CHAPTER IX
CONCLUSION

Law must become the gravestone of the old and the cornerstone of the new, an instrument of the people, for the people and by the people.¹ The synthesis of the conflict between the old dying order and the pangs of the new born system² sprung from the activist role of the Supreme Court, the highest in the pyramid of justice. The court must set the rhythm of law to the wavelength of life and liberty of the people enshrined in article 21 of the Constitution, which is a revolutionary and activist charter for protecting the fundamental rights of the people. If life and personal liberty is to become living reality for the little Indians, all the organs of the state must attach importance to liberty and freedom of the people.

The value of "liberty" lies deep rooted in history. "Liberty" means right to do what one desires. But this desire should be subject to the desire of others because otherwise liberty of one would mean no liberty of the other. And in such a case there is frustration which would result in chaos and disorder. In the variegated kaleidoscope of social order, no absolute mathematical balance is either possible or immutable but some balance has to be drawn between the individual liberty and the social control. Sometimes, social control may have upper hand and at other times, individual liberty may have more importance.

To begin with, judiciary followed the restricted interpretation of the expressions "life", "liberty" and "procedure established by law". Gopalan³ was the first case where the concept of "life" and "personal liberty" came for interpretation before the Supreme Court and the court gave it a

2. Id. at 127-128.
narrow interpretation. According to it, the word "liberty" was qualified by the word "personal", so it did not include all the attributes of "liberty". Gopalan was so dominant that the court refused to include the right to livelihood in the right to life in re Sant Ram. While interpreting the expression "procedure established by law", Gopalan held that "law" meant lex, that is, enacted law and not jus and "procedure" meant procedure laid down by law. It did not include the principles of natural justice in the expression "law". Thus, according to the court, any enacted law which might be harsh to any height, was law. That is why, Justice Das remarked that the cook of Bishop of Rochester be boiled to death, would be valid under article 21. Minority view in Gopalan wanted to interpret "law" as valid law by including the principles of natural justice. The fairness, with which the minority wanted to decorate "law" and "procedure" was discarded by the majority in Gopalan. Thus, the majority in Gopalan bound them to cover the indispensable right under article 21 with the shadow of harsh laws and unreasonable procedures and deprive so many persons of their life and personal liberty every day. The minority view must be appreciated to adopt the principles of natural justice recognized by all the civilised systems. The article which is the saviour of the precious life of the people, must be given liberal interpretation. If the legislature commits the wrong of taking away the right to life and personal liberty by enacting harsh laws, then it is the foremost duty of the judiciary to save people from the impact of those harsh laws.

Anwar Ali Sarkar interpreted the expression "law" as state-made law and also held that it must be valid law. Gopalan's interpretation of the expression "procedure established by law" was followed in E.Ebrahim Hajee.

and Ram Chander Prasad. However Lakhanpal showed a slight change in the judicial approach.

Emergencies were imposed in 1962 and 1971 and right to move the court for the enforcement of fundamental rights guaranteed under articles 14, 21 and 22 was suspended by the President. During this period, till the internal emergency was imposed, the right to "life" and "personal liberty" was given a wider meaning than it was construed in Gopalan. Kharak Singh liberated "personal liberty" from the clutches of narrower meaning given in Gopalan. It gave a better chance of protecting "personal liberty", which was interpreted as freedom of the individual, from such restrictions which obstructed the development of one's personality.

But the path was yet to be paved to reach a liberal approach towards the protection of "life" and "personal liberty" as the court again followed the restrictive approach in Mohan Chowdhary. When emergency was declared in 1962 and right to move the court for the enforcement of articles 14, 21 and 22 was suspended by the Presidential order, the Apex Court once again denied the protection of "life" and "personal liberty" on the ground of Presidential order that due to the suspension of right to move the court, the detained person has lost the locus standi to move the court. In Makhan Singh, another detention case of emergency, the Supreme Court had asserted that during the emergency, the government remained bound by the Constitution and the laws. It is correct to the extent that the Constitution provided for the emergency provisions and under one of these provisions, the fundamental rights can be suspended during the emergency. Once the provision is there,

the government abides by that and the court keeps on giving restrictive interpretation to the right to "life" and "personal liberty".

In K. Ananda Nambiar,12 Ram Manohar Lohia,13 Mohd. Yusuf14 and Sadanandan,15 the Summit Court took an healthy view regarding the concept of "personal liberty". The government was compelled to follow the provisions of the statute under which the detention was made. Detention could also be challenged on any ground other than articles 14, 21 and 22 only which were suspended during emergency, for example, on the ground of mala fide of the executive.

An effort was made to liberate the concept of "life" and "personal liberty" from the clutches of the restrictive view by recognizing the rights of the prisoners to some extent in Pandurang.16 The judiciary further widened the scope of "life" and "personal liberty" by extending the protection of article 21 to passport cases in Satwant Singh.17 In this case, the majority as well as minority judges agreed on one point that there was a fundamental right of equality in the obtaining of a passport but there was no fundamental right to the grant of a passport. The only point of difference between the majority and the minority opinion was that the executive might discriminate while exercising the power to grant or refuse a passport but the minority felt that there was no discrimination because the government had to scrutinize the credentials before granting the passport. Whatever may be the point of agreement or difference between the majority and minority, the judges tried to add to the attributes of "personal liberty".

held that travelling abroad was an attribute of "personal liberty". The majority judgment depicted the need of society for such right and to preserve the lofty ideal of "one world and one government".

In D.B.M.Patnaik, the court recognized that the right to "life" and "personal liberty" was available not only to a free person but also to a convict. After Kharak Singh, the question whether right to privacy was a fundamental right guaranteed under our Constitution or not, was raised in Govind but the highest court, instead of stepping up towards the liberal interpretation of article 21, stepped down again to follow the restrictive approach by not finding right to privacy as an absolute right. The court accepted the nexus between the right to privacy, human dignity, happiness and the need to safeguard privacy from the subtle and sophisticated devices through which the police could hear in the street the whispers in the closet. But it hesitated to cross the Rubican to hold that there was a right to privacy. Fundamental rights can endure for ages to protect the individual's dignity and happiness from the new threats that may arise from time to time only if they are interpreted in an evolutive sense. If this is not done the Constitution may in course of time degenerate into only a paper parchment.

During this period, the ghost of Gopalan continued to follow the judicial trend regarding the interpretation of the expression "procedure established by law". In Kharak Singh, the court was concerned with the unconstitutional exercise of a power and not with the reasonableness of the power. Makhan Singh found that the requirement of "procedure established by law" was fulfilled if the legal authority, which deprived a person of his "life" or "personal liberty", had followed the prescribed legal procedure.

20. Supra note 9.
21. Supra note 11.
dure for the purpose. In this case, the Apex Court found the prescribed legal procedure under article 359(1) and the Presidential Order issued under it to suspend the remedies under articles 32 and 226.

Ram Manohar Lohia laid stress on the strict compliance with the letter of the rule which deprived a person of his "life" or "personal liberty". In Satwant Singh, the Summit Court held that every executive action, which operated to the prejudice of any person, must be supported by legislative authority. For the purposes of article 21, departmental instructions without statutory authority were not included in the expression "law" in D.B.M. Patnaik. Jagmohan Singh voted for the award of death sentence as the relevant provisions of the Criminal Procedure Code constituted "procedure established by law". Govind found that the procedure was reasonable having regard to the regulations which allowed surveillance by domiciliary visits. Thus, it can be seen that the Apex Court held in different cases that it was the legislature only which could prescribe procedure for regulating "life" and "personal liberty". The court did not test the "procedure" on the touchstone of fairness, justness and reasonableness. As a result of these judicial decisions every executive action, may be reasonable or unreasonable, was valid if it had legislative sanction.

