" 'Justice is dead: long live the law' seems to be the epitaph on the gravestone of the old order... Justice is struggling to be born; constitutional organs must midwife it."¹ The draconian laws of the internal emergency period, which virtually wiped off personal liberty of the people, are still written on the pages of history. Life of law is not logic but experience.² The judiciary, saviour of people's life and liberty, whose cerebration was benumbed during internal emergency, learning a lesson from this experience, started innovations to protect life and liberty. Lord Denning had beautifully pointed out that the judge "must consciously mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason, laying brick on brick without thought to the overall design. He must be an architect - thinking of the structure as a whole - building for society a system of law which is strong".³

A pachydermic judicature is contradiction of our Constitution.⁴ Therefore, the judiciary awakened from the slumber and freed article 21, which embodies the most fundamental of the fundamental rights enshrined in Part III of the Constitution, that is, right to life and personal liberty, from the traditional barriers imposed by A.K. Gopalan v. State of Madras.⁵

² Maneka Gandhi v. Union of India, A.I.R.1978 S.C.597 at 629[per Bhagwati J. (as he then was)]. In this case, Justice Bhagwati delivered the majority 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 Kailasam delivered the minority view.
³ Quoted in V.R.Krishna Iyer, Justice and Beyond, 25(1980).
⁴ Id. at 26.
⁵ A.I.R.1950 S.C.27.
In this case, the Supreme Court interpreted the expression "procedure established by law" in a restricted manner. It held that "law" meant enacted law and "procedure" meant "procedure" laid down by enacted law. The Apex Court, after about three decades, liberated article 21 from Gopalan in Maneka Gandhi v. Union of India. In this case, the Summit Court treated "procedure" under "procedure established by law" as "fair, just and reasonable". But regarding the interpretation of "law", the court kept Gopalan intact. In this case, only Justice Krishna Iyer treated "law" as reasonable law. Law is to be understood including both substantive and procedural aspects. Thus, article 21 was revolutionised by the Supreme Court, which is the highest in the pyramid of justice, by making "fair procedure" an integral part of article 21. But the post Maneka decisions showed good swings, sometime embracing due process and some time showing it the exit gate.

Maneka for the first time interpreted article 21 as positive right and in post Maneka decisions, the article came to be interpreted as sanctuary of human values, prescribing fair procedure and forbidding barbarities, punitive and processual. In this process, right to speedy trial, right to legal aid, right to bail etc., because fundamental rights. In order to make these rights a living reality, the court went a step ahead by permitting the public-spirited persons or groups to bring before the court any case which need to be pursued in public interest. Thus, birth of Public Interest Litigation took place as a result of expanded scope of article 21.

5a. Supra note 2.
6. See infra Chapter VI.
7. See also Parmanand Singh, "Access To Justice: Public Interest Litigation And the Indian Supreme Court", 10-11, Delhi Law Review at 159-160 (1981-82).
With this backdrop in mind, an attempt has been made in this Chapter to analyse how the decision of the Supreme Court in Maneka Gandhi became the birth-place of "just, fair and reasonable" procedure. The judicial vicissitude in post-Maneka period has also been analysed and it has been further examined that whether this approach can digest the American"due process" or not. The role of the Supreme Court in post internal emergency, vis-a-vis fair procedure and public interest litigation has also been examined.

(B) Procedure Established by Law: A Post-Maneka Approach

(a) Maneka - The Birthplace of Fair And Reasonable Procedure

In Maneka the passport of the petitioner was impounded by the central government on the ground that it was in the interests of the general public under section 19(3)(c) of the Passports Act. The petitioner was also told that the government had decided in the interests of the general public not to furnish the reasons for taking such action. The petitioner challenged the validity of the order on the ground that section 10(3)(c) violated articles 14, 19 and 21 and that the order issued thereunder without giving reasons was ultra vires section 10(3)(c).  

The contention of the petitioner that right to travel abroad was part of "personal liberty" within the meaning of that expression as used in article 21 raised the question as to the true interpretation of article 21. What was the nature and extent of the protection afforded by this article? Whether the expression "personal liberty" included the right to go abroad, whether article 21 merely required that there must be some semblance of procedure, howsoever arbitrary or fanciful prescribed by law

8. Supra note 2.
9. Id. at 616-617.
before a person could be deprived of his personal liberty or that the
procedure must satisfy certain requisites in the sense that it must
be fair and reasonable.10

According to Justice Bhagwati (as he then was), article 21 occurred
in Part III of the Constitution which conferred certain fundamental rights
and

These fundamental 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 guaran-
tees on the basic structure of human rights and impose
negative obligations on the state not to encroach on
individual liberty in the various dimensions.11

Keeping in mind the importance of fundamental rights and after
considering the leading judgements on personal liberty for example,
Kharak Singh,12 Satwant Singh,13 Cooper,14 Sarkar15 and Saha16 and also
considering their view on the relationship between article 21 and article
1719 Justice Bhagwati pointed out:

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.18

He also observed:

The expression 'personal liberty' in Article 21
is of the widest amplitude and it covers a variety
of rights which go to constitute the personal
liberty of men and some of them have been raised
to the status of distinct fundamental rights and
given additional protection under Art.19.19

10. Id. at 619.
11. Id. at 620.
17. For relationship between article 21 and article 19 see supra Chapter
III.
18. Supra note 2 at 622.
19. Ibid.
Justice Bhagwati found that the court had held in Satwant Singh that "personal liberty" within the meaning of article 21 included within its ambit right to passport. Therefore, to deny passport, the executive must act in accordance with the "procedure established by law". Following Gopalan, he held that "law" meant state made law. But regarding "procedure" he held that it did not mean arbitrary procedure. He stated:

Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously, the procedure cannot be arbitrary, unfair or unreasonable... we find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Art.21 having regard to the impact of Art.14 on Article 21.

Justice Bhagwati also held that even if law laid down a procedure and complied with the requirement of that article, it should in so far as it violated articles 19 and 14, satisfy the requirements of articles 19 and 14 as well. He observed:

[If a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex hypothesi it must also be liable to be tested with reference to Article 14.]

Justice Bhagwati sought help from article 14 in making the procedure under article 21 as fair, just and reasonable. In E.P.Royappa v. State of Tamil Nadu, the court had held:

[Equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one

20. Ibid.
21. Here Justice Bhagwati followed State of West Bengal v. Anwar Ali Sarkar, A.I.R.1952 S.C.75 and Kathi Raning v. State of Saurashtra, A.I.R.1952 S.C.123 where the question was the validity of a law establishing special procedure for the speedier trial of specified offences in special courts. Justice Bhagwati pointed out that in these cases, this procedure could not be condemned as inherently unfair or unjust as there was compliance with the requirement of article 21 but even so the validity of the special law was tested before the Supreme Court on the touchstone of article 14. Id. at 624.
belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. 24

Following Royappa, Justice Bhagwati held:

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. 25

Thus, Justice Bhagwati read articles 14 and 19 in article 21 in order to make the "procedure" under "procedure established by law" as "fair, just and reasonable".

When fairness was imported into the "procedure" under article 21, another question arose whether the procedure prescribed by the Passport Act, 1967 for impounding a passport was "right or fair or just". The petitioner contended that it was not because it provided for impounding a passport without affording reasonable opportunity to the holder of the passport to be heard in defence. It was further argued that as audi alteram partem rule was not followed, procedure could not be fair and just and thus violative of article 21. Justice Bhagwati found that the Passport Act, 1967 had no express provision which required that the audi alteram partem rule should be followed before impounding a passport. Reacting to it, he pointed out that it is "not conclusive of the question" and that "if the statute makes itself clear on this point, then no more question arises". But he felt that even when the statute was silent, the law might in a given case make an implication and apply audi alteram partem rule. 26

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24. Id. at 583. 25. Supra note 2 at 624.
26. Ibid.
In Cooper v. Wandsworth Board of Works, Justice Byles laid down the principle:

A long course of decisions, beginning with Dr. Bantley'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.

In Wiseman v. Borneman, Lord Morris pointed out that "the principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice...is "fair play in action"."

Justice Magarry in Fountaul v. Chastarton described natural justice "as a distillate of due process of law".

Following all these cases and after realising that the soul of natural justice was "fair play in action" and it invested law with fairness, Justice Bhagwati held that audi alteram partem might be read into the Passports Act as it was silent on this question.

The Attorney General, appearing on behalf of the Union of India fairly conceded that the audi alteram partem rule was a highly effective tool devised by the courts to enable a statutory authority to arrive at a just decision and it was calculated to act as a healthy check on abuse or misuse of administrative power. But he contended that having regard to the nature of the action involved in the impounding of a passport, the audi alteram partem rule must be held to be excluded because if notice were to be given to the holder of the passport and reasonable opportunity was given to him to show why his passport should not be impounded, he might escape from the country and the object of impounding the passport would be frustrated. So in

27. (1863) 14 C.B.N.S.180.
29. (1968) 112 Sol Gen 690.
30. Supra note 2 at 625. 31. Id. at 628.
fairness, this rule should be inapplicable to impounding of passports. Justice Bhagwati agreed that in questions of this kind a fanatical or doctrinaire approach should be avoided but it did not mean that merely because the traditional methodology of a formalised hearing might have the effect of stultifying the exercise of the statutory power, the *audi alteram partem* should be wholly excluded. According to him, the court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. He observed:

> The *audi alteram partem* rule is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise.  

This circumstantial flexibility of the *audi alteram partem* rule was emphasised by Lord Reid in *Wiseman v. Borneman* when he stated that he would be sorry to see this fundamental general principle degenerate into a series of hard and fast rules.

Thus, Justice Bhagwati held that a fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring giving of such opportunity to the person concerned can and should be read by implication in the Passport Act, 1967. He stated:

> If such a provision were held to be incorporated in the Passport Act, 1967 by necessary implication, as we hold it must be, the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness. We must, therefore, hold that the procedure 'established' by the Passport Act, 1967 for impounding a passport is in conformity with the requirement of Art. 21 and does not fall foul of that article.

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32. Id. at 628-629. See also A.S. de Smith, *Judicial Review of Administrative Action*, 174 (2nd Ed.).  
33. Id. at 629-630.  
34. Supra note 28.  
35. Supra note 2 at 630.
On the Attorney General's undertaking that the government would consider the petitioner's representation against the impounding of her passport and that she would be given an opportunity within two weeks of the receipt of the representation, Justice Bhagwati held that the challenged order was valid.

