely Art.19 into Art.21. Here, again, the learned judge appears to have been ambivalent. As noted above, first he has attempted to give the 'widest amplitude" to the expression 'personal liberty' in Art.21 so as to include in it all the freedoms in Art.19 as well. Then, while considering the inter-relation between Arts.19 and 21, His Lordship held that a law authorising deprivation of 'personal liberty' within the meaning of Art.21 would be required to meet the challenge of Art.19 only so far as that law takes away or abridges any of the freedoms conferred under Art.19. This conditionitonal clause which has been given emphasis in the above proposition is clearly indicative of the rejection of the theory that 'personal liberty' in Art.21 includes all the freedoms in Art.19, for, otherwise, that conditional clause would only be meaningless

145. See, supra, Ch.IV, also the earlier discussion in this Chapter.
and irrelevant. The inference as to His Lordship's rejection of the above said theory of total inclusion stands further reinforced by his formulation and application of the test of "direct and inevitable effect"\textsuperscript{146} for the purpose of determining whether the law providing for the deprivation of 'personal liberty' within the meaning of Art.21 violates any of the distinct freedoms under Art.19(1) as a 'direct and inevitable consequence of that law'. For, if 'personal liberty' in Art.21 includes within its meaning all the distinct freedoms in Art.19, the deprivation of one would automatically be the infringement of the other, there being no necessity for an independent test to determine whether and if what freedom in Art.19 is infringed as a result of the deprivation of 'personal liberty' in Art.21.

Thus, it is reasonably clear from the judgement of Bhagwati J. that a law prescribing a procedure for the deprivation of 'personal liberty' in Art.21 would be required to comply with the standard of reasonableness only to the extent that any of the independent rights in Art 19(1) is taken away or abridged as a 'direct and inevitable consequence' of such law. It implies necessarily that if no right under Art.19(1) is violated as a 'direct and inevitable consequence' of such law, Art.19 would not be

\textsuperscript{146} Maneka \textit{op.cit.}, pp.635-36.
applicable to test the validity of that law, with the inevitable result that the deprivation of 'personal liberty' in Art.21 would stand denuded of its 'due process' cloak. Thus the 'due process' which is claimed to have been 'inducted' into Art.21 from Art.19 seems to be only conditional and contingent in nature. Also in that process, Art.21 has been rendered completely dependent upon Art.19 so far as the 'due process' requirement is concerned.

Further even in a case of deprivation of personal liberty where Art.19 is applicable and so the 'due process' requirement is available, it is submitted that, the requirement that the law authorising deprivation of 'personal liberty' must conform to the standard of reasonableness is not the outcome of and does not proceed from Art.21; but that requirement is the outcome of Art.19. It is not with reference to the reasonableness of the deprivation of 'personal liberty' the law would be scrutinised as to its validity; but the law would be tested only with reference to the reasonableness of the restriction imposed on any of the freedoms in Art.19 as a direct and inevitable consequence of that law. And as long as Art.21 by itself does not and cannot require that the law authorising the deprivation of 'personal liberty' must be reasonable, it would continue to be incapable of imposing any limitation on the legislature.
Therefore it is submitted that the 'alternate strategy' adopted by Bhagwati J. with reference to Art.19 does not seem to have succeeded in achieving an unqualified induction of 'due process' into Art.21. Perhaps the only limited success of that 'strategy' lies in its rejection of the theory laid down in Gopalan that Art.19 would be totally inapplicable to test the validity of a law providing for the deprivation of 'personal liberty' in Art.21 even if that law violates any of the freedoms conferred by Art.19.