The only armoury available to the judiciary is the armoury of law. But the weapons can be used, misused, abused and even allowed to rust. It all depends on the judge who handles them. This conception proved to be a living reality when internal emergency was imposed under article 352(1) on 25 June 1975. By virtue of the proclamation of emergency issued by the President

22. Supra note 13.
23. Supra note 17.
24. Supra note 18.
26. Supra note 19.
27. See Hari Swarup, For Whom the Law is Made, 5(1981).
the fundamental rights under articles 14, 21 and 22 were suspended. As a result of the declaration of emergency, many persons were detained under the Maintenance of Internal Security Act, 1971. At this crucial juncture, Habeas Corpus case\textsuperscript{28} gave a true picture of the role of the highest court, that is whether it stood by the people, saviour of whose life and liberty it is, or whether it confined itself within the boundary line drawn by the executive.

During this darkest period in the history of independent India, the judiciary, the savioury of life and liberty of people, instead of eliminating this darkness made the darkness complete. It refused to release the persons detained during internal emergency by issuing the writ of habeas corpus in Shukla on the ground that it would be enforcement of fundamental rights which were suspended by the Presidential order issued under article 359(1). Thus, the faith of the framers of the Constitution, who had included article 359 as the life of the Constitution, was shattered to the grounds because it, instead of becoming life of the Constitution, took away the "life" protection of which was guaranteed by this very Constitution.

The majority in Shukla found article 21 to be the sole repository of the right to "life" and "personal liberty" and did not allow its protection under any other law. Justice Khanna, while giving his dissenting opinion, did not consider article 21 as the sole repository of "life" and "liberty". He did not accede to the contention that because of article 21 of the Constitution, any law, which was already in force and which provided that no one could be deprived of his life or liberty without the authority of law, was obliterated and ceased to remain in force because life and liberty were priceless possessions which could not be made the plaything of individual whim and caprice and any act which deprived any person of his life and liberty under articles 14, 21 and 22 were suspended. As a result of the declaration of emergency, many persons were detained under the Maintenance of Internal Security Act, 1971. At this crucial juncture, Habeas Corpus case\textsuperscript{28} gave a true picture of the role of the highest court, that is whether it stood by the people, saviour of whose life and liberty it is, or whether it confined itself within the boundary line drawn by the executive.

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life and liberty must receive sanction from the laws of the land.

Thus, the judiciary, instead of protecting the life and liberty of people by declaring such harsh laws as unconstitutional, which played with individual liberty, bound itself within the rigid limits of law.

While interpreting the expression "procedure established by law", they did not think of principles of natural justice and of rule of law. According to them, the expression "procedure established by law" meant procedure laid down by the enacted law. Judicial passivism went to this extent that they held that when the presidential order suspending article 21 was in force, there was no need of fulfilling even the minimal requirement of procedure which was to be followed for exercising the substantive power by the executive in depriving the persons of their "life" and "personal liberty". They did not think of their role as crusaders and protectors of the "life" and "liberty" of the people and expressed diamond-bright hope and faith in the executive that fear of people regarding their life and liberty would never come true. But within no time unbridled executive showed its real face and instead of illuminating the "life" and "personal liberty" of the people with the brightness of diamond, it used the poisonous effect of the diamond to deprive the people of their life and liberty.

Shukla made Gopalan's shadow even more darker and the consequence was Bhanudas, another creation of slumbering judiciary. The result of the passivist judges, imposing diamond-bright hope in the executive was that the government could think of the extremity that if a detenue was shot or starved to death, there was no remedy till the emergency was over. Wearing the "roseate spectacles", the Apex Court judges did not even care to look at the legality of the specific conditions of detention. What to talk of giving relief to the people whose liberty was crushed under the dominating

feet of the executive, the relief given by the High Courts was also taken away.

After the internal emergency, the Constitution (Forty-fourth Amendment) Act was passed. It proved to be a boon by laying down that article 21 could not be suspended during the period of emergency. But now the Constitution (Fifty-ninth Amendment) Act has revived the pre-44th Amendment situation by permitting the suspension of article 21 during emergency if an emergency be declared in relation to Punjab. The Constitution (Fifty-ninth Amendment) Act has been challenged before the Supreme Court and the petition has been referred to the Constitution Bench. It has to be seen whether the court would stick to the *Habeas Corpus* decision or would follow the post-internal emergency activist approach.

The question of activist and passivist approach of the highest court had been well depicted while discussing the relationship of article 21 with other fundamental rights. Since *Gopalan*, this concept had seen many ups and downs. *Gopalan* found these articles as mutually exclusive. *Bank Nationalisation* case decided differently that these were not distinct and mutually exclusive rights. Even though *Cooper* dealt with the inter-relationship of article 19 and article 31, the basic approach regarding interaction of different fundamental rights declared the major premise of the majority in *Gopalan* as incorrect.

During the imposition of internal emergency, the Summit Court in *Shukla* followed *Cooper's* approach. In the post-internal emergency era, *Maneka* cleared all the doubts about the relationship of article 21 with

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other fundamental rights that these were not mutually exclusive rights. Thus, the martyrdom of Gopalan and resurrection by Cooper paved the way for Maneka which way was further trodden by Sunil Batra and Hoskot. Unfortunately, at this juncture, Bachan Singh gave a back turn following Gopalan approach. Javed Ahmed again emerged on the judicial scene and by following Cooper enlivened by Maneka further strengthened and nourished the relationship of article 21 with other fundamental rights. Thus, the judicial trend, which took birth in pre-internal emergency era was properly looked after in the post-internal emergency era, granted protective umbrella to the people by drawing the limits of the executive and awakening the legislature to perform its role.

At such a crucial juncture when the liberty of people is at stake, the Supreme Court is increasingly seen as the only surviving assurance of fair play and justice and even as "the last resort for the oppressed and the bewildered". Thus, the desideratum for the protection of "life" and "personal liberty" is adoption of "fair procedure" before any person is deprived of his "life" and "personal liberty". This desire became a living reality in Maneka which proved to be a panacea for "life" and "personal liberty" by prescribing fair procedure. Justice Bhagwati (as he then was) did not agree with Gopalan's view that mere prescription of some sort of procedure was enough. He while seeking help from articles 14 and 19, held that "procedure" under article 21 must be fair, just and reasonable. By considering "procedure" under article 21 as fair procedure, he expanded the scope of article 21 and included right to go abroad in "personal liberty" within the meaning of this

38. See Upendra Baxi, The Indian Supreme Court And Politics, XI (1980).
39. Supra note 32. In this case, Justice Bhagwati delivered the majority (conted.)
article. He also made the principles of natural justice a component part of article 21. He brought a revolution in the concept of "procedure" under "procedure established by law" but kept Gopalan on law intact by holding that law meant "enacted law" or state-made law and not fair, just and reasonable law. This half-way activist approach of Justice Bhagwati is really astonishing. On the one hand, he invoked fairness in the "procedure" and on the other, he did not care for prescribing fairness, justness and reasonableness in "law" which prescribes unfair procedure. Had "law" also been considered as fair, just and reasonable, Maneka would have been the gateway not only for procedural due process but also for substantive due process. Justice Chandrachud (as he then was) agreed with Justice Bhagwati that procedure must be "just, fair and reasonable" but warned against the inclusion of "due process" because once "procedural due process" was allowed an entry in the Indian Constitution, it would be difficult to stop "substantive due process". Chief Justice Beg, while delivering concurrent opinion, found the elements of "due process of law" under article 22 but at the same time, he agreed to treat procedure as "fair procedure" in the areas where article 22 was not applicable. When he stated that the substantive as well as procedural laws made to cover them (the areas not covered by article 22) must satisfy the requirements of both articles 14 and 19 of the Constitution, it meant that he wanted to test both the substantive as well as procedural laws on the touchstone of fairness and reasonableness. Did it not imply that he permitted the entry of substantive as well as procedural due process.