It is submitted that Justice Bhagwati read right to go abroad in "personal liberty" within the meaning of article 21. He expanded the concept of right to "life" and "personal liberty" by declaring "procedure" within the expression "procedure established by law" as fair, just and reasonable but regarding law which prescribes the procedure, he kept Gopalan intact by holding that "law" meant "enacted law" or state-made law and not fair, just and reasonable law. He stated:

> It will be seen at once from the language of Article 21 that the protection it secures is a limited one. It safeguards the right to go abroad against executive interference which is not supported by law and law here means "enacted law" or "state law".36

It is further submitted that by implicitly reading the rule of audi alteram partem in the Passport Act, 1967, he donated fairness to the Act and saved it from being declared unconstitutional. It is surprising why he remained half way activist. On the one hand, he invented the concept of "fair, just and reasonable" procedure and on the other hand, he did not care for the unfairness, unjustness and unreasonableness of the Act which prescribed unfair procedure. Had Justice Bhagwati done it, Maneka could have been the birth-place not only of procedural due process but also substantive due process.

Among the concurring opinions in this case, Justice Chandrachud(as he then was) also held that mere prescription of some kind of procedure could

36. Id. at 622.
not ever meet the mandate of article 21. The procedure prescribed by law must be fair, just and reasonable, not fanciful, oppressive or arbitrary.\textsuperscript{37}

But he cautioned that "due process" should not be read into article 21. He pointed out:

> The content which has been meaningfully and imaginatively poured into "due process of law" may, in my view, constitute an important point of distinction between the American Constitution and ours which studiously avoided the use of that expression....Our Constitution too strides in its majesty but, may it be remembered without the due process clause...\textsuperscript{38}

Justice Chandrachud did not allow the entrance of American due process clause because one right leading to another and that another to still other would produce "grotesque result".\textsuperscript{39}

It is submitted that Justice Chandrachud joined hands with Justice Bhagwati in emphasising on "fair, just and reasonable" procedure but advised to prohibit the entrance of 'due process' clause. What he wanted to say was that once a new vista under article 21 was created by expanding the right to life and personal liberty through the elastic of fair procedure, if American "due process" was literally included under article 21, there would be significant change in the approach of judges towards other constitutional guarantees. In fact, the fear was that once "procedural due process" was allowed to become a part of article 21, it would be difficult to stop "substantive due process".

Chief Justice Beg held that no question of "due process of law" could really arise, apart from procedural requirements of preventive detention laid down by article 22. According to him, the clear meaning of article 22 was that the requirements of "due process of law" in cases of preventive detention, were satisfied by what was provided by article 22 of

\textsuperscript{37} Id. at 613.
\textsuperscript{38} Id. at 616.
\textsuperscript{39} Ibid. See All India Bank Employees Association v. N.I.Tribunal, A.I.R. 1962 S.C.171.
the Constitution itself. This article indicated the pattern of "the procedure established by law" for cases of preventive detention. But he was inclined to treat procedure as fair procedure in cases not covered by article 22. He stated:

[T]he field of "due process" for cases of preventive detention is fully covered by article 22, but other parts of that field, not covered by Article 22, are 'unoccupied' by its specific provisions. I have no doubt that, in what may be called "unoccupied" portions of the vast sphere of personal liberty, the substantive as well as procedural laws must satisfy the requirements of both Articles 14 and 19 of the Constitution.40

It is submitted that Chief Justice Beg 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 show that he permitted the entry of substantive as well as procedural due process.

Justice Krishna Iyer, while agreeing with Justice Bhagwati (as he then was), went far beyond his opinion on article 21. Justice Krishna Iyer beautifully expressed:

[W]here the vires of a few, which arms the Central Executive with vide powers of potentially imperilling some of the life-giving liberties of the people in a pluralist system like ours, is under challenge, and more so, when the ground is virgin and the subject is of growing importance...my sensitivity lifts the veil of silence. Such is my justification for breaking judicial lock-jaw to express sharply the juristic perspective and philosophy behind the practical necessities and possible dangers that society and citizenry may face if the clauses of our Constitution are bestirred into court action....in my separate opinion, I propose only to paint the back-drop with a broad brush project

40. Supra note 2 at 606(Emphasis added).
Regarding the legislation regulating travel abroad, Justice Krishna Iyer questioned whether this legislation was void in part or over-wide in terms? According to him, "Lawful illegality becomes the rule, if lawless legislation be not removed". That is why he further raised the question that if a statute was void, should the constitution remain silent or should the lines of legality be declared with clarity so that adherence to valid norms became easy and precise?

While admitting that article 21 includes the freedom to travel abroad and considering the question whether this freedom could be fettered by "procedure established by law" and whether "procedure" and "law" could be arbitrary, Keeping in mind that law was the reasonable mode regarded as dharm by the cream of society and that often it was a legislative act which should be functional and not fatuous, he observed:

'Procedure established by law', with its legal potentiality, will reduce life and liberty to a precarious playing 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....Processual justice is writ patently on Art.21. It is too grave to be circumvented by a black letter ritual processed through the legislature.

Thus, according to Justice Krishna Iyer also, procedure must be "fair, just and reasonable". But he added to the opinion of Justice Bhagwati by taking "law" also reasonable. He interpreted the expression "procedure established by law" in such a manner as to reach the conclusion that "law" and "procedure" must be "fair, just and reasonable". He explained:

What is fundamental is life and liberty. What is procedural is the manner of its exercise. This quality of fairness in

41. Id. at 652.
42. Ibid.
43. Id. at 658.
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 normal regarded as just since law is the means and justice is the end.44

Justice Krishna Iyer also held that if Gopalan on article 21 was followed, procedural safeguards under article 22 would be available for preventive and punitive detention. But for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 were available because otherwise, as the procedural safeguards contained in article 22, would be available only in cases of preventive and punitive detention, the right to life which was more fundamental than any other forming part of personal liberty, would have no procedural safeguard "save such as a legislature's mood chooses". Therefore, agreeing with the dissent of Justice Fazal Ali in Gopalan held that "procedure" in Article 21 means fair, not formal procedure. "Law" is reasonable law, not any enacted piece."45

He left no tools unmoved for the clear entry of fairness in every executive and legislative action. He held that the provisions of the Act in question had to be read down into constitutionality, tailored to fit the reasonableness test and humanised by natural justice.46 Holding the view that "Bolt the stables after the horse has been stolen is not a command of natural justice", he like Justice Bhagwati(as he then was) made the fairness, imported from the principles of natural justice, an integral part of article 21.47

It is submitted that Justice Krishna Iyer was the lone voice crying for adoption of substantive as well as procedural fairness under article 21 because he not only wanted to protect the "life", which is the most precious treasure of human beings from the arbitrary executive action but

44. Ibid.
45. Id. at 659.
46. Id. at 666.
47. Id. at 660.
also from the legislative callousness. He read reasonableness of article 19 and fairness of article 14 in article 21 and decorated it with legislatively sanctioned fair procedure because "no Passport officer shall be mini-Caeser nor Minister incarnate Caeser in a system where the rule of law reigns supreme". His search for fairness can be well-traced in his words:

[Law becomes unlawful even if it is legitimated by three legislative readings and one assent, if it is not in accord with constitutional provisions, beyond abridgement by the two branches of government.]^{49}

Justice Kailasam in his dissent kept Gopalan intact regarding "procedure" as well as "law" under "procedure established by law". According to him, the "procedure established by law" must be taken to mean as the ordinary and well established criminal procedure, that is to say, those settled usages and normal modes of proceedings, sanctioned by the Criminal Procedure Code which was a general law of criminal procedure in the country.\(^{50}\)

The opinion of Justice Kailasam on natural justice that "rule of natural justice cannot be equated with the Fundamental Rights"\(^{51}\) gave a surprising shock why the advancements in administrative law on the techniques of judicial control of administrative action could not be woven into a fundamental right encompassing procedural fairness.\(^{52}\)

It is submitted that Maneka overthrew Gopalan on "procedure" but obeyed Gopalan blindly on "law" except Justice Krishna Iyer who brought revolution in the virgin field of "procedure established by law" under article 21. Long back, Mohammad Ghouse had suggested alternative juristic postulates to overthrow Gopalan to restore to right to "life" and "personal liberty" the protection due to them. He had pointed out:

\(^{48}\) Id. at 660.
\(^{49}\) Id. at 663.
\(^{50}\) Id. at 666.
\(^{51}\) Id. at 689.
Procedural safeguards are of the indispensable essence of personal liberty. In fact, the history of personal liberty is largely the history of procedural safeguards. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights; observance of fundamental rights is not yet regarded as good politics and their transgression as bad politics. The need for procedural safeguards, particularly in cases of deprivation of life and liberty is, therefore, more than obvious in India.53

The restricted view of Gopalan on "procedure" under "procedure established by law" also led him to state:

It is also inconceivable that 'procedure' in Article 21 includes boiling or torturing a person to death, flaying him alive or flogging him to death, and similar other cruelties....To construe 'procedure' to include such cruelties is to subvert the right to life and personal liberty....'Procedure' in that Article, therefore, means fair procedure.54

Thus, Maneka also only freed "procedure" from Gopalan. But Gopalan on "law" remained intact. The result is that 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. So a legislature, not subject to article 21, can cock a snook at the substantive rights in "personal liberty" and the procedural safeguards in procedure. The liberalism pervading the construction of "personal liberty" and "procedure" becomes real and meaningful only when law is freed from Gopalan. To enrich "procedure" and enlarge "personal liberty", without treating "law" as reasonable law, is to try to build the second and the third floor first. Only a balanced construction of all these expressions can transform article 21 into a palladium of liberty. The nightmarish experience and the macabre developments of 1975 teach the valuable lesson that the executive can acquire a complete stranglehold over the legislature to make it enact draconian laws. Even after Maneka, article 21

54. Id. at 571.
cannot prohibit enactment of such laws. In *Maneka*, only Justice Krishna Iyer was alive to this fact. He alone treated "law" as reasonable law.55

Once the principles of natural justice have been read into article 21, there is nothing to prevent the court from construing "law" as reasonable law. It will be very strange indeed, if article 21 leaves a legislature free to dispense with "fair play in action" while authorizing deprivation of life or liberty. It will be a subversion of a fundamental right if it is held that article 21 contemplates deprivation of life or liberty through "a foul play in action". Therefore, the court may construe "personal liberty" in an evolutive sense, "procedure" as "fair play in action" and "law" as reasonable law.56