Yet another tragic feature of Maneka which appears to have eroded considerably the foundation of the 'due process' strategy has been the apparent antinomy between what the learned judges have said and what they have really done in Maneka. In the first instance, as noted earlier, the Court has attempted to evolve a new version of 'due process' out of rules of natural justice and Arts.14 and 19 and has said that the 'procedure' contemplated by Art.21 must be "just, fair and reasonable". And the Court has also taken note of the fact that Sec.10(3)(C) of the Passport Act, i.e. the impugned law did not embody the rule of fair hearing;147 that the expression "in the interest of general public" in the Act covered much more than the restrictions permissible under Art.19(2);148 that the impugned order had

147. Ibid., at p.624.
148. Ibid., at p.635 et.seq.
impounded the petitioner's passport for an indefinite period without giving her any reason or any opportunity to state her case;\textsuperscript{149} and that the order of the central government was, final, not being subject to any appeal. Nevertheless when it came to the question of actual determination of the validity of the impugned provision in the Passport Act and the order passed thereunder, Bhagwati J. appears to have failed to apply the standard of "just, fair and reasonable procedure" which he had evolved through a liberal and activist interpretation of the fundamental rights provisions. Thus the learned judge seems to have read the rule of fair hearing into Sec.10(3)(C) of the Act to save it from unconstitutionality.\textsuperscript{150} Then in order to save the order he appears to have gone a step further and held that a post-decisional hearing would be sufficient to meet the requirement of natural justice.\textsuperscript{151} Then, displaying an unbelievable degree of restraintivism, His Lordship also held that if the requirement of audi alteram partem rule was expressly excluded by statute "no more question remains".\textsuperscript{152} Further, he seems to have read down the expression "in the interest of general public" in order to sustain Sec.10(3)(C) as intra vires Art.19(2). And to save Sec.11 of the Act,

\textsuperscript{149} Ibid., at p.618.
\textsuperscript{150} Ibid., at p.630.
\textsuperscript{151} Ibid.
\textsuperscript{152} Ibid., at p.624.
he resorted to the 'high authority'\textsuperscript{153} theory. With reference to Art.14 also the learned judge upheld the validity of Sec.10(3)(C). According to him the ground "in the interest of general public" did not confer any unguided discretion on the Passport Authority. And he further held that 'when power was vested in a high authority like the Central Government, abuse of power could not lightly be assumed',\textsuperscript{154} despite his own admission at the beginning of his judgement that 'it was indeed a matter of regret that the Central Government should have taken up this attitude' towards the request of the petitioner for a copy of the statement of reasons; and that 'that was an instance showing how power conferred on a statutory authority... could sometimes be improperly exercised'.\textsuperscript{155} Though His Lordship said in the beginning that Art.14 embodied the concept of reasonableness,\textsuperscript{156} Sec.(10)(3)(C) had been finally upheld on the ground that 'it could not be regarded as discriminatory'. The Court thus upheld the impugned law as well as the order as constitutional and disposed of the petition without passing any formal order.\textsuperscript{157}

\begin{itemize}
  \item \textsuperscript{153} Ibid., at pp.631-32. For the criticism of 'high authority' theory, see, Mohammad Ghouse, supra, n.138, pp.424-25; U.Baxi, supra, n.138.
  \item \textsuperscript{154} Ibid., at pp.631-32.
  \item \textsuperscript{155} Ibid., at p.618.
  \item \textsuperscript{156} Ibid., at p.624.
  \item \textsuperscript{157} Ibid., at p.651.
\end{itemize}
This patent incongruity between the activist interpretation of the fundamental rights provisions and the restraintivist refusal to apply that interpretation to the facts of the case appears to have further shaken the foundation of the 'due process' strategy in Maneka by exposing that strategy to the vulnerability of being brushed aside as a heap of *obiter dicta* by a legalist judge. Even while praising Bhagwati J. for his "judicial craftsmanship" and describing the dichotomy between interpretation and application as a splendid example of "juristic activism", Prof. Baxi had to acknowledge that 'legalistic justices can reduce most of Maneka to massive *obiter*'. Another eminent Professor criticises this "mixture of activism and passivism" in the judgement of Bhagwati J. on the ground that 'it is likely that the passivism may recoil on the activism'. He apprehends that 'a judge may find the *ratio* only in the latter part of the judgement and dismiss the rest of it as *obiter dicta*'.