In this case, Justice Krishna Iyer, while delivering a concurrent opinion with Justice Bhagwati, was the lone voice crying for adoption of view for himself and on behalf of Untawalia and Murtaza Fazal Ali, JJ. Chief Justice Beg, Justice Chandrachud (as he then was) and Justice Krishna Iyer gave separate but concurrent opinions. Justice Kailasan delivered the minority view.
substantive as well as procedural fairness under article 21 because he not only wanted to protect "life" and "personal liberty" from the arbitrary executive action but also from the legislative callousness. He followed Justice Bhagwati's opinion in holding that procedure must be "fair, just and reasonable". However, he added to the opinion of Justice Bhagwati by taking "laws" also as reasonable law and not any enacted piece. Thus, he left no tools unmoved for the clear entry of fairness in every executive and legislative action because law remained unlawful even if it was legitimated by three legislative readings and one assent, if it was not in accordance with constitutional provisions.

Justice Kailasam, while delivering the minority opinion, allowed the shadow of Gopalan to continue covering article 21 regarding the interpretation of "procedure" and "law" under "procedure established by law".

Thus, Maneka only freed "procedure" from Gopalan but kept Gopalan on "law" intact. As a result the substantive rights poured into personal liberty and the principles of natural justice woven into procedure are available only against the executive. The legislature is even now not subject to article 21. Article 21 can usher in new era created for it by the judiciary in Maneka only if law is freed from Gopalan. Only a balanced interpretation of the term "personal liberty", "procedure" and "law" can make article 21 a holy shrine of "liberty". In Maneka, Justice Bhagwati hoped that if the law was unreasonable law, the arms of the court were long enough to reach it and strike it down. But the dreadful experience of emergency laws shows that the arms of the Parliament are longer than that of the court. Even after Maneka, article 21 cannot prohibit enactment of such laws. The Constitution(Fifty-ninth Amendment) Act, 1988 is a living example of it. This Act has been challenged before the court and it is high time to see whether judicial
arms are longer or shorter than the legislative arms.

The post-Maneka judicial scene showed good swings of sometime embracing due process and sometime showing it the exist gate. Hoskot\textsuperscript{40} and Sunil Batra(I) and (II)\textsuperscript{41} adopted both the substantive as well as procedural due process. Hussainara,\textsuperscript{42} Francis Corallie Mullin\textsuperscript{43} and the majority in Bachan Singh\textsuperscript{44} voted only for procedural fairness. Justice Bhagwati, while delivering minority view in Bachan Singh,\textsuperscript{45} changed his view from what was held by him in Maneka, Hussainara and Francis Corallie Mullin and held that "law" as well as "procedure" under "procedure established by law" should be "fair, just and reasonable". A.K.Roy\textsuperscript{46} showed judicial passivism by not accepting "due process" as a part of article 21. However, Ranjan Dwivedi\textsuperscript{47} keeping in view Maneka decision, admitted that it was difficult to hold that the substance of American "due process" had not still been into the conservative text of article 21. In Olga Tellis,\textsuperscript{48} the Supreme Court joined the series of judicial decisions which had made fairness an integral part of article 21. In this case, the Apex Court was ready to strike down the "law" which prescribed unreasonable procedure. Thus, by its implication, it does not mean that only "procedure" should be reasonable but that the "law" prescribing that procedure must also be reasonable. The court may not be wanting to allow substantive due process directly along with procedural due process but indirectly and impliedly it has expressed so.

\textsuperscript{40} Supra note 35.
\textsuperscript{43} Francis Corallie Mullin \textit{v.} Union Territory of Delhi, A.I.R.1981 S.C.746.
\textsuperscript{44} Supra note 36.
\textsuperscript{47} Ranjan Dwivedi \textit{v.} Union of India, A.I.R.1983 S.C.624.
It is hoped that this fluctuation in the judicial decisions would come to an end and a final stage would come when "procedure" as well as "law" under the expression "procedure established by law" in article 21 would be interpreted as "fair, just and reasonable". Article 21 has been revolutionized but the revolution would be complete when it finally becomes the counterpart of American "due process" in India. The question remains how far it is judicious and feasible to include "due process" under article 21. The Constituent Assembly did not include the American "due process" clause under the Indian Constitution. But after the enactment of the Constitution of India, the concept of "due process" started travelling the same wavelength as it did in the United States of America. In United States of America, the Slaughter House cases did not allow the substantive "due process". In India, Gopalan totally exiled the "due process" from article 21. The minority opinion in Slaughter House became the majority opinion in Smyth and the minority opinion in Gopalan impressed upon the majority in Maneka and Maneka became the birthplace of "due process" by prescribing "procedure" under "procedure established by law" in article 21 as fair, just and reasonable. Only Justice Krishna Iyer voted for reasonableness of "law". The post Maneka decisions were fluctuating some time welcoming only procedural due process and at times substantive due process as well. However, Mithu is a living example of the adoption of substantive due process by the Summit Court. In this case, the court declared section 303 of the Indian Penal Code unconstitutional it being unfair and unreasonable as it prescribed death sentence as the only sentence for the offence of murder committed by the lifer undergoing the sentence.

Thus, in the post-internal emergency period, the Apex Court removed the clouds of darkness which were governing the judicial scene during emer-

49. (1873) 16 Wel.36.
gency through the concept of fair procedure. And this new innovation encouraged the Summit Court to leave the adversary procedure and adopt the new devise of public interest litigation which permitted the public spirited persons to seek the judicial redress for those whose life and liberty is at stake but who cannot protect it due to poverty or any other incapacity. In pre-Maneka period, this concept of public interest litigation (without this nomenclature) was evolved by Justice Krishna Iyer in Mumbai Kamgar Sabha. In post Maneka period, its importance was discussed in Ratlam Municipality and Fertilizer Corporation. This concept was given a comprehensive exposition in Transfer of judges case and its further elaboration was found in Asiad Workers case and Bandhua Mukti Morcha.

Thus, the post-Maneka Supreme court created new dimensions for the enforcement of fundamental rights and to protect life and liberty of the people by adopting not the adversarial procedure but the newly innovated "fair, just and reasonable" procedure. If the adversarial procedure is blindly followed, fundamental rights cannot be protected and enforced by the protective organ of the state and the result would be nothing but a mockery of the Constitution. Therefore, the post Maneka judicial activism impressed upon the Apex Court to liberate itself from the clutches of the traditional technicalities of procedure. The concept of "fair, just and reasonable" procedure was evoked in Maneka in order to give protection from the executive action

58. Supra note 32.
which is unfair, unjust and unreasonable. If the executive action is unfair unjust and unreasonable and some public injury is caused and if no one is there to knock the doors of the court, the judicial activism would have no value. Therefore, the highest court adopted new devise of public interest litigation in order to allow the public spirited persons having "sufficient interest" in the matter to move the court. While innovating this new method, the Apex Court also cautioned itself not to cross the barriers of its province in the name of judicial activism. When the Summit Court trod the path of activism by innocating the new method of public interest litigation, it was criticised on the ground that it would open the floodgates of litigation and result into conflict with the executive. Rebutting all such criticism, the Supreme Court gave relief to prisoners, undertrials, workers, bonded labourers, women and children etc. through this new tool of public interest litigation.

Hence, the activist approach of the post Maneka59 Supreme Court rightly depicts that our Constitution is not a non-aligned instrument but an activist, even revolutionary charter for the transformation of the social order. Any one who takes his oath of office under the Constitution must acknowledge, accept, abide by and implement those values in his functional role.60 The changing grammar of judicial approach in different areas of "life" and "personal liberty" is clear from many pronouncements of the Apex Court.