In this case, the activism of Justice Bhagwati gives way to passivism when he reads *audi alteram partem* rule into section 10(3)(i) of the Passport Act to save it from unconstitutionality. If natural justice is a part of articles 14 and 19, statutory exclusion of *audi alteram partem* is unconstitutional. There can never be infringement of and compliance with a fundamental right at the same time. When the order impounded a passport in violation of articles 14 and 19, it was dead and gone. The court cannot infuse life into that dead order by accepting state's undertaking long after the issuance of the order.57

According to Upendra Baxi, despite the lofty rhetoric about article 21 rights in *Maneka*, its actual holding does not quite amount to saying that article 21 operates as a limitation on legislative power or that it imports a certain minima of the right of genuine hearing in laws establishing procedures effecting personal liberty rights. Parliament may still establish any law or procedure through law to achieve deprivation of personal liberty. He

55. Mohammad Ghouse, supra note 52 at 421-422.
56. Id. at 423.
57. Id. at 424.
finds this to be the real meaning although much of the language and discourse in Maneka emboldens one to hope otherwise.\textsuperscript{58}

Upendra Baxi has suggested that it is high time that this elitist view of high authorities be drastically modified, if not altogether abandoned. If it was not clear in the India before 1975 that authorities can be just as unreasonable and irresponsible in exercising their legal powers, the events of 1975-77 have proved beyond doubt that the incidence of arbitrary exercise of power escalated with the hierarchical layers.\textsuperscript{59}

In spite of dreadful experience of emergency laws, Justice Bhagwati hopes that if the law is unreasonable law, the arms of the court are long enough to reach it and strike it down. But the history has shown it from time to time that if the arms of the Courts are long, the arms of the Parliament are also long enough.\textsuperscript{60} Such approach of Justice Bhagwati shows that like the public memory, the judicial memory is also short. Could a court of law set aside\textit{mala fide} detentions during the emergency?\textsuperscript{61}

(b) Fluctuations After Maneka

In \textit{Maneka}, the Supreme Court took the activist approach and expanded the ambit of article 21. Now it has to be seen whether the post \textit{Maneka} Summit Court followed this activist approach or passivisim recoiled on the activism.

In \textit{M.H.Hoskot v. State of Maharashtra},\textsuperscript{62} Justice Krishna Iyer quoted Justice Bhagwati's and his own opinion in \textit{Maneka} and held:

\begin{quote}
'Procedure established by law' are words of deep meaning for all lovers of liberty and judicial sentinels. Amplified, activist fashion, 'procedure' means 'fair and
\end{quote}

\textsuperscript{58} Upendra Baxi, The Indian Supreme Court and Politics, 160-161(1980).
\textsuperscript{59} Ibid.
\textsuperscript{60} Id. at 163.
\textsuperscript{61} Mohammad Ghouse, supra note 52 at 424-425.
reasonable procedure' which comports with civilised norms like natural justice rooted firm in community consciousness - not primitive processual barbarity nor legislated normative mockery.63

It is submitted that even though in this Justice Krishna Iyer directly talked of procedural fairness only but by quoting his own view in Maneka, where he held that law should also be reasonable, he impliedly endorsed that law could also be tested on the touchstone of reasonableness. In this case, Justice Krishna Iyer considered, right to legal aid as an integral part of fair procedure.64

In United States of America, from where this "due process" has been said to be imported in article 21, the American Supreme Court has held that right to legal aid was found to be part of fundamental fairness by virtue of fourteenth amendment read with sixth amendment so as to avoid the risk of conviction due to the poverty of a person.

Justice Sutherland in Powell v. Alabama observed:

If the accused were unable to get counsel, even though opportunity was offered, then the 'due process' clause in the Fourteenth Amendment required the trial court 'to make effective appointment of counsel'.

In Gideon v. Wainwright, the court held that sixth amendment's unqualified guarantee of counsel for all indigent accused was a fundamental right made obligatory upon the state by the Fourteenth Amendment.

In United States of America, "due process clause" was also used to bring prison discipline.

In Sostre v. Rockefeller, the court observed:

Very recently, the Supreme Court reiterated the firmly established due process principles that where governmental action may seriously injure an individual and the reasonableness of that action depends on fact findings, the

63. Id. at 1553.
64. Id. at 1554.
65. See Powell v. Alabama, 287 US 45(1932); Gideon v. Vainwright 372 US 335 (conted.)
evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

It is also pointed out:

We would not lightly condone the absence of such basic safeguards against arbitrariness as adequate notice, an opportunity for the prisoner to reply to charges lodged against him, and a reasonable investigation into the substantial discipline.69

In Charles Wolf v. McDonnell,70 the Supreme Court of the United States laid down what the "due process clause" demanded regarding prison disciplinary hearing, confrontation and cross-examination and even presence of counsel. Justice White stated:

[W]e hold that written notice of the charges must be given to the disciplinary action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defence.

Justice Marshal went far beyond when he stated:

[By far the greater weight of correctional authority is that greater procedural fairness in disciplinary proceedings, including permitting confrontation and cross-examination, would enhance rather than impair the disciplinary process as a rehabilitative tool.... There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly.71

It was also observed by the court that fair treatment would enhance the chance of rehabilitation by avoiding reactions to arbitrariness.

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66. 287 US 45(1932).
69. Ibid.
71. Ibid.
After Maneka, article 21 has become counterpart of "procedural due process". Just as in United States "due process" clause is used to maintain prison discipline, similarly in India, procedural fairness under article 21 encouraged the Summit Court to bring prison reforms.

In Sunil Batra v. Delhi Administration, Justice Krishna Iyer observed:

True, our Constitution has no 'due process' clause or the VIII Amendment, but in this branch of law, after Cooper...and Maneka Gandhi...the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Arts.14 and 19 and if inflicted with procedural unfairness, falls foul of Art.21.74

In this case, Justice Desai held that the word "law" in article 21 had been interpreted to mean in Maneka that law must be right, 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.76

72. Ibid.
74. Id. at 1690. See also Sita Ram v. State of U.P., A.I.R.1979 S.C.745 at 753-754, in which Justice Krishna Iyer quoted his own opinion of Maneka for emphasising on fundamental fairness.
75. Justice D.A.Desai delivered the judgment for himself and on behalf of Chandrachud C.J., S.Murtaza Fazal Ali and P.N.Shinghal, JJ.
76. Id. at 1732.
It is submitted that in this case, Justice Desai took Justice Krishna Iyer's view in *Maneka* as majority view by holding that "law" should also be reasonable law. Justice Krishna Iyer has followed his view in *Maneka*. According to him, *Maneka* has brought American due process in India. Thus, it can be said that *Maneka* recognized only procedural due process but Sunil Batra(I) favoured both procedural due process as well as substantive due process.

In *Hussainara Khatoon v. State of Bihar*, Justice Bhagwati (as he then was) reiterated his opinion in *Maneka* and held that article 21 conferred a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it was not enough to constitute compliance with the requirement of that article that some semblance of a procedure should be prescribed by law but that the procedure should be "reasonable, fair and just". If a person was deprived of his liberty under a procedure which was not "reasonable, fair or just", such deprivation would be violative of his fundamental right under article 21.

It is submitted that Hussainara again limited the judicial activism to procedural fairness only. Justice Desai while giving majority opinion in *Sunil Batra* I treated "law" as reasonable law, quietly joined hands with Justice Bhagwati in one of Hussainaras in recognizing only procedural "due process".

In *Jolly George Warghese v. Bank of Cochin*, Justice Krishna Iyer delivering the judgment, observed:

> The high value of human dignity and the worth of the human person enshrined in Art.21, read with Arts.14 and 19, obligates the state not to incarcerate except

under law which is fair, just and reasonable in its processual essence.79

In this case, the question was of imprisonment for non-payment of debts under section 51 of Civil Procedure Code. In spite of Justice Krishna Iyer stating that to recover debts by the procedure of putting one in prison was too flagrantly violative of article 21 unless there was proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means to pay, he held that the lethal blow of article 21 could not strike down the provision due to the interpretation given to the proviso to section 51 C.P.C.80

It is submitted that Justice Krishna Iyer also floated on the flow of judicial activism by adopting only procedural fairness. He did not directly talk of reasonableness of "law" and saved the provision in question from being struck down by testing its reasonability. In fact interpretation to that provision saved it from unconstitutionality which laid down that before imprisoning any person for the non-payment of debt, sufficient opportunity to show cause will be given to him and even then no imprisonment would be there if he had not sufficient means to pay.

While saving the prisoners from prison torture, Justice Krishna Iyer again applied the concept of fair procedure in Sunil Batra v. Delhi Administration.81 He held:

[I]t is imperative, as implicit in Art.21, that life or liberty shall not be kept in suspended animation or congealed into animal existence without the freshening flow of fair procedure.82

In M/s Kasturi Lal v. State ofJ&K,83 Justice Bhagwati(as he then was) did not miss the chance to revive the concept of "fair,just and reasonable"

79. Id. at 475.
80. Ibid. See also proviso to section 51 of Civil Procedure Code.
82. Id. at 1593.
procedure as invoked in article 21 by \textit{Maneka}. He observed:

\begin{quote}

The concept of reasonableness in fact pervades the entire constitutional scheme the interaction of Articles 14, 19 and 21 analysed by this court in \textit{Maneka Gandhi v. Union of India}...clearly demonstrated that the requirement of reasonableness runs like a golden thread through entire fabric of fundamental rights....Article 14 strikes at arbitrariness in state action....So also the concept of reasonableness runs through the totality of Article 19....Art. 21 in the full plenitude of its activist magnitude as discovered by \textit{Maneka Gandhi}'s case, insists that no one shall be deprived of his life or personal liberty except in accordance with procedure established by law and such procedure must be reasonable, fair and just.\textsuperscript{84}
\end{quote}

The majority in \textit{Bachan Singh v. State of Punjab},\textsuperscript{85} also stood in the row of cases which had followed the \textit{Maneka} expansion of article 21 regarding fairness, justness and reasonableness of "procedure" under "procedure established by law". The court held that the principle of reasonableness pervaded articles 14, 19 and 21 and as a result the procedure contemplated by article 21 must be "right and just and fair" and not "arbitrary, fanciful or oppressive", otherwise it should be no procedure at all and the requirement of article 21 would not be satisfied.\textsuperscript{86}

Justice Bhagwati (as he then was) while delivering the minority view\textsuperscript{87} observed that \textit{Maneka} marked the beginning of a most astonishing development of law. Before that, there was no protection against executive action which had no authority of law. If there was a law which provided some sort of procedure it was enough to deprive a person of his life or personal liberty. He held that this court in \textit{Maneka}, which marked a watershed in the history of development of constitutional law in our country, took the view that Article 21 afforded protection not only against executive action but also

\textsuperscript{84} Id. at 2000.
\textsuperscript{86} Id. at 930.
\textsuperscript{87} \textit{Bachan Singh v. State of Punjab}, A.I.R.1982 S.C.1325. Justice Bhagwati (as he then was) reserved his minority opinion and delivered it after two years.
against legislation and any law which deprived a person of his life or personal liberty would be invalid unless it prescribed a procedure for such deprivation which was reasonable, fair and just. He pointed out:

The word 'procedure' in Article 21 is wide enough to cover the entire process by which deprivation is effected and that would include not only the adjectival but also the substantive part of the law. Take for example, a law of preventive detention which sets out the grounds on which a person may be preventively detained. If a person is preventively detained on a ground other than those set out in the law, the preventive detention would obviously not be according to the procedure prescribed by the law, because the procedure set out in the law for preventively detaining a person prescribes certain specific grounds on which alone a person can be preventively detained, and he is detained on any other ground, it would be violative of Article 21. Every facet of the law which deprives a person of his life or personal liberty would therefore have to stand the test of reasonableness, fairness and justness in order to be outside the inhibition of Article 21.