158. U. Baxi, *op. cit.*, supra, n.1, p.167. To Prof. Baxi "the introduction and elaboration of new ideas and conceptions without at the same time using these in deciding cases at hand" is "juristic activism". But to Prof. Ghouse this dichotomy between interpretation and application is judicial "passivism". See M. Ghouse, *supra*, n.1, p.425.

159. Ibid.

The above mentioned apprehension appears to be real and significant particularly in view of the dissenting judgement of Kailasam J. The learned judge appears to have adhered steadfast to the exclusionary theories laid down by the Court in Gopalan and refused to accept as correct the rejection of those theories in Cooper and its progeny. This positivistic propensity of Kailasam J. is clearly indicative of the historical continuity and persistence of the tradition of legal positivism in the Supreme Court. The dissenting opinion appears to be a resounding reminder that Gopalan may resurrect along with its mode of constitutional interpretation and judicial techniques. And it also seems to be a clear warning for the 'activist' judges to be more careful and cautious, reinforcing the need for principled decision making even while judicial activism and creativity go on.

Thus the detailed analysis of the arguments adopted by Bhagwati J. with reference to Arts.14, 19 and the rules of natural justice brings to surface a series of infirmities, inadequacies and contradictions in those arguments, seriously impairing the very efficacy of the 'alternate strategy' as an appropriate means to induct 'due process' into Art.21 from outside that Article. The "just, fair and reasonable procedure" formula — the Maneka version

161. Maneka, op.cit., p.675 et seq.
of 'due process' evolved by Bhagwati J. through the 'alternate strategy' does not seem to exist on a sound and stable foundation. This new version of 'due process', appears to be a truncated and conditional concept from the standpoint of its availability for the protection of 'personal liberty' in Art.21. And above all, the "fortress" of 'due process' which Maneka claims to have erected around Art.21 does not seem to be strong enough to safeguard 'personal liberty' against the legislative arm of the State.\textsuperscript{162} Though on the meaning of 'personal liberty' and on the inter-relation between Arts.19 and 21 Maneka has liberated Art.21 from the positivist grips of Gopalan, 'law' in that Article still means a 'State-made law', without being required to comply with any standard of reasonableness.\textsuperscript{163}

It is submitted that this apparent failure of the alternate strategy to induct the requirements of 'due process' into Art.21 and to transform that Article into a limitation on the legislative powers of the State once again reinforces the view taken in this study that any meaningful attempt to introduce 'due process' into Art.21 should be only through a liberal and activist interpretation of the standard which Art.21 itself provides for the protection of

\textsuperscript{162} This aspect is discussed in detail in the next Chapter.
\textsuperscript{163} See, M.Ghouse, \textit{supra}, n.1, p.422.
'personal liberty'. In *Maneka* it is only Krishna Iyer J. who appears to have adopted this line of thought. Hence it may not be out of place here to refer briefly to the judgement of Krishna Iyer J.

On the protection of 'personal liberty' though Krishna Iyer J. has gone "the whole hog" with Bhagwati J., he appears to have thought prudent to found his 'due process' strategy within Art.21 itself. Reflecting his activist instinct, the learned judge has declared at the outset that 'legal interpretation, in the last analysis, is value judgement'. With this perspective of judicial process, he has set out to interpret the expression 'procedure established by law', the standard which Art.21 provides for the protection of personal liberty. Emphasising the value premises of Art.21, His Lordship has pointed out that 'reverence for life and liberty desiderates law; but law is not any 'capricious command but reasonable mode ordinarily regarded by the cream of society as dharma or law'. According to him 'the compulsion of constitutional humanism and the assumption of full faith in life and liberty cannot be so futile or fragmentary that any transient legislative majority... can prescribe any

165. Ibid.
166. Ibid.
unreasonable modality and thereby sterilise the grandiloquent mandate'. Then he said, it is submitted, rightly thus:

"'procedure established by law' with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not ex-necessitate import into those weighty words an adjectival rule of law, civilized in its soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head. Can the sacred essence of the human right to secure which the struggle for liberation, with 'do or die' partiotism, was lunched be sapped by formalistic and pharisaic prescriptions, regardless of essential standards?"\footnote{168}{Ibid.}