The question of abolition or retention of the capital punishment has travelled from north pole to south pole. The retentionists favour it for protecting the society by the elimination of the criminal from the society. On the other hand, the abolitionists vote for its abolition because they want to eliminate crime from the society and not the criminal by reforming the criminal.

59. Ibid.
The controversy of imposition of death penalty has been tested on the touchstone of the Constitution many a time. In the pre-internal emergency era, Jagmohan Singh held capital punishment constitutional as the constitution framers were well aware of the existence of the death sentence as a permissible punishment under the law and, therefore, they introduced different provisions in the Constitution which permit death sentence. According to the court, there were no chances of discrimination as every case was decided on facts. But as no two human minds can think in the same manner, there would be every chance of discrimination and it is against the concept of "reasonableness, fairness and justness" enshrined in articles 14, 19 and 21.

In the post-internal emergency era, the Apex Court found it necessary to have a second look at the life versus death controversy. Rajendra Prasad tested the capital punishment on the touchstone of equality under article 14, reasonableness under article 19 and procedural fairness under article 21 and held that it should be awarded only in "rarest of rare cases". Thus, Maneka's concept of fairness changed the judicial trend of retaining capital punishment and favoured its abolition. Rajendra Prasad was followed in Dalbir Singh and Bishnu Deo. The Summit Court, while opting for the abolition of death sentence, also kept space for the death penalty by holding that it could be imposed in "rarest of rare cases". Now, death sentence is an alternative sentence for murder and section 354(3) of the Code of Criminal Procedure provides that "special reasons" must be given for the imposition of death sentence. But it is not clear what can be the "rarest of rare cases" and what can be "special reasons" and it is left to the discretion of the judges. So again, there is risk of discrimination. Thus, the legislature must be active.

61. Supra note 25.
to perform its role by laying down "special reasons" to some extent.

The inconsistencies between Jagmohan Singh and Rajendra Prasad led to the decision of Bachan Singh which again tilted the balance towards constitutionality of capital punishment. Justice Bhagwati, (as he then was) while giving the minority opinion, voted for the unconstitutionality of death sentence. His view does not appear to be right because the main base of his view is that since there are no guidelines for imposing death sentence, therefore, the death sentence is unconstitutional. There are many other expressions of great importance used in the Constitution, for example, reasonable restriction, public interest, basic structure etc., but there are no guidelines regarding their scope and it is left to the judges to interpret different situations according to their viewpoint. Justice Bhagwati's view was merely a shadow of Rajendra Prasad regarding the retention of death sentence in the "exceptional cases" or "rarest of rare cases". This view was taken by the minority in Bachan Singh and the Division Bench in Rajendra Prasad. Jagmohan Singh and Bachan Singh were decisions of the Constitution Bench. Ranga Billa, which was again a Division Bench decision, demanded extinction of the life of notorious murderers and thus favoured retention of capital punishment.

Kehar Singh, while awarded death sentence to the murderer and conspirator in the murder of the former Prime Minister of India, reiterated the view that death sentence should be retained for "rarest of rare cases". In Kehar Singh v. Union of India, the Supreme Court considered the scope of article 72 and held that the President while acting under article 72 can go into the merits of the case, review the evidence in record and if he

thinks necessary, can even afford oral hearing. On the other hand, the Supreme Court has also held that the President in exercise of its powers under article 72 is to act upon the aid and advice of Council of Ministers headed by the Prime Minister. These two aspects are difficult to be reconciled. It would have been understandable if there had been some other body like, for instance, an "advisory board", to assist the President in such a situation. As long as the present constitutional position stands, it does not seem practically feasible to carry out in letter and spirit what has been held by the final court of the country.

This controversy of option for life and death should be set at rest. It is high time to think that the precious lives of human beings, who are not born criminals, should not be sacrificed at the altar of different approaches of judges, who can also commit blunders like any other human being. In order to reach to some conclusion, the decision has to be taken by the judiciary only. But as there are different opinions of the Division Benches and the Constitution Benches, this matter must be referred to a larger bench. Justice Bhagwati had suggested in Bachan Singh that once the conviction was final by the High Court, the matter must be automatically decided by the Supreme Court sitting en banc. It may not be feasible for the Summit Court to follow such a procedure every time whenever any case comes before it, but at least once this question can be decided by a special bench or a larger bench.

The Apex Court strengthened the hands of the abolitionists by declaring section 303 which prescribed death sentence as the only sentence for the murder committed by a person undergoing life sentence as unconstitutional.

71. Supra note 66 at 1389.
being violative of articles 14 and 21 of the Constitution in Mithu. The Summit Court, following the humanistic approach, again showed a tilt towards abolition of death sentence when it converted death sentence into life sentence where there was delay in execution of death sentence in T.V. Vatheeswaran. However, the decisions of the Supreme Court regarding the period of delay fluctuated. In Vatheeswaran, the Supreme Court found two years delay to be sufficient to convert death sentence into life imprisonment but in Sher Singh disagreed to fix the time limit. Javed Ahmad again followed Vatheeswaran. In Lallo, the Apex Court converted death sentence into life imprisonment keeping in view the fact that the offence was committed over a decade ago. Recently, in Triveniben the Constitution Bench of the Supreme Court overruled Vatheeswaran and held that while the court has the power to commute sentence of death to life imprisonment in cases of prolonged delay in execution, no fixed period of delay could be held to make the sentence of death inexecutable and entitle the accused to the lesser sentence of life imprisonment. On this question of delay in execution of death sentence, conflicting views have been given by the Summit Court. In spite of the decision by the Constitution Bench, the question still remains what delay would be "prolonged delay" to convert death sentence into life imprisonment. Discretion is given in the hands of the judges without laying down any guidelines which is not in consonance with the concept of "fair, just and reasonable" procedure evoked by Maneka. Moreover, the Supreme Court must become conscious of the fact that capital cases must be given top priority on the court calendars. The judicial mutation of interpretation of "just, fair and reasonable" procedure under article 21 will become a living reality, if this approach was followed.

75. Supra note 37.
The highest court timely and judiciously set at rest the controversy relating to the method of hanging in Deena v. Union of India.\(^{78}\) The role of the legislature was to lay down the best method of executing the death sentence.\(^{79}\) In whatsoever cases, death sentence was to be awarded in an appropriate manner. The method by which the sentence was required by law to be executed must meet the mandate of article 21. The mandate of death sentence was not that the death sentence shall not be executed but it shall not be executed in a cruel, barbarous, degrading or humiliating manner.\(^{80}\) It is for the judiciary to check whether the mandate of article 21 was met with or not. After testing the method of hanging by rope on the touchstone of "fair, just and reasonable" procedure, the court held it constitutional.

When the Apex Court was on the move to abolish death penalty, it was but natural not to allow public hanging in Lachma Devi it being barbarous in nature. No doubt, the humanistic court voted totally against public hanging but it may be reserved for "rarest of rare cases". Public hanging can be a lesson for the people for such "rarest of rare cases" where hardened criminals are publicly hanged. When imposition of death penalty can be there in the "rarest of rare cases" equally why not public hanging be there in the "rarest of rare cases".

Thus, the post Maneka Supreme Court has changed its role from a decision-making body to a protective organ. Finding the logic of humanistic and reformistic approach in the concept of "reasonableness, fairness and justness", it advocated an amalgam of the divergent and conflicting views from the evolving schools of jurisprudence.

