

PROCEDURE ESTABLISHED BY LAW *VIS-À-VIS* DUE PROCESS: AN OVERVIEW OF RIGHT TO PERSONAL LIBERTY IN INDIA

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I. Introduction

The concept of right to 'Life and Liberty' as enshrined under Article 21 of the Constitution of India, being a guaranteed fundamental right undoubtedly is very wide in its scope and applicability and with the advent of the modern strides in jurisprudence, with revolutionary pronouncements by the Apex court in judgment