It is submitted that while delivering his minority opinion even Justice Bhagwati (as he then was) took Justice Krishna Iyer's opinion as majority in Maneka by stating that post Maneka effect is protection not only against executive action but also against legislative action. He illustrated through an example of law of preventive detention that if a law was unreasonable it would be violative of article 21. What Justice Bhagwati did as a minority judge, had he done it while giving majority opinion in Maneka, decision would have been entirely different.

In Francis Coralie Mullin v. Union of Territory of Delhi, Justice Bhagwati (as he then was) had also observed:

[I]n Maneka Gandhi's case...this Court for the first time opened up a new dimension of Article 21 and laid down that Article 21 is not only a guarantee against
executive action unsupported by law, but also a restriction on law making.91

Thus, this statement again proves that Justice Bhagwati took Justice Krishna Iyer's opinion in Maneka as majority opinion and preferred to treat "law" as well as "procedure" under "procedure established by law". But at the same time, he pointed out:

This decision in Maneka Gandhi's case became the starting point, the spring-board, for a most spectacular evolution of the law culminating in the decisions in M.H.Hoskot...Hussainara Khatoon's case...the first Sunil Patra's case...and the second Sunil Patra's case. The position now is that Article 21 as interpreted in Maneka Gandhi's case...requires that....procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful and it is for the Court to decide in the exercise of its constitutional power of judicial review whether the deprivation of life or personal liberty in a given case is by procedure, which is reasonable, fair and just or it is otherwise.92

It was also held by him that the law of preventive detention had to pass the test not only of Article 22 but also of Article 21 and if the constitutional validity of any such law was challenged, the Court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty was reasonable, fair and just.93

It is submitted that it seems Justice Bhagwati preferred the opinion of Justice Krishna Iyer in Maneka by recognizing the birth of substantive as well as procedural due process through Maneka, Sunil Patra(I) had expressly voted for substantive as well as procedural due process. This half-hearted welcome to substantive due process was perhaps the preparation for the total acceptance of it in his minority opinion in Bachan Singh which was delivered one and half years after Francis Coralie Mullin.94

91. Id. at 750. (Emphasis added).
92. Ibid.
93. Ibid.
94. Francis Coralie Mullin was decided on 13.1.81 and the minority opinion of Bhagwati J., in Bachan Singh was delivered on 16.8.1982.
In \textit{Nand Lal v. State of Punjab}\footnote{A.I.R.1981 S.C.2041. See R.K.Garg v. Union of India, A.I.R.1981 S.C. 2138. In this case, Justice Bhagwati (as he then was), delivering the minority judgment on behalf of Chandrachud, C.J., Fazal Ali and A.N.Sen JJ., did not consider "reasonableness" as an essential of article 14. The Bearer Bond Legislation which was challenged as violative of article 14 was not tested on the touchstone of reasonableness. \textit{Id.} at 2155-2157. Justice Gupta, while delivering the minority opinion, held it violative of article 14. It is really a set back to the reasonableness which is projected under article 21 through article 14. It is even more shocking that Justice Bhagwati, who had given life to these fundamental rights in \textit{Maneka} took a different view about article 14 as to what was held by him there following E.P.Royappa. See supra note 2 at 624. It is really surprising how judges change their views. Chief Justice Chandrachud was party to \textit{Maneka} as well as E.P.Royappa. See also supra note 23 at 583. Justice Fazal Ali was also party to \textit{Maneka}.} the Apex Court made it clear that chain of judicial recognition of procedural fairness under article 21 is not broken. In this case, the court observed that in \textit{Maneka} the judges agreed that the "procedure" must be reasonable and fair and not arbitrary or capricious because if the procedure was arbitrary, it would violate article 14.\footnote{Id. at 2043.} The court held:

\begin{quote}
[T]he procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14.\footnote{Id. at 2044.}
\end{quote}

It is submitted that in this case, the Summit Court read article 14 in article 21 to make the "procedure" under "procedure established by law" reasonable.

When the Summit Court was passing through the continuous process of manoeuvring "due process" under article 21, A.K.Roy\footnote{A.K.Roy v. Union of India, A.I.R.1982 S.C.710.} proved to be a deadly stroke. In this case it was contended that the National Security Act, 1980 must be struck down on the ground that it interfered with the liberties of the people. Chief Justice Chandrachud, while delivering the majority judgment rejected the contention that the court could not invalidate on the specious
ground that it was calculated to interfere with the liberties of the people.\textsuperscript{99} He also pointed out that the fact that England and America did not resort to preventive detention was known to our Constituent Assembly and yet it chose to provide for it.\textsuperscript{100} Therefore, he observed:

\begin{quote}
The power to judge the fairness and justness of procedure established by a law for the purposes of Article 21 is one thing: that power can be spelt out from the language of that article. The power to decide upon the justness of the law itself is quite another thing: that power springs from a 'due process' provision such as is to be found in the 5th and 14th Amendments of the American Constitution.\textsuperscript{101}
\end{quote}

The Chief Justice also referred to the Constituent Assembly Debates, which showed that the words "due process of law" had been rejected by the Constituent Assembly, which after considering it properly, had concluded that the power to judge the justness of the law of preventive detention was not possessed by the Court.\textsuperscript{102}

It is submitted that the Chief Justice's refusal to examine the justness of the law under article 21 was born out of a narrow construction of that article which may not be consistent with the decisional law that has grown in the recent past.\textsuperscript{103} It is really shocking that Justice Bhagwati (as he then was) was party to this decision, who himself had become the creator of "due process" under article 21 in \textit{Maneka}. It is even more surprising that while delivering the minority opinion in \textit{Bachan Singh} (which was delivered after this judgment) he gave the example of law of preventive detention to prove the existence of "due Process" and in this case, he joined hands with Chief Justice Chandrachud to state that the power to judge the justness of preventive detention was not possessed by the court. Justice Desai, who had considered in \textit{Sunil Batra(I)} procedural as well as

\textsuperscript{99} Id. at 726.
\textsuperscript{100} Ibid.
\textsuperscript{101} Ibid.
\textsuperscript{102} Ibid.
\textsuperscript{103} See S.P. Sathe, "Constitutional Law-I", XVIII A.S.I.L. 300 at 312(1982).
A year later, Ranjan Dwivedi joined the row of cases which recognized the entry of due process. In this case, the Supreme Court did not hesitate to admit that it was difficult to hold in view of *Maneka* and E.P.Royappa etc. that the substance of the American doctrine of "due process" had not still been infused into the conservative text of article 21. But one fails to understand why, while taking such an activist approach, the activist court did not bother to consider decisions of the Supreme Court of United States for granting right to Legal Aid through a competent lawyer. The Apex Court remarked:

We are however not in the United States of America and therefore not strictly governed by the 'due process' clause in the Fourteenth Amendment.106

It is submitted that the holdings of the summit Court are self-conflicting. It admits that now American "due process" is part of article 21 but it is not ready to consider what is American "due process" clause.

In *Olga Tellis v. Bombay Municipal Corporation*,107 Chief Justice Chandrachud, while delivering the judgment, following the row of cases beginning with *Maneka*, held that the procedure prescribed by law for the deprivation of the right conferred by article 21 must be fair, just and reasonable.108 It was pointed out:

[The procedure prescribed by law for depriving a person of his...right to life, must conform to the norms of justice and fairplay. Procedure which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and]

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105. Id. at 627.
106. Id. at 628.
108. Id. at 196.
consequently, the action taken under it....The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it. 109

Chief Justice Chandrachud also observed that if a law was found to direct the doing of an act which was forbidden by the Constitution or if for the performance of an act, it compelled the adoption of the procedure which was impermissible under the Constitution, it was liable to be struck down. 110

It is submitted that when the Summit Court is ready to strike down the "law" which prescribes unreasonable "procedure" that 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 fairness but indirectly and impliedly it has expressed so.

In Kehar Singh v. State (Delhi Admn). 110a Justice Oza pointed out that "procedure established by law" means the procedure as was on the day on which the Constitution of India was adopted. The trend of decisions of this Court has clearly indicated that procedure must be fair and just. It was further pointed out that the effect of "procedure established by law" cannot be taken away by amending the existing statute (Criminal Procedure Code in this case). 110b

It is further submitted that these decisions show the fluctuations after Maneka how some decisions only recognized procedural fairness while some voted for reasonableness of law also. It is hoped that this fluctuation would be controlled by the highest judiciary also and it would reach

109. Id. at 197 (Emphasis added).
110. Id. at 198.
110b. Id. at 1897. In the present case, the Court pointed out that the "procedure established by law" as indicated in article 21 was as provided in section 327 of the Criminal Procedure Code and unless on facts (conted..)
the final point to take "procedure" as "fair, just and reasonable" procedure and "law" as "fair, just and reasonable" law under the expression "procedure established by law" in article 21. Article 21 has been revolutionized but the revolution would be complete only 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.

(c) Whether This Approach Can Digest The American "Due Process"

In United States of America, the expression "due process of law" was in the Fifth Amendment adopted in 1791. It laid down that no person shall be deprived of life, liberty or property without "due process of law". When the U.S. Supreme Court held in *Barron v. Baltimore* that this amendment was applicable only against the federal power and not against the states, the Fourteenth Amendment was adopted in United States of America in 1868 in order to make it applicable to the States as well. The Fourteenth Amendment laid down:

No state shall...deprive any person of life, liberty or property without due process of law.

The *Slaughter House cases* showed how in the beginning, there was only procedural due process and substantive due process was not recognized.