\(^{78}\) A.I.R.1983 S.C.1155.
\(^{79}\) Id. at 1172-1173.
\(^{80}\) Id. at 1186.
In maximum cases, it opted for abolition of death penalty because
Every sombre dawn a human being is hanged by the legal process the flag of human justice shall be hung half-mast. For this is the symbolic reverence the world should pay to human life haltered up by lethal law. ....However much judicially sanctified and constitutionally legitimated, there is a factor of fallibility, a pall of irrevocability and a core of sublimated cruelty, implied in every death sentence...82

Neither the death penalty nor the prison trauma is the panacea for a crimeless society. In the post-internal emergency era especially in the post Maneka period, the highest court in the pyramid of justice, concentrated on the improvement of the conditions of the prisoners. The court did not allow the prison laws to swallow up the fundamental rights of the prisoners. The prisoners' rights were restricted to some extent by the very fact of the conviction but the restrictions must be subject to fairness under article 21, reasonableness under article 19 and to the test of arbitrariness under article 14.

If "rights jurisprudence" is to be granted vitality, then it must be followed with the remedial jurisprudence. Therefore, the Apex Court broadened the scope of habeas corpus in Sunil Batra(II).83 Before this judicial step was taken, the writ of habeas corpus was available only for the release of the person but now it can be evoked even to save the prisoner from prison torture. The court even bid farewell to adversarial procedure and by adopting a new constitutional jurisprudence permitted the entertainment of habeas corpus petition through letters.

The Summit Court has applied the concept of fair procedure on the various aspects of prison jurisprudence. The concept fair procedure led the court to prohibit imposition of solitary confinement by the jail authorities in Sunil Batra(I) because it had a degrading and dehumanising effect on

82. See V.R.Krishna Iyer, Justice And Beyond,146(1980).
84. Supra note 34.
prisoners. However, the court reserved its imposition in exceptional cases where the convict was of such a dangerous character that he must be segregated from other prisoners. In spite of the court's efforts made in Sunil Batra(I) against solitary confinement, the authorities did not change their sadistic approach and the Supreme Court had to remind them again of the importance of human dignity and barbarous character of the solitary confinement in Sunil Batra(II), Kishore Singh and Rakesh Kaushik.

Life and liberty being precious values, article 21 forbids deprivation except in accordance with "procedure established by law". Bar fetters which make a serious inroad in life and liberty, cannot be reconciled with the protections granted under articles 14, 19 and 21. Bar fetters convert the human existence into a zoological existence. Therefore, the human values conscious Supreme Court forbade the putting of bar fetters in Sunil Batra(I), Sunil Batra(II), Prem Shankar Shukla and Kishore Singh. The court favoured its imposition only in "rarest of rare cases" where no other alternative was available to comply with the functional compulsions of the security and that is also after following the principles of natural justice. The court also did not allow the putting of leg irons on the undertrials in Sunil Batra(I) and Kadra Pehadiya. Despite these judgments in Aeltemesh Rein, the Summit Court had to issue direction to the Union of India to frame rules or guidelines regarding the circumstances in which handcuffing of the accused should be resorted to in conformity with the judgment of this court in Prem Shankar Shukla and to circulate them amongst all the state governments and the governments of Union Territories. It is heartening that the Learned Attorney General very fairly conceded that it was for the Union of India to

issue instruction in this behalf to all the State governments and Union Territories.

The Supreme Court has also protected the prisoners from other prison excesses. Charles Sobraj and Sunil Batra(II) put a ban on the practice of keeping undertrials with convicts in prisons because it affected the fairness in article 21 which ensured life and liberty. Sunil Batra(II) protected the young inmates of the jail from the sexual exploitation by the adult prisoners. Sunil Batra(II) and Mohammad Giasuddin protected the prisoners from doing harsh and degrading jobs and ensured them the congenial work so that they should have job satisfaction and not jail frustration.

The activist Supreme Court while making efforts to remedy the prison malady, knitted the human thread of prison jurisprudence to give special protection to women and child prisoners because "our humanist heritage and constitutional mandate concur in evolving a remedial jurisprudence of female-juvenile justice". In Sheela Barse the highest court gave detailed directions in order to provide adequate protection to women prisoners.

In Sheela Barse cases decided in 1986 and 1987, the court expressed a deep concern about the freedom and dignity of childhood and youth by protecting them against exploitation and dehumanizing effect of the prisons. The Apex Court prohibited to put children in jails. This was treated as unfair punishment having no parity with the child's non-criminal behaviour. It preferred sending them to children homes, remand homes and observation homes where they could be properly looked after and they could be given facilities and opportunities to develop in a healthy manner and in conditions of

92. See Krishna Iyer supra note 1 at 101.
freedom and dignity. The court made all the efforts to overhaul the whole juvenile justice system by asking for Juvenile Courts manned by specially trained officers and observation homes for the children offenders where they can be reformed instead of being victimised by the contagious atmosphere of the jail. The court also give directions to all the states having Children Acts to enforce these acts. At the same time, the court favoured the enactment of Uniform Children Act for whole of the country. It is heartening that the legislature showed positive reaction to the timely suggestion made by the judiciary and enacted the Juvenile Justice Act, 1986. The highest judiciary had always imposed faith in other organs of the state. But Sheela Barse gave a dismaying picture of the indolent attitude of the executive and the subordinate judiciary. The subordinate judiciary by not obeying the orders of the highest judiciary, desecrated the sacred document, that is, the Constitution. In Vikram Deo Singh Tomar95 The Apex Court, recognizing the constitutional protection to women and children, directed for improving the conditions in Patna Care Home in order to provide at least the minimum conditions ensuring human dignity.

Visits of family members, relatives and friends and interview with the legal adviser is a solace in isolation for the prisoners. The Apex Court prescribed this mental food to the prisoners in Sunil Batra(II) and Francis Coralie Mullin96 as personal liberty included the right to socialise with family members and friends. Prabha Dutt97 even allowed the prisoners who were death sentencees, to give interview to the press. While recognizing these rights, the court understandably did not grant absolute liberty but subject to the jail regulations which must also be "fair, just and reasonable" under

article 21.

When the judicial trend is towards accepting reformation as the penological purpose of the punishment, every criminal must be given the chance to atone and rehabilitate him as a normal human being who would not commit crime again. If any person, while undergoing punishment, repents and wants to atone by donating his organs, this step must be appreciated. It is heartening that after a long controversy, the authorities have permitted the prisoners to donate organs and thus by enlarging the scope of prisoners' rights, have further nourished article 21. Satwant Singh, who was convicted in the Indira Gandhi assassination case, donated his eyes and other organs of the body.98

The judiciary, by recognizing the prisoners' right to bail as a part of personal liberty under article 21 in Babu Singh,99 Moti Ram,100 and Hussainara101 cases has widened the scope of right to life and personal liberty under article 21. Once the prisoner is bailed out, he would have proper time and facility to prepare his defence. Bail is a part of the compassionate constitutionalism of our system.102 Therefore, when the criminal is bailed out, the limited socialization with his family and friends would have some dehumanizing effect on him. The Apex Court added another jewel in the crown of "personal liberty" by emphasising that the prisoners should be paid the same wages which a free man gets for the same type of work. In Mohammad Giasuddin,103 the Summit Court directed the state to fix reasonable wages for the prisoners. It must be appreciated that the Kerala High Court followed the activist approach of the highest judiciary and fixed the rate of wages.

It is travesty of justice that when the Apex Court was singing the paean of liberty, the subordinate judiciary and the executive were still

98. See Tribune, 1, 6 January 1989.
slumbering over the rights of the thousands of persons languishing in jails without trial. Hussainara cases brought forth the dismaying picture of the undertrials languishing in jails for a period longer than the period for which they would have been detained had they been tried for the offences committed by them. The reformist court, under the impact of Maneka's reasonableness, fairness and justness, included the right to speedy trial as an integral part of right to "life" and "personal liberty". Thus, it held that "procedure established by law" under article 21 could not be "fair, just and reasonable" unless it ensured speedy trial. The Apex Court proved to be the real protection for the Indians languishing in jails. It is unfortunate that everytime, the highest court had to interfere to release the undertrials as in Mentoo Majumdar, Khatri, Kadra Pehadiya and Sant Bir.