Integrating those values which he delineated, into the verbal framework of the standard of 'procedure established by law', His Lordship held:

"Procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Art.21 has to be

\footnote{167}{Ibid.}

\footnote{168}{Ibid.}
fair, not foolish, carefully designed to effectuate, not to subvert the substantive right itself. Thus understood, 'procedure' must rule out anything arbitrary, freakish or bizarre... what is fundamental is life and liberty. What is procedural is the manner of its exercise. This quality of fairness in the process is emphasised by the strong word 'established' which means 'settled firmly' not wantonly or whimsically. If it is rooted in the legal consciousness of the community it becomes, 'established' procedure. And 'Law' leaves little doubt that it is normae regarded as just since law is the means, and justice is the end".169

Krishna Iyer J. appears to have tacitly acknowledged the inherent limitation in the alternate strategy when he said: "Even as relevant reasonableness informs Arts.14 and 19, the component of fairness is implicit in Art.21".170 (emphasis added).

169. Ibid. Here it may be noticed that his Lordship appears to have approved the views of Fazl Ali J. in Gopalan, and the opinion of Subba Rao J. in Kharak Singh and Kochunni as regards, the interpretation of the expression 'procedure established by law'.

170. Ibid.
Elaborating further the rationale behind giving such a purposive and 'due process' oriented interpretation to the expression 'procedure established by law', His Lordship added: "Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of procedural safeguards and right to a hearing has a human-right ring. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights: observance of fundamental rights is not regarded as good politics and their transgression as bad politics". 171 And the learned judge clinched the issue in these words: "To sum up, 'procedure' in Article 21 means fair, not formal procedural. 'Law' is reasonable law, not any enacted piece." 172 And 'due process of law' it is submitted, is all about 'fair procedure' and 'reasonable law'.

It is submitted that through a liberal, purposive and policy-making mode of constitutional interpretation Krishna Iyer J. appears to have integrated the value premises of 'personal liberty' in Art.21 into the verbal framework of that Article and construed 'procedure' as fair procedure and 'law' as reasonable law. He appears to have, founded, thus, the 'due process of law' at the heart of

171. Ibid.
172. Ibid., at p.659.
Art.21 itself. Unfortunately, the opinion of Krishna Iyer J. did not come to be one of the Court, which pursued only the alternate strategy of gathering the elements of 'due process' from outside Article 21.

Nevertheless, Maneka has emerged as a landmark in the history of personal liberty and judicial process in India. It serves as a great symbol. It signifies the resurgence of an activist judicial concern for personal liberty and human rights. The decision in Maneka displays a new attitude and approach not only towards the protection of personal liberty, but also towards the very mode of constitutional interpretation and judicial techniques. Perhaps, it is here Maneka has demolished Gopalan. Though the Maneka version of 'due process' - the "just, fair and reasonable procedure" formula - has not emerged as a full-fledged 'due process' clause and has failed to get itself integrated into Art.21, that satellitic concept appears to hold out the promise of occasional glitterings of 'due process', of course, subject to the conditions and contingencies which are inherent in the 'alternate strategy'. Thus in the end one can see in Maneka, at least the twilight of due process, if not the very birth of it. And more than any thing else, Maneka, as a symbol, appears to have helped the Indian judicial psyche to liberate itself from the 'due process' phobia from which it has been
suffering eversince Gopalan. Though Maneka has not succeeded in inducting unequivocally the 'due process' clause into Art.21, it appears to have succeeded in imparting a 'due process' dynamism to the judicial process in the field of personal liberty. And in a way it is the skilful display of this 'due process' dynamism by the post - Maneka Supreme Court that appears to have made Maneka still more significant and memorable.

Hence a close study of this 'due process' dynamism shown by the Court in dealing with personal liberty becomes imperative in order to conclude whether judicial process has ultimately succeeded in founding the 'due process' clause in Art.21 as a protection for personal liberty.