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111. The expression "Due Process of Law" was for the first time introduced in England in the Petition of Right, 1728 in which it was laid down that "free man be imprisoned or detained only by law of the land or by due process of law and not by the King's special command without any charge", See G.C. Subbarao P. Kalpakam, "Revolution In Indian "Due Process", A.I.R. 1980 Journal 44.

112. (1833) 7 Pet 243. In this case, the Supreme Court of America had held first ten amendments applicable only to federal power and not to the States.

113. (1873) 16 Wal 36.
The judges, holding majority opinion, did not approve of substantive due process because according to them, if it was adopted it would give the court a perpetual power to check legislation by the states and to hold them void. Justice Swayne and Justice Braidley, while giving dissenting opinion, held that any legislation which barred a citizen from a lawful occupation was violative of "due process".

This minority view became the birth giver of the substantive due process. In Smyth v. Ames, the majority following the minority view in Slaughter House, struck down a statute which deprived a person of the property without "due process of law".

It is submitted that this was a veritable revolution in due process as the substantive concept of "due process" enabled the Supreme Court of America to test legislation made by federal or state on the touchstone of reasonableness and to strike down unreasonable restrictions upon property rights and civil liberties.

In India, the "due process" in order to take birth had to face the same birth pangs as it had faced in United States of America. In the Constituent Assembly, the question of including "due process" under the Indian Constitution was considered. Ambedkar in his speech explained the effect of this "due process" clause:

The question of "due process" raises, in my judgment, the question of the relationship between the legislature and the judiciary...the judiciary would be endowed with the authority to question the law not merely on the ground whether it was in excess of the authority of the legislature, but also on the ground whether the law was good law, apart from the question of the powers of the legislature making the law.... The question now raised by the introduction of the phrase "due process" is whether the judiciary should be given the additional power to question the laws

114. (1898) 169 US 466.
115. See supra note 111.
made by the state on the ground that they violate certain fundamental rights.116

He further stated:

[T]here are dangers on both sides, for myself, I cannot altogether omit the possibility of a legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the legislature and by dint of their own individual conscience or their bias or their prejudice be trusted to determine which law is good and which law is bad. It is rather a case where a man has to sail between Charybdis and Scylla and I, therefore, would not say anything. I would leave it to the House to decide in any way it likes.117

The Constituent Assembly did not adopt "due process", that is, reasonableness of law and procedure in order to strike balance between individual liberty and social control.

Thus, the Constituent Assembly did not favour the inclusion of "due process" clause under the Indian Constitution. But after that, the concept of "due process" started travelling the same way as it did in the United States of America. Just like the Slaughter House Cases118 did not allow the substantive "due process", similarly Gopalan119 totally exiled the "due process" from article 21. The minority opinion in Slaughter House became majority opinion in Smyth v. Ames,120 similarly, the minority opinion in Gopalan121 which favoured the existence of due process, that is, reasonableness of law and procedure impressed the majority in Maneka.

Maneka became the birthplace of "due process" in the guise of "fairness, justness and reasonableness" of procedure. It only departed from Gopalan in procedure and not in law. In this case, Justice Bhagwati(as he then

116. See VII C.A.D. 999-1001. See also supra Chapter II.
117. Ibid.
118. Supra note 113.
119. Supra note 5. See also supra Chapter III.
120. Supra note 114.
was) delivering the majority judgment adopted only procedural "due process". An encouraging sign was shown by Justice Krishna Iyer by showing the desire to include both procedural as well as substantive "due process". By reading articles 14 and 19 in article 21, the procedure under "procedure established by law" was made "fair, just and reasonable". But Justice Chandrachud (as he then was) had warned against the inclusion of due process.

The post-Maneka judicial somersault was perplexing. The Apex Court kept on making space for the procedural due process in Hussainaras, Sunil Batra I & II and Bachan Singh. Following Justice Krishna Iyer in Maneka, Justice Desai declared Maneka the spring board of due process, substantive as well as procedural, and made Sunil Batra(I) the generator of substantive as well as procedural due process by declaring that "law" as well as "procedure" under "procedure established by law" must be reasonable. Justice Bhagwati, perhaps desiring to improve the mistake, done by him by not recognizing reasonableness of law in Maneka, did so in his minority opinion in Bachan Singh. Ranjan Dwivedi openly admitted the presence of "due process" in article 21. A.K. Roy proved disastrous to this "due process" yatra by showing its decline. Chief Justice Chandrachud, who delivered the judgment in A.K. Roy had given a warning in Maneka also against the import of American due process. But the same Chief Justice Chandrachud in Olga Tellis expressed the desire to include both substantive as well as procedural due process.

It is interesting to note that in the United States, it took exactly three decades from the time of the adoption of the Due Process Clause in the

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123. Supra note 77.
124. Supra notes 73 and 81.
125. Supra notes 85 and 87.
126. Supra note 104.
127. Supra note 98.
128. Supra note 2 at 616.
129. Supra note 107.
14th Amendment for the Supreme Court to spell out its substantive implications and bring about a evolution in their concept of "due process", similarly in India, three decades had to elapse for this consummation to be attained after the Constitution came into force.\footnote{130}

It has been criticised that the conclusion in \textit{Maneka} is totally contrary to what the framers of the Constitution had specifically intended. "Reasonableness" which is no different from "due process" be it procedural or substantive was not to be a part of Article 21. It is also argued that the legislature was to be the protector of life and personal liberty instead of the judiciary, as compared to the American system. The court has bestowed to itself the power to decide the reasonableness of the procedure under article 21. This has lend a "due process" character to article 21.\footnote{132}

It is submitted that even though the framers of the Constitution expressly excluded the "due process" clause, but the speech delivered by Ambedkar disclosed the negatives of both the inclusion and exclusion of "due process" clause. The negative point for exclusion of "due process" was that the legislature consisting of few party men could not be trusted that they would never infringe the fundamental rights. This fear became a living reality and the eye-opener evidence in draconian laws and excesses of internal emergency. During emergency, the right to life and personal liberty of individuals was virtually wiped off in the name of public security. And at the same time, negative point of inclusion of "due process" clause is how could five-six persons sitting on the bench decide about the validity of any law made by the legislature. \textit{Habeas Corpus case}\footnote{133} is the living proof where the judiciary failed to protect life and liberty of people from the cruel clutches of legislature as well as executive.

\footnote{130. \textit{Supra} note 111 at 48.}
\footnote{131. See \textit{supra} note 122 at 5.}
\footnote{132. Id. at 9.}
It is further submitted that "reasonableness" is an integral part of article 21 by virtue of articles 14 and 19. With the help of Cooper, it was repatriated in Maneka. Mohammad Ghouse went to the extent of stating that "reasonableness" in article 19 echoes in its own way the procedural as well as the substantive due process. Thus, due process sneaks into article 21 through the back door. Even if the reasonableness was not imported into article 21 from article 19, would it be reasonable to put the life and liberty of the people at stake by allowing the executive to take it away by reasonable or unreasonable procedure and encouraging the legislature to enact any law whether reasonable or unreasonable for granting such power to the executive. In such circumstances, the statement of Justice Das in Gopalan, that a law decreeing that the cook of the Bishop of Rochester be boiled to death would be valid under article 21 is worth noting.

It is also not true that if "due process" is included in the Constitution, the judiciary will start performing the role of the legislature. The judiciary would not interfere unless the legislature lags behind and the law is unreasonable beyond doubt. Even though the judiciary has been finding that the death penalty is cruel, inhuman and degrading, it did not wipe it off from the statute book. The Apex Court pointed out in Dalbir Singh v. State of Punjab, that it was only the Parliament which could pronounce "death sentence on death sentence". No doubt, the Summit Court in Mithu v. State of Punjab declared section 303 unconstitutional, it being unfair and unreasonable as it prescribed death sentence as the only sentence for the offence of murder committed by the life sentence.

134. Supra note 14.
135. Supra note 122.
136. Supra note 52, and 25 at 395.
137. See supra note 5.
The case of Mithu is a clear cut example of substantive due process adopted by the Apex Court. Once we have allowed the "due process" to enter our Constitution through article 21, why to hesitate to admit it? Justice Mathew rightly observed in Kesavananda Bharti v. State of Kerala:140

When a court adjudges that a legislation is bad on the ground that it is an unreasonable restriction, it is drawing the elusive ingredients for its conclusion from several sources....if you examine the cases relating to the imposition of reasonable restrictions by a law, it will be found that all of them adopt a standard which the American Supreme Court has adopted in adjudging reasonableness of a legislation under the due process clause.

(C) Fair Procedure And Public Interest Litigation

In the modern times, the state's main attention is on the "Little Man". This concern of the state also creates its own paradoxes. Most of the steps for his welfare are taken by the state. The question arises if the state misperforms or does not perform these functions, how to make it accountable for its action or inaction and how to enable this "little man" to establish that accountability vis-a-vis his own rights and interests.

"Public Interest Litigation" is a partial answer to this paradox. It is a late comer to India. The concept and procedure of public interest litigation in India have been fashioned by the Supreme Court of India. They are still in the process of formulation and concretization.141

Public Interest Litigation142 is concerned not with the rights of one individual but the interest of a class or group of persons who are either the victims of exploitation or oppression or are denied their constitutional

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139a. See also Maruti Shripati Dubal v. Maharashtra,(1986) Maharashtra Law Journal 913. In this case, the Bombay High Court declared section 309 of the Indian Penal Code unconstitutional as being violative of article 14 and 21.

140. (1973) 4 S.C.C.225 at 874.