Brutality cannot be subjugated by brutality and only good can exercise evil out of man. History tells us that maximum security prisons have a high rate of recidivists, that punitive cruelty has been counter-productive. Human dignity cannot be crushed in our era of human rights without the state being guilty of crime against humanity. Therefore, the judiciary, the protective organ of the state, could not slumber over the existing shocking state of affairs in the prisons. It gave momentus to the movement of rehabilitation of the prisoners and reorientation of prison staff and converting prisons from punishment cells to the correctional homes in Sunil Batra (II).

The Apex Court, assisted with armoury of the constitutional provisions,

102. Supra note 99 at 531-532.
103. Supra note 91.
104. Supra note 101.
109. See V.R. Krishna Iyer, supra note 82 at 137.
110. See Id. at 141.
111. Supra note 83.
especially article 21, made efforts to reach this therapeutic goal in Mohammad Giasuddin, Sunil Batra(I), Hoskot, Charles Sobraj and Francis Coralie Mullin. The judiciary did the spadework and the constructive job was left in the hands of the executive and legislature but unfortunately, in spite of these decisions, the prisons did not give the picture which was painted on the judicial canvas. In this era of judicial activism, the proposal for Prison Ombudsman to join hands with the reformistic approach of the court must be appreciated and implemented.

The traditional approach of only application of law is being converted into the justice-oriented approach of the Summit Court but this approach would only be a hollow promise unless this temple of justice is accessible to all who need its help to protect their life and liberty. In the pre-internal emergency period, access to justice for poor was as inaccessible as access to any five star hotel. Nothing except legal aid could be better judicial alms to the poor but the miser judiciary refused to open its treasury in the pre-internal emergency period in Janardhan Reddy and Tara Singh.

In the post-internal emergency era, when Maneka expanded the scope of article 21, it also had the impact on judicial approach towards granting of free legal aid. Hoskot made article 39-A as an interpretative tool for article 21 to provide free legal aid for doing complete justice. In spite of Hoskot's inclusion of free legal aid as a fundamental right under article 21, Hussainara had to remind that free legal service was an essential element of reasonable, fair and just procedure. Following these footsteps, Khatri

112. Supra note 91.
113. Supra note 34.
114. Supra note 35.
115. Supra note 90.
116. Supra note 96.
did not allow the state to escape liability by pleading financial constraints. It also impressed upon the subordinate judiciary to participate in the legal aid movement. Sheela Barse\textsuperscript{119} joined the chain of judgments making judicial activism more active and gave a clarion call to the lawyers also to become active members of the rising legal aid movement. The court rightly did so because lawyers are as much instrument of the processual justice as the legislature which enacts, the executive which implements and the judiciary which protects. Khatri's echo was found even after five years in Suk Das.\textsuperscript{120} Thus, free legal aid was made an integral part of fundamental right under article 21 but the unfortunate part of the story is that in spite of its repeated warnings, it could not revolutionise the executive and instead of trodding new paths of activism, it had to walk on the same footsteps time and again.

The Apex Court in Kadra Pehadiya touched another aspect of free legal aid, that is, providing fairly competent lawyer. It was a necessary step to make the concept of "fair, just and reasonable" procedure a living reality because processual justice cannot exist without processual fairness.

At this juncture, when article 39-A was made an helping instrument in further nourishing article 21 to protect life and liberty of people, the passivist approach of Ranjan Dwivedi\textsuperscript{121} not to issue mandamus for the enforcement of article 39-A was a sufficient stroke to break the chain of judicial activism evolved by this very court only. It is shocking that the suffering masses, who were looking upon the human rights protector Summit Court as their Godfather, had to bear this face of the court also. In the judicial history, this case would be a dark spot which was self-conflicting. On the one hand, the court admitted that there had been tremendous change after the inclusion

\textsuperscript{119} Supra note 93.

\textsuperscript{120} Suk Das v. Union of Territory of Arunachal Pradesh, A.I.R. 1986 S.C. 991.

\textsuperscript{121} Ranjan Dwivedi v. Union of India, A.I.R.1983 S.C. 624.
of article 39-A and recognized its relationship with article 21 as prescribed by the previous decisions of this court only, on the other hand, it took such a retrogressive step. American "due process" had been included in the Indian Constitution by this court. On the other hand, it has obstructed the way of due "process" by not allowing mandamus to be issued to the state for the grant of a competent lawyer. It is fortunate that the subordinate judiciary was not affected by this retrogressive step of the highest judiciary and continued to follow the activist approach when Delhi High Court issued the writ of mandamus to enforce article 39-A.

In order to have equal access to justice, the legal aid jurisprudence has to be expanded by taking the practical step of abolition of court fee. The Apex Court in Darshana Devi\textsuperscript{122} depicted how the social ethos had not imbibed the legal aid values woven into a fundamental right under article 21. The Summit Court in Darshana Devi and Central Coal Fields\textsuperscript{123} favoured the abolition of court fee.

The Supreme Court also found public participation as an important instrument of legal aid movement. Rakesh Kaushik\textsuperscript{124} proposed for the promotion of legal aid movement through professional organizations. In Centre of Legal Research\textsuperscript{125} the court encouraged the voluntary organizations, social action groups and Lok Adalats in the operation of legal aid movement. Shri Sachidanand Pandey\textsuperscript{126} was another step towards ensuring speedy and cheap justice through Lok Adalats. Thus, the concept of processual fairness was properly looked after by making free legal aid as an integral part of article 21.

\textsuperscript{124} Supra note 86.
The paean of right to life and personal liberty as given in article 21 of the Constitution also includes the right to live with human dignity and protection against exploitation. The judiciary had given widest possible amplitude to it. It is only through the judicial process in the post internal emergency era that some of the provisions of the Constitution, protecting workers against exploitation and children against exploitation and moral and material abandonment have been provided with life and vigour.

The practice of bonded labour is not only an ugly and shameful feature of our national life but it is also an affront to basic human dignity and constitutes gross and revolting violation of constitutional values. The founding fathers of the Constitution specifically enacted article 23 of the Constitution to abolish begar and "other similar forms of forced labour". In order to fulfil this constitutional goal, the Parliament enacted Bonded Labour System (Abolition) Act, 1976. But this enactment failed to remove the shameful scar from the Indian social scene. Lack of proper identification of the bonded labourers, ignorance of their rights and entitlements, obstruction by the vested interests in the implementation of the beneficial provision of laws, inadequate punishment to those who violate the labour laws and lack of proper rehabilitation of the liberated bonded labourers, are some of the reasons responsible for the failure of the Bonded Labour System (Abolition) Act, 1976.

The Supreme Court in the post internal emergency era played an important role and made the right to live with human dignity a living reality for millions of Indians and protected them from exploitation.

In Asiad Workers, the Supreme Court rightly entertained public interest litigation so as to enable the have-nots to make meaningful their fundamental right to live with human dignity. The Supreme Court eloquently explained the scope and ambit of the expressions "begar" and "other similar

forms of forced labour". It was rightly pointed out that article 23 strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values, it has also held that right to life guaranteed under article 21 is not merely confined to physical existence or to the use of any limb or faculty through which life is enjoyed or through which soul communicates with outside world but it also includes within its scope and ambit the right to live with human dignity. By holding that the word "force" be construed to include not only physical or legal force but also force arising from compulsions of economic circumstances which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wages, the Supreme Court made the right to live with human dignity a living reality. The Supreme Courts' reminder that the violators of labour laws should be punished with adequate punishment will ensure the observance of various labour laws and other beneficial provisions.

In Sanjit Roy, labourers Working on Salal Hydro Project and Bandhua Mukti Morcha, the Supreme Court relied upon Asiad Workers and gave further impetus to the protection of the right to live with human dignity and protecting the poor from exploitation. In Bandhua Mukti Morcha, the Supreme Court rightly pointed out that the right to live with human dignity enshrined in article 21 also includes protection of health and strength of workers, men and women, and just and humane conditions of work. The suggestions of the Supreme Court to identify the bonded labourers by holding labour camps and legal aid camps in the more prone areas, should be implemented without any further delay. At the same time, investigative journalism and social

action groups and other voluntary agencies can play an important role in the identification of the bonded labourers.

Mere liberation of the bonded labourers from bondage without making proper and effective arrangements for their rehabilitation will serve no useful purpose and may even create a real problem as to livelihood of the labourers so set free. In Bandhua Mukti Morcha, the Supreme Court while explaining the concept of rehabilitation pointed out that psychological rehabilitation must go side by side with physical and economic rehabilitation.

In Neeraja Chaudhary, a landmark decision of the Supreme Court on rehabilitation, it was pointed out that it is the plainest requirement of article 21 and 23 that bonded labourers must be identified and released, and on release, they must be suitably rehabilitated. It is suggested that the government should take the task of rehabilitation seriously. It is then the liberty and freedom to live with human dignity will become meaningful to millions of Indians. It is also suggested while rehabilitating bonded labourers, care should be taken that the socio-economic causes which led them in bondage are satisfied and skilled labourers should not be rehabilitated with unskilled jobs.

In Sivaswami, the Supreme Court reiterated the need for effective rehabilitation of the released bonded labourers. It is hoped that the government would take into consideration the various guidelines laid down by the Supreme Court and protect the labourers and workers from exploitation.

Children are a supremely important asset of the nation. As a class they constitute the weakest and most vulnerable and defenceless section of the human society. It is the duty of all the organs of the state, including the judiciary to protect them from exploitation and moral and material aban-

donment. It is the duty of the state to look after them with a view to ensuring full development of their personality and with full human dignity. Otherwise, the right to life and liberty would become meaningless for them. There are many constitutional provisions which are aimed at this goal.

The Supreme Court of India, in the post internal emergency era has shown its deep concern towards the moral and material development of the children. In Labourers Working on Salal Hydro Project, the Supreme Court stressed the need for free and compulsory education to all children so as to enable them to develop with human dignity. The suggestion of the Supreme Court that the Central Government should provide school facilities to the children of construction workers near the site of project is a healthy suggestion and should be implemented without any further delay. It is suggested that considering the root cause why poor parents do not send their children to schools, the government should provide free mid day meals, free uniform, stationery and books upto atleast primary level. For children coming from very poor families, some scholarship in the form of some incentive should be given. This will also enable the children to remain away from child labour and they will be able to participate in the living stream of national life with human dignity.

In order to fulfil the constitutional mandate that children below the age of 14 years should not be employed in hazardous concerns, the Supreme Court in the post internal emergency era expanded the meaning and scope of the phrase "hazardous employment". In Asiad Workers and Labourers Working on Salal Hydro Project the Supreme Court held that "construction work" is a "Hazardous concern" and no child below the age of 14 years should be employed in it.
In response to the judicial concern for children, the Parliament also enacted the Child Labour (Prohibition and Regulation) Act, 1986. The Act was passed to regulate the conditions of children in most of the employments and specify the employments, occupations and processes in which the employment of children should be banned. Thus, the Parliament has not only given impetus to the Supreme Court judgements but also taken a step forward to prevent the exploitation of children in various employments.

In Lakshmi Kant Pande the Supreme Court in a public interest litigation protected the children from moral and material abandonment. By laying down the detailed guidelines governing the inter country adoption, the Supreme Court in the post internal emergency era filled up the vacuum created by the absence of any Parliamentary legislation in this regard.

Sheela Barse is yet another instance in the post internal emergency era where the Supreme Court admitted the public interest litigation and issued a number of directions to the state for protecting the children from exploitation in jails. It is suggested that the Supreme Court's directions that the children below the age of 16 years should be released from jails, they should be kept in separate observation homes, establishment of special juvenile courts for their trial, manning the juvenile court with special judicial officer having special training and speedy trial of children, should be implemented without any further delay.

It is heartening to note that the Parliament has enacted juvenile Justice Act, 1986 in response to judicial concern to protect the children from exploitation and in making the right to live with human dignity meaningful to them. It is hoped that the judicial and legislative concern for children in the post internal emergency era will be faithfully implemented by the executive branch of the state.

The judicial grammar of interpretation has fertilized many provisions of the Constitution, including the one dealing with right to life and personal liberty, with meaning and content. The Supreme Court, has in fact, brought forensic mutation to the provision dealing with the right to life and personal liberty. Judicial activism in the post Maneka\(^\text{135}\) period has expanded the meaning and scope of right to life and personal liberty.

The right to livelihood is given in Part IV of the Constitution as one of the directive principles. However, it constitutes one of the most important aspect of life. There had been judicial vicissitude to hold that right to livelihood is a part of the right to life and personal liberty. This is evident from \(\text{re Sant Ram}^{136}\) to \(\text{Olga Tellis}^{137}\). In \(\text{Olga Tellis}\), the Supreme Court pointed out that right to livelihood is an important facet of the right to life because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood was not treated as a part of the constitutional right to life, the easiest way of depriving a person of this right to life would be to deprive him of his means of livelihood to the point of abrogation. The state might not, by affirmative action, be compellable to provide adequate means of livelihood or work to citizens. But, any person, who is deprived of his right to livelihood except according to the procedure established by law, can challenge the deprivation as offending the right to life conferred by article 21.

It is submitted that the Supreme Court rightly made explicit the nexus of right to livelihood and right to life by interpreting the ambit and scope of articles 39(a) and 41 read with article 21 of the Constitution.

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135. \(\text{Maneka Gandhi v. Union of India, A.I.R.1978 S.C.597.}\)
136. \(\text{A.I.R.1960 S.C.932.}\)
In Umed Ram, the Supreme Court interpreted the right to life as not only right to livelihood but also the right to means of livelihood. In Gurnam Kaur, the Supreme Court again followed Olga Tellis. However, the Supreme Court rightly pointed out that the plea that removal of illegal encroachments constitute threat to life and liberty, cannot be allowed to be raised for the first time before the Supreme Court.

The positive content of article 21 is that it ensures the right of every individual to live with human dignity. The negative aspect of the right to life is the "right not to live" or the "right to die", particularly when life cannot be lived with dignity or when other important contents essential for the substance of life are missing from it.

This negative aspect of the right to life was examined by the Bombay High Court in Shripati Dubai which declared section 309 of the Indian Penal Code as unconstitutional on the ground that it violates article 21 of the Constitution. A petition in this regard is already pending before the Supreme Court, which, it is hoped, would clarify the exact position of law on this point.

Judicial activism of the Supreme Court in regard to the interpretation of article 21, also had an impact on some of the provisions of personal laws.

In T. Sareetha, Andhra Pradesh High Court went to the extent of saying that the remedy of restitution of conjugal rights provided in section 9 of Hindu Marriage Act, was a "savage and barbarous remedy, violating the right to privacy and human dignity guaranteed by article 21 of our Constitution". In Harvinder Kaur, Delhi High Court expressed the contrary view and dissented from Andhra Pradesh High Court view.