142. Prof.Upendra Baxi called it "Social Action Litigation". See Upendra Baxi, "Taking suffering seriously:Social Action Litigation in the Supreme Court of India", 8-9 Delhi Law Review, 91(1979-1980);Upendra (conted.)
or legal rights and who are not in a position to approach the courts for redressal of their grievances. It seeks to help the victims of governmental lawlessness or repression. 143

This public interest litigation has been mainly American development. It has been defined there in the following words:

Public Interest Law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in recognition that the ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others. 144

As compared to the American development, public interest litigation in India has been initiated by some judges of the Supreme Court themselves. In India, Justice was only a remote and even, theoretical proposition for the mass of illiterate, under-privileged and exploited persons in the country till the concept of public interest litigation was accepted as a part of our


Constitutional jurisprudence. They were unaware of the law or even of their legal rights, unacquainted with the niceties of procedure involved, and too impoverished to engage lawyers, file papers and bear heavy expenditure on dilatory litigation. Thus the vested interests that exploited them were emboldened to continue with their cruel and even illegal practices with cynical contempt for the law. This vast underprivileged section of the society found themselves utterly helpless. Nor could anyone else take up their case for lack of locus standi or any direct interest in the matter.\textsuperscript{146} Thus the activist judges expressed the opinion that the present legal and judicial system was a "colonial legacy" unsuited to our condition.\textsuperscript{147} They expanded the concept of locus standi from "traditional individualism" to "community orientation of public interest litigation" and thus relaxed the formalities of procedure.\textsuperscript{148}

The liberalisation of the rule of locus standi was necessitated only because of the new constitutionalism blazed in Maneka Gandhi and refined and extended in post Maneka cases.\textsuperscript{149} In Maneka\textsuperscript{150} the court expanded the scope of right to "life" and "personal liberty" by considering "procedure" under "procedure established by law" as "fair, just and reasonable". The concept of fair procedure led the Apex Court to leave the adversary procedure

\textsuperscript{147} See Upendra Baxi, The Crisis of Indian Legal System, 48-63 (1982).
\textsuperscript{148} Under the traditional rule, only an "aggrieved person" by administrative action could come to the court. However, a few exceptions were there. Firstly, in habeas corpus and quo warrants, any member of the public could go to the court. Secondly, a rate payer of local authority had a standing to challenge its illegal action. See K.R. Shenoy v. Udipi Municipality, A.I.R. 1974 S.C. 2177; Lastly, the statute may explicitly recognize standing though no special right of an individual may have suffered. See J.M. Desai v. Roshan Kumar, A.I.R. 1976 S.C. 578.
\textsuperscript{149} Supra note 143 at 162.
\textsuperscript{150} Supra note 2.
and adopt the new innovation of public interest litigation to give relief to prisoners, workers, bonded labourers, children and many others. The Summit Court also used this tool for the protection of environment, which is an essential element needed to live a healthy life.

According to Professor Upendra Baxi, the concept of public interest litigation was the result of "judicial populism". He observed:

Judicial populism was partly an aspect of post-emergency catharsis. Partly, it was an attempt to refurbish the image of the Court tarvested by a few emergency decisions and also an attempt to seek new historical bases of legitimation of judicial power.

No doubt, the concept of public interest litigation is the result of the efforts of "activist" or "populist" Supreme Court, which identified itself as the protector of the exploited, in the post-internal emergency era, especially in the post Maneka period. But this concept (without giving it a nomenclature) was initiated in India in 1976 when Justice Krishna Iyer

Test litigations, representative actions, pro bono publico and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral, procedural shortcomings...Public interest is promoted by a spacious construction of locus standi in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualisation of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker. Less litigation, consistent with fair process, is the aim of adjective law...

In Ratlam Municipality, Justice Krishna Iyer observed:

It is procedural rules...'which infuse life into substantive rights which activate them to make them effective'....The truth is that a few profound issues of processual jurisprudence of great strategic significance to our legal system face us and we must zero-in on them as they involve problems of access to justice for the people beyond the blinkered rules of 'standing' of British Indian vintage.

The activist judge like Justice Krishna Iyer continued to make the most unconventional and unorthodox use of this judicial process. In Akhil Bhartiya Soshit Karmchari Sangh(Railway) v. Union of India, he observed:

Our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions access to justice through "class actions", "public interest litigation" and "representative proceedings". Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of "cause of action" and "person aggrieved"...
and individual litigation is becoming obsolescent in some jurisdictions.  

In Fertilizer Corporation Kamgar Union, Sindri v. Union of India, Justice Krishna Iyer emphasised the importance of public interest litigation:

Law...is a social auditor and this audit function can be put into action only when some one with real public interest ignites the jurisdiction.... In a society where freedoms suffer from atrophy and activism is essential for participative public justice, some risks have to be taken and more opportunities opened for the public-minded citizen to rely on the legal process and not be repelled, from it by narrow pendentry now surrounding locus standi.

Justice Bhagwati, who was party to Krishna Iyer's opinion in Fertilizer Corporation, gave a comprehensive exposition to this concept of public interest litigation in S.P.Gupta v. Union of India. According to him, the traditional rule, that judicial redress was available only to an aggrieved party, was "a rule of ancient vintage". Formulating the concept of public interest litigation, he observed:

[Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any urban is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Art.226 and in case of breach of any fundamental right of such persons, in this Court under Art.32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.]

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164. Id. at 317.
165. A.I.R.1981 S.C.344. In this case, the bench consisted of Y.V.Chandrachud, C.J., P.N.Bhagwati, J.(as he then was), V.R.Krishna Iyer, S.M.Fazal Ali and A.D.Kaushal,JJ.,Chief Justice Chandrachud delivered the judgment for himself and on behalf of S.M.Fazal Ali and A.D. Kaushal, JJ. Justice Krishna Iyer delivered separate judgment for himself and on behalf of Justice P.N.Bhagwati(as he then was).
166. Id. at 354.
167. A.I.R.1982 S.C.149. 168. Id. at 185. 169. Id. at 188-189.
He further observed:

[It] must not be forgotten that procedure is but a handmaiden of justice and the cause of justice can never be thwarted by any procedural technicalities. The court would therefore unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in the exercise of its dispensing power and treat the latter of the public minded individual as a writ petition and act upon it. Today, a fast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The Court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning.170

It is an essential element of the rule of law that every organ of the state must act within the limits of its power and carry out the duty imposed upon it by the Constitution or the law. If breach of duty is caused by the state and injury is caused not to any specific or determinate class or group of persons but to the general public. And if no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law because it would be open to the state or a public authority to act with impunity beyond the scope of its power. Where the observance of the law is left to the sweet will of the authority bound by it without any redress, if the law is contravened, the courts cannot countenance such a situation. Therefore, the court relaxed the strict rule of standing which insisted that only a person who had suffered a specific injury could maintain an action for judicial redress and adopted a broad rule which gave standing to any member of the public who was not a mere busy-body or a meddlesome interloper but who had sufficient interest in the proceeding.171

The Apex Court broadened this rule because:

[It] is only the availability of judicial remedy for enforcement which invests law with meaning and purpose or else the law would remain merely a paper parchment. It is only by liberalising the rule of locus standi that it is possible to police the corri-

170. Id. at 189 (Emphasis added).
171. Id. at 190-191.
dors of powers and prevent violations of law.\textsuperscript{172}

Schwartz and Wade also pointed out the same thing:

Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away, merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the public interest. If no one can have standing to maintain an action for judicial redress in respect of a public injury, not only will the cause of legality suffer but the people not having any judicial remedy to redress such public wrong or public injury may turn to the street and in that process, the rule of law will be seriously impaired. It is absolutely essential that the rule of law must wean the people away from the lawless street and win them for the court of law.\textsuperscript{173}

Justice Bhagwati (as he then was) cautioned the court that it must be careful to see that the member of the public who approached the court in such cases, must be acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration.\textsuperscript{174} He also pointed out:

The Court must take care to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved to the Executive and the legislature by the Constitution. It is a fascinating exercise for the court to deal with public interest litigation because it is a new jurisprudence which the court is evolving, a jurisprudence which demands judicial statesmanship and high creative ability. The frontiers of public law are expanding far and wide and new concepts and doctrines which will change the complexion of the law which were so far as embedded in the womb of the future, are beginning to be born.\textsuperscript{175}

It is submitted that Maneka's creation of "fair, just and reasonable"

procedure protected the life and liberty of exploited through the expansion

\textsuperscript{172} Ibid. (Emphasis added).
\textsuperscript{173} E. Schwartz and H.W. Wade, Legal Control of Government,\textsuperscript{291}(1972).
\textsuperscript{174} Supra note 167 at 195.
of the rule of *locus standi* by permitting the public-minded persons to seek the judicial redress for those whose life and liberty is at stake but they cannot protect it due to poverty or any other incapacity. The post Maneka judicial activism impressed upon the Summit Court to liberate itself from clutches of the traditional technicalities of procedure which is to be followed for access to justice. *Maneka* made the procedure "fair, just and reasonable" in order to give protection from the executive action which is unfair and unreasonable. Now if the executive action is unfair, unjust and unreasonable and some public injury is caused and if no one is there to move the judicial machinery, where lies the value of this judicial activism. Therefore, the Apex Court rightly innovated this new method of public interest litigation where public spirited persons who have "sufficient interest" in the matter can move the court. It is worth appreciating that while trodding the path of judicial activism, the Apex Court has always cautioned itself never to allow the misuse of new activist approach and also not to cross the barriers of its own province.

In *People's Union for Democratic Rights v. Union of India*, Justice Bhagwati (as he then was) further elaborated the principle of public interest litigation. According to him, public interest litigation was essentially a co-operative or collaborative effort on the part of the petitioner, the state or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community.

Justice Bhagwati explained the scope and importance of public interest litigation in the legal aid movement, which is part of "fair, just and reasonable" procedure under article 21. He pointed out:

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177. *I.C.* at 1477-1478.
Public interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character...but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of a large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unrederessed. That would be destructive of the Rule of Law which forms one of the essential elements of public interest in any democratic form of government.178

Justice Bhagwati (as he then was) again elaborated the importance of public interest litigation in Pandhua Mukti Morcha v. Union of India.179

Public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community....180

Justice Pathak (as he then was) also observed that public interest litigation in its present form constituted a new chapter in our judicial system. It acquired a significant degree of importance in the jurisprudence practised by the courts and evoked a lively, if somewhat controversial, response in legal circles, in the media and among general public.181

It is not at all obligatory to follow adversarial procedure merely because it being followed for over a century owing to the introduction of the Anglo-Saxon system of jurisprudence under the British rule, that it had become a part of judicial conscious as well as sub-conscious thinking that every judicial proceeding must be cast in the mould of adversarial procedure. The adversarial procedure had become a part of our legal system, it being embodied in the Code of Civil Procedure and Indian Evidence Act. Justice

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178. Id. at 1476-1477.
180. Id. at 811.
181. Id. at 838.
Rhagwati pointed out that these statutes had no application where a new jurisprudence was created by the Supreme Court for the enforcement of a fundamental right. 182

Thus, the Summit Court has 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". 183 Therefore, the Apex Court rightly abandoned the laissez faire approach in the judicial process particularly where it involved a question of enforcement of fundamental rights and forged new tools, devised new methods and adopted new strategies for making the fundamental rights meaningful for the large masses of people. The right to life and personal liberty would also become effective only if new device of public interest litigation becomes part of "fair, just and reasonable" procedure. The constitution makers have also deliberately and advisedly not used any words restricting the power of the court to adopt any procedure which it considers appropriate in the circumstances of a case for the enforcement of a fundamental right. 184 Justice Bhagwati pointed out:

[I]f we want the fundamental rights to become a living reality and the Supreme Court to become a real sentinel on the qui vive, we must free ourselves from the shackles of outdated and out-moded assumptions and bring to bear on the subject fresh outlook and original unconventional thinking.185

The Apex Court voted for the rejection of adversarial procedure and

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182. Id. at 815.
183. Ibid.
184. Id. at 815-816.
185. Id. at 816.
adoption of new strategies for the protection of fundamental rights from the misperformance or non-performance of state action. While doing so, the judiciary is functioning as one of the organs of the state and thus performing the task allotted to it. If in the process of new judicial activism to control unfair procedure, any aspersion is cast on the executive, that should not be taken in a wrong spirit. The Apex Court also admitted:

When the Court entertains public interest litigation, it does not do so in a cavilling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. The Court is thus merely assisting in the realisation of the constitutional objectives.186

Thus, public interest litigation, which is the outcome of judicial activism has given impetus to article 21 of the Constitution. The enforcement dimension of the judicial process has led the court to issue successive directions and the remiders to the state to comply with the judicial guidelines to protect the rights of the tortured and exploited.187 The highest judiciary allowed the public spirited persons to come forward and become God fathers for the protection of life and personal liberty of the poor and ignorant. Due to the efforts of such public-spirited persons. Hussainara188 cried for the release of undertrials and echo was heard in Khatri189 and Kadra Pehadiya.190 Free legal aid was made part of "fair, just and reasonable" procedure to protect the fundamental rights of the poor. Hoskot191 started

186. Id. at 811.
187. Supra note 143 at 161.
191. Supra note 62. See also infra Chapter VI.
the movement and Hussainara, Darshana Devi, and Khatri did not lag behind. Sunil Patra and Sheela Barse brought the inhuman and degrading condition of prisons and prisoners before the human rights conscious court. P.N. Thumpy Thera v. Union of India made the court to endorse Francis Coralie Mullin and observed that "the right to life has recently been held by this Court to connote not merely animal existence but to have a much wider meaning to include the finer graces of human civilization". Bandhua Mukti Morcha made right to live with human dignity a fundamental right under article 21. Neeraja Chaudhary released and directed for the rehabilitation of bonded labourers. Olga Tellis recognizing right to livelihood as a part of right to life, brought a shameful picture of pavement dwellers in Bombay before the court:

Rabid dogs in search of stinking meat and cats in search of hungry rats keep them company. They cook and sleep where they ease, for no conveniences are available to them. Their daughters, come of age, bathe under the nosy gaze of passers-by, unmindful of the feminine sense of bashfulness.... The boys beg.

All this activism was given birth by the post-internal emergency Supreme Court and it is now evident that the Apex Court is not "a distant abstraction omnipotent in books but an activist institution which is a cynosure of public hope".

192. Supra note 188. See also infra Chapter VI.
194. Supra note 189.
195. Supra note 81. See infra Chapter VI.
197. A.I.R.1984 S.C.74. See infra Chapter VIII.
198. Supra note 90. See also infra Chapter VII.
199. Supra note 179. See also infra Chapter VII.
201. Supra note 107. See also infra Chapter VIII.
202. Id. at 183.
203. Supra note 81 at 1589.
The widest amplitude that can be given to the right to life and personal liberty is most welcome. The point is raised that then all the suffering of the people, political mismanagement and corruption and any other conceivable governmental action or inaction can be said to be violative of article 21 and perhaps no state activity can be spared from the purview of the Supreme Court as a public interest litigation. Its logical extension could mean the taking over the total administration of the country from the executive by the court.\(^{204}\) It is feared that the executive may find little comfort with the court's new role in settling matters of administration over which it has little expertise or no claim. The court is already looked upon as a hostile branch of the government by the executive and public interest litigation contains all potentials for a possible confrontation between the court and the executive. At times the state governments may even be reluctant to faithfully implement the interim directions issued by the court for providing temporary or situational relief to the victims of constitutional violations.\(^{205}\) This is clear from the fact that how far the state governments carried out the judicial directions given by the Summit Court in Hussainara,\(^{206}\) Sunil Batra(II),\(^{207}\) Khatri,\(^{208}\) Francis Coralie Mullin,\(^{209}\) Sheela Barse v. Union of India\(^{210}\) or Upendra Baxi v. State of U.P.\(^{210a}\)

Justice Tulzapurkar has also criticised this intervention by the Court. According to him, in the name of alleviating the grave public injury, 

\(^{204}\) See supra note 141 at 37.
\(^{205}\) See supra note 143 at 169.
\(^{206}\) Supra note 188.
\(^{207}\) Supra note 81. For detail discussion see infra Chapter VI.
\(^{208}\) Supra note 189. In this case, when the Supreme Court asked the State of Bihar to produce before it the various enquiries on Bhagalpur blinding case, the state avoided a disclosure of important information by agreeing for holding a CBI inquiry. Now it is no longer possible for government to claim executive privilege in respect of disclosure of documents and proceedings of enquiries in order to frustrate a PIL petition. Supra note 167.
\(^{209}\) Supra note 90.
\(^{210}\) Supra note 196. For detail discussion see infra Chapter VI.
the court should not arrogate to itself the role of an administrator look­
ing after the management of all non-functioning or mal-functioning public bodies.211 He felt that the court should not have asked for the list of
names of the police officers and doctors involved in the Bhagalpur Blindings
case212 from CBI. He stated that the court’s over-anxiety towards the conduct
of prosecution was subversive of the fair procedure requirement of Maneka.
He observed:

With the highest Court of the land supervising and
overseering the progress and conduct of the case
against them with a view to ensure vigorous prosecu­
tion and effective trial, will the concerned accused,
the police officers and doctors feel assured of a
fair trial, Is not the court violating the spirit of
Article 21 which according to Maneka Gandhi's case
must ensure just and fair procedure for trial?213

The views of the learned judge do not seem to be well-founded in
view of the activist approach of the Supreme Court particularly in the
post-internal emergency era. The courts in the exercise of the jurisdiction
are competent, in fact, constitutionally bound to pass such decrees or make
such orders as are necessary for doing "complete justice" in any cause or
matter pending before them.213a Whenever and wherever one organ of the state,
that is, executive in the present case fails to discharge the assigned
function, the other organ of the state has to step in. The role of the
judiciary in this regard had been encouraging in the post-internal emergency
era.

Professor Griffith also talked about the risk of judicial inter­
ference with the executive. He pointed out:

There is danger that the executive will react against
the courts in a way which will be designed finally to

9 at 14.
212. Supra note 189.
213. Supra note 211.
213a. See article 142(1) of the Constitution.
The court from whole areas of public administration. There is always a balance of power between the courts and the executive. This is particularly obvious in a country, like India, which has a written constitution. There is this balance. It does move. It does change. But if one side or the other, either the executive or the judiciary, overloads the balance in one direction, and puts pressure on the other side beyond what that side regards as tolerable, then some sort of explosion generally takes place. And in the particular area of the relationship between judiciary and executive it is better, if possible, to avoid explosions.214

It is submitted that judicial activism of today is an healthy trend. It makes the Constitution, dynamic document and enables the accommodation of the aspirations of the vast masses of our people. But it has its limits. In a system of government wherein the court is the final interpreter of the Constitution and its own powers, this activism must be legitimised by the constituencies and the consumers of the administration of justice. In any case, the delicate balance between the three organs of the state at any time must not be overloaded in favour of any of them beyond tolerable limits. A continuous assessment of this legitimisation, however, is indispensable in a dynamic policy no matter that the evaluations differ.215

It is also feared that the concept of public interest litigation will encourage vexatious litigants to file a large number of cases and as a result, the judicial process will be abused causing further delay in the administration of justice and opening a floodgate of litigation.216

Justice Krishna Iyer rejecting this fear in Bar Council of Maharashtra v. M.V. Dabhokar,217 observed:

215. See supra note 141 at 40.
The possible apprehension that widening legal standing with a public connotation may unloose a flood of litigation which may overwhelm the judges is misplaced because public resort to court to suppress public mischief is a tribute to the justice system.218

The Australian Law Reform Commission also opposed this argument:

The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the court.219

Schwartz and Wade also did not agree with the view that public interest litigation would open the floodgates of litigation. They observed that "litigants are unlikely to expand their time and money unless they have real interest at stake. In the rare cases where they wish to sue merely out of public spirit why should they be discouraged?"220

Justice Krishna Iyer also pointed out in Fertilizer Corporation Kamgar Union v. Union of India:221

We cannot be scared by the fear that all and sundry will be litigation happy and waste their time and money and the time of the Court through false and frivolous cases.222

In People's Union for Democratic Rights,223 Justice Bhagwati (as he then was) pointed out that there was misconception in the mind of some lawyers, journalists and men in public life that public interest was unnecessary cluttering up the files of the court and adding to the already staggering arrears of cases pending in the court for years. Those who were decrying public interest litigation did not realise that "it is only the moneymen who have so far had the golden key to unlock the doors of justice" and then for the first time the portals of the court were being thrown open.

218. Id. at 2106.
219. Quoted in supra note 165 at 355.
220. Supra note 173.
221. Supra note 165.
222. Id. at 354.
223. Supra note 176.
to the poor and the downtrodden, the ignorant and the illiterate and that their cases were coming before the courts through public interest litigation.224

Professor S.P. Sathe, while agreeing with Justice Bhagwati, cautioned that public interest litigation should not become a resort of the trigger happy litigants or of professional litigants, or another method of political agitation. The task of bringing about change in the system cannot be brought through the judicial process. Public interest litigation is method of increasing accountability of the government but they are not a panacea for social injustice. There are limits to what can be achieved through judicial process. Therefore, he suggested that effective methods of dispute settlement and redressal of citizen's grievances against the administration must be provided so that occasions for going to courts are reduced. The government itself can do a lot by cutting down its own litigation because the government litigation constitutes the bulk of litigation before courts.225 S.N. Jain had also made the court conscious that "while using their newly got power...The courts should be selective in accepting public interest litigation".226

In Sheela Barse v. Union of India,227 the Court gave directions regarding public interest litigation. The court declared that in public interest litigation, the petitioner has no vested right to demand expeditious final disposal. It criticised the petitioner's unfounded allegations that

224. Id. at 1476. See also Bihar Legal Support Society, New Delhi v. C.J. of India, A.I.R.1987 S.C.38, where the court observed that the strategy of public interest litigation was evolved in order to bring justice within the easy reach of the poor and disadvantaged sections of the community. Id. at 39. See also Veena Sethi v. State of Bihar, A.I.R.1983 S.C.339.
225. Supra note 216 at 11.
the court had become dysfunctional and that the final disposal of the main petition was not expeditiously done. The court held that acknowledging any such status of a dominus litis to a person who brings a public interest litigation, will render the proceedings in public interest litigations vulnerable to and susceptible of a new dimension which might, in conceivable cases, be used by persons for personal ends resulting in prejudice to the public weal. The proceedings in a public interest litigation are, therefore, intended to vindicate and effectuate the public interest by prevention of violation of the rights, constitutional or statutory of sizeable segments of the society, which owing to poverty, ignorance, social and economic disadvantages cannot themselves assert and quite often not even aware of those rights. The "rights" of those who bring the action on behalf of the others must necessarily be subordinate to the "interests" of those for whose benefit the action is brought.