The controversy raised by A.P. High Court and Delhi High Court was rightly set at rest by the Supreme Court in Saroj Rani\(^{143}\) where it was held that section 9 of Hindu Marriage Act is not violative of article 21 of the Constitution. The Supreme Court pointed out that in India it may be born in mind that conjugal rights, that is, right of husband or the wife to the society of the other spouse, is not merely a creature of the statute. Such a right is inherent in the very institution of marriage itself. Thus, the concept of conjugal rights has to be viewed in the proper perspective. In an orderly society, it is desired that the spouses should not stay away from each other unless there is a reasonable excuse.

The Supreme Court in the post internal emergency era has used the armoury of law in such a way so as to make the right to life and personal liberty effective and meaningful. It has developed the concept of affirmative action and granted monetary compensation to those persons whose right to life and liberty was violated by the state or its administration. The Supreme Court transformed the Court's power into affirmative structuring of redress so as to make it personally meaningful and socially relevant.

In Ratlam\(^{144}\) the Supreme Court through affirmative action compelled the statutory body to carry out its functions so as to make right to live with human dignity meaningful and effective. In Umed Ram\(^{145}\) the Supreme Court pointed out that affirmative actions are sometimes necessary to keep the judiciary on the wave length of legislative intention. This in the form of remedial measure "activises" or "energises" the executive action. However, the extent or limit upto which the affirmative action can be taken by the Courts, depends on the facts and circumstances of each case. It is suggested that under the garb of affirmative action, the Courts should not cross the possible

limit within which it is required to function under the constitutional set up.

Judicial activism in the post internal emergency era in giving wider interpretation to article 21 also had an impact on courts' power to grant monetary compensation to one who might have suffered unduly, detained illegally or was harmed badly. It was in Bhagalpur Blinding case, where the Supreme Court for the first time considered the question of granting of monetary compensation. It was rightly pointed out that the court should be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious rights, that is, right to life and personal liberty. Conviction of police officials, who had taken the law into their own hands in this case, should serve as an example to all those in uniform who think that their misguided sense of justice allows them to take the law into their own hands.

It was in Rudul Sah, where the Supreme Court for the first time awarded monetary compensation to the victim against the lawlessness of the state. It was rightly pointed out by the Supreme Court that one of the telling ways in which the violation of the right to life and personal liberty can reasonably be prevented and due compliance with the mandate of article 21 seemed, is to mulct its violators in the payment of monetary compensation. In Bhim Singh, while awarding the monetary compensation for illegal detention

of the petitioner, the Supreme Court made it explicitly clear that in "appropriate case" it has the jurisdiction to compensate the victim by awarding suitable monetary compensation.

In all cases from Rudul Sah to Bhim Singh, where the monetary compensation was given to the victims, no basis for the quantification of the amount of compensation was laid down by the Supreme Court. This was one of the reasons that in all the cases where the compensation was given by the Court, the amount of compensation varied. In other words, this was left to the discretion of individual judge handling a particular case to decide as to how much compensation should be given in that case. It is submitted that Supreme Court while enunciating new principles of law should provide clear and certain guidelines which should guide the future application of that law. In Peoples' Union for Democratic Rights, the Supreme Court did lay down a working principle for the payment of compensation to the victims of ruthless and unwarranted police firing. But in view of the given realities of life this was not a good precedent to be followed in future.

In M.C.Mehta, the Supreme Court has rightly explained the meaning of the phrase "appropriate cases" where the compensation is required to be awarded to the victim. So the clouds of confusion which prevailed till Bhim Singh regarding the meaning of the phrase "appropriate cases" were cleared by the Supreme Court in M.C.Mehta.

Another area where judicial activism in the post internal emergency had its impact is the environmental jurisprudence. The judicial technology of statutory interpretation has made the right to live in healthy environment as a part of article 21 of the Constitution. From R.L.&E.Kendra to M.C. Mehta, the Supreme Court has demonstrated the activist role with regard to environmental issues. The Supreme Court has been proactive in ensuring the protection of the environment and the rights of the individuals to live in a healthy environment.
to the environmental issue in the post internal emergency era. The Supreme Court has treated, though not expressly, the right to live in a healthy environment as a part of article 21 of the Constitution. This approach of the Supreme Court had its impact on the various High Courts which now in T. Damodhar Rao, Kinkri Devi, and L.K. Koolwal have expressly held that the slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should be treated as amounting to violation of article 21 of the Constitution.

Thus, now as a result of judicial activism in the post internal emergency era, the maintenance of health, preservation of sanitation and environment falls within the purview of article 21 of the Constitution.

The ding-dong battles regarding the interpretation of the most precious fundamental right given in article 21 continued during the internal emergency era and thereafter as well. From A.K. Gopalan to the end of internal emergency era, there is ample evidence to show that the Supreme Court of India could not take consistent, coherent and a balanced approach. In fact, the period of internal emergency era represents the darkest period of the constitutional history of the independent India. The judiciary also was at its lowest ebb and it made the darkness complete after the decision of A.D.M. Jabalpur, which had the effect of, inter-alia, abrogating the right to life and personal liberty in the practical sense. The people of India, whose right to life and personal liberty was hampered during the internal emergency era by the government and could not get the protection from the judiciary as well, reacted vehemently against the government by giving its positive mandate to

the newly formed Janata party. The task of cleaning the debris of the part of constitutional edifice which was bulldozed during the emergency era was taken by the Supreme Court. Through judicial activism and dynamism, the judiciary wanted to secure the faith of "people of India". It wanted to regain the credibility which it had lost during the emergency period. In order to undo the image of the consequences of the emergency period, the attitude of the Supreme Court in the post-internal emergency era depicts that it tried to maintain through its judicial interpretative technology the sanctity of the sanctum sanctorum of the temple of fundamental rights. It is this background which played vital role in giving liberal interpretation to scope of Article 21. Probably, in the absence of internal emergency experience, today Article 21 would have had altogether different ambit. One might even record that internal emergency has in fact proved a blessing in disguise. This certainly does not mean that internal emergency experience was a happy one. The negative period had to be countered by a positive one. This is what precisely has happened.

Thus, the study of the role of the Supreme Court with regard to right to "life" and "personal liberty" in the post-internal emergency period shows how internal emergency was responsible for revolutionary juristic thinking. Therefore, the rhythm of judicial thinking, which had become very slow during internal emergency, was set to the wavelength of the demand of protection of life and liberty of people in the post-internal emergency era. If this rhythm is not continued, the whole paean of liberty sung by the judiciary in the name of judicial activism would lose its object and purpose. The Apex Court itself admitted:

To deny activism to the courts is to nullify the judicial process and to negate justice...Nature abhors a vacuum. Take away judicial activism and tyranny will step in to fill the vacant space.156

The judicial activism has created a new jurisprudence by adding soul to article 21 of the Constitution. However, the finest hour for the highest judiciary would be when it brings the subordinate judiciary and executive also in the flowing stream of "activism". The passivist attitude of the subordinate judiciary and the incalcitrant behaviour of the executive could benumb the judiciary but it tried to remain alert and active to its best and used judicial armoury even to penalise the executive if it refused to wake up from its slumber. It cannot be denied that no law would be acceptable to "We, the people of India" if it does not bring justice by recognizing the liberty of the people and no government would be people's government if it did not honour such law. Robert G. Ingersoll beautifully stated:

>A government founded upon anything except liberty and justice cannot stand. All the wrecks on either side of the stream of time, all the wrecks of the great cities, and all the nations that have passed away all are a warning that no nation founded upon injustice can stand. From the sand enshrouded Egypt, from the marble wilderness of Athens, and from every fallen, crumbling stone of the once mighty Rome, comes a wail as it were, the cry that no nation founded upon injustice can permanently stand.\textsuperscript{157}

It is hoped that the future will become a living proof of the harmonious relationship among all the organs of the state in their functional approach towards the protection of "life" and "personal liberty" of the people.

\textsuperscript{157} Cited in Krishna Iyer, supra note 60 at 220.