In this case, the petitioner wanted to withdraw from the court on the ground that she could not represent her case with dignity. The court responded to this allegation and stated that in the existing system, the parties who seek recourse to courts have to submit themselves to the jurisdiction and discipline of the court. Their conduct, in relation to the proceedings, is liable to be regulated by the court. This is not a matter of expression or assertion of any superiority but is merely a necessity and a functional imperative.

The court also held that in public interest litigation, it would be inappropriate for party to litigation to write letters to judges.

228. Id. at 2213-2214.  
229. Id. at 2214-2215.  
230. Id. at 2222.  
231. Id. at 2221.
The contention of the petitioner was not agreed upon that applicant is entitled to sustain her right to be the "petitioner-in-person" in a public interest litigation and that the proceedings cannot be proceed with after delinking her from the proceedings. The court held that in public interest litigation, no litigant can be permitted to stipulate conditions with the court for the continuance of his or her participation. The petitioner cannot claim that proceedings should not be continued on his/her withdrawal by anybody else.232

Thus, the Apex Court has at a right juncture (when this public interest litigation was facing criticism) created a control mechanism so that this devise should not be misused. The judiciary innovated device must be controlled by the judiciary itself. It is finally submitted that this new innovation and creation of the Summit Court has proved to be a boon for "We, the People of India".

(D) An Appraisal

The justice-conscious and liberty protecting dimensions of the law complex demands revolutionary juristic thinking and post internal emergency Supreme Court gave a living proof of it by making article 21 as binding mandate against draconian laws and blind justice.

The Apex Court marked the beginning of a most astonishing development of the law in Maneka. It is with this decision that the court burst forth into unprecedented creative activity and gave to the law a new dimension and a new vitality. Until this decision was given, the view held by this court was that article 21 merely embodied a facet of the Diceyian concept of the rule of law that no one can be deprived of his personal liberty by executive action unsupported by law. It was intended to be no

232. Id. at 2222-23.
more than a protection against executive action which had no authority of law. 233

In Maneka, Justice Bhagwati (as he then was) held that procedure under "procedure established by law" in article 21 meant "fair, just and reasonable procedure" and not oppressive, fanciful or arbitrary. He also made the principles of natural justice a component part of article 21. But he kept Gopalan on "law" under "procedure established by law" intact by holding that law meant "enacted law" and not "fair, just and reasonable law". He saved the Passport Act from being declared unconstitutional by reading fairness in it. This half-way activist approach of Justice Bhagwati really gives a surprise why, while demanding fairness in the procedure he did not bother for the unfairness, unjustness and unreasonableness of the law which prescribes unfair procedure. Had Bhagwati done it, Maneka could have been the birth place not only of procedural due process but also of substantive due process.

Justice Chandrachud (as he then was) agreed with Justice Bhagwati that procedure should be "just, fair and reasonable" but warned against the inclusion of "due process" because if "due process" was literally included it would bring change in the thinking of the judges. In fact, the fear was that once "procedural due process" was allowed to become a part of article 21, it would be difficult to stop "substantive due process".

Chief Justice Beg found that the elements of "due process" for preventive detention were fully covered by article 22 of the Constitution. At the same time, he agreed to treat procedure as "fair procedure" in the areas where article 22 was not applicable. When he held that the substantive as well as procedural laws made to cover the areas not covered by article 22 must satisfy the requirements of both articles 14 and 19 of the Constitution, did it

233. See supra note 87 at 1339.
not show that he wanted to test both the substantive as well as procedural
laws on the touchstone of fairness and reasonableness.

Justice Krishna Iyer was the lone voice crying for the adoption of
the substantive as well as procedural fairness under article 21. He not
only wanted to protect the "life", which is most dear to human beings,
from the arbitrary action but also from the legislative callousness because
he felt that law does not become lawful merely by its legitimation by three
legislative readings and one assent but it must be in accordance with constitu­
tional provisions.

Justice Kailasam, in his dissent, kept Gopalan intact regarding "law"
as well as "procedure" under "procedure established by law", that is,"law"
meant enacted law and "procedure established by law" meant procedure laid
down by the enacted law.

Thus, Maneka only freed "procedure" from Gopalan and Gopalan on law
is intact. The result is that the substantive rights poured into personal
liberty and the principles of natural justice woven into procedure are avail­
able only against the executive. The legislature is even now not subject to
article 21. So a legislature not subject to article 21, can cock a snook at
the substantive rights in "personal liberty" and the procedural safeguards
in procedure. The liberalism pervading the construction of "personal liberty"
and "procedure" becomes real and meaningful only when law is freed from
Gopalan. To enrich "procedure" and enlarge "personal liberty" without treating
"law" as reasonable law, is to try to build the second and the third floor
first. Only a balanced construction of all these expressions can transform
article 21 into a palladium of liberty. The nightmarish experience and the
macabre developments of 1975 teach the valuable lesson that the executive
can acquire a complete stranglehold over the legislature to make it enact
draconian laws. Even after Maneka, article 21 cannot prohibit enactment
of such laws. In Maneka, only Justice Krishna Iyer was alive to this fact who treated "law" as reasonable law.

In post Maneka period, Justice Krishna Iyer followed his own approach in Maneka and Hoskot and Sunil Batra I and II. Justice Desai treated Justice Krishna Iyer's view in Maneka as majority view and included in Sunil Batra I & II both the substantial as well as procedural due process. Justice Bhagwati in Hussainara, Francis Corallie Mullin reiterated his view in Maneka that "procedure" should be "fair and reasonable", but in his minority opinion in Bachan Singh, he followed Justice Krishna Iyer's opinion that both "law" as well as "procedure" under "procedure established by law" should be "fair, just and reasonable". The majority in Bachan Singh voted for only procedural fairness. At this juncture A.K.Roy gave a shock by not accepting "due process" as a part of article 21. But in Ranjan Dwivedi, the Supreme Court did not hesitate to admit that it was difficult to hold in view of Maneka that the substance of American "due process" had not still been infused into the conservative text of article 21. Olga Tellis also joined hands to make fairness an integral part of article 21. In Kehar Singh v. State(Delhi Admn.), the Supreme Court held that"procedure established by law" means procedure as was on the day on which Constitution was adopted. Therefore, by amending the statute, the effect of the procedure established by law indicated in article 21 could not be taken away.

Thus, the post-Maneka Supreme Court has revolutionised article 21 but the revolution would be complete when it finally becomes the counterpart of American "due process" in India. The question remains how far this activist approach can digest the American "due process". The Constituent Assembly did not favour the inclusion of "due process" clause under the Indian Constitution. But after that the concept of "due process" started travelling
the same wavelength as it did in the United States of America. Just like the Slaughter House cases did not allow the substantive "due process" similarly Gopalan totally exiled the "due process" from article 21. The minority opinion in Slaughter House became the majority opinion in Smyth v. Ames, similarly, the minority opinion in Gopalan, which favoured the existence of "due process", that is, reasonableness of law and procedure impressed the majority in Maneka. Maneka became the birthplace of "due process" in the guise of "fairness, justness and reasonableness" of procedure. Only Justice Krishna Iyer favoured reasonableness of "law". The post Maneka decisions were fluctuating sometime allowing only procedural due process and at times substantive due process as well.

No doubt, the Constituent Assembly did not include the "due process" clause but it discussed negative points for exclusion as well as inclusion of the "due process". It feared that if it was not included, the legislature might enact unreasonable laws and infringe fundamental rights. This fear became a living reality and the eye-opener evidence is draconian laws and excesses of internal emergency. It was thought that if it was included then the decision of the validity of any legislation would be left in the hands of five-six judges sitting in the bench. This fear did not come true and the Habeas Corpus case is the living proof where the judiciary failed to protect life and liberty from the cruel clutches of legislature as well as executive.

Now Mithu is a clear cut example of the adoption of substantive due process by the Apex 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 life sentencee.
Judicial activism of the post-internal emergency era made an attempt to clear the image of the Apex Court travestied by a few emergency decisions. It evolved the concept of fair procedure and this concept led the court to leave the adversary procedure and adopt the new innovation 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. The concept of public interest litigation (without this nomenclature) was evoloved by Justice Krishna Iyer even in the pre Maneka period in Mumbai Kamgar Sabha. In post Maneka period also, he emphasised the importance of this concept in Ratlam Municipality and Fertilizer Corporation. Justice Bhagwati gave this concept a comprehensive exposition in the Transfer of judges case and it was further elaborated by the Summit Court in Asiad Workers case and Pandhua Mukti Morcha. Thus, the post Maneka judicial activism impressed upon the Apex Court to liberate itself from the clutches of the traditional technicalities of procedure which is to be followed for access to justice. Maneka made the procedure "fair, just and reasonable" in order to give protection from the executive action which is unfair, unjust and unreasonable. If some public injury is caused and no one is there to move the judicial machinery where lies the value of this judicial activism. Therefore, the Apex Court rightly innovated this new method of public interest litigation where public minded persons who have "sufficient interest" in the matter can move the court. It is worth appreciating that while trodding the path of judicial activism, the Summit Court has always cautioned itself never to allow the misuse of new activist approach and also not to cross the barriers of its own province.

This concept of public interest litigation has been criticised on the ground that it would open the floodgates of litigation and result into conflict with the executive. Rebutting all such criticisms, the Apex Court
has given relief to prisoners, undertrials, workers, bonded labourers, women and children etc. In Sheela Barse, the Supreme Court laid down guidelines regarding this new devise of public interest litigation.

To conclude, article 21 has been given new dimensions by the Apex Court in the post-internal emergency era by innovating the concept of "justness, fairness and reasonableness" in the expression "procedure established by law" under article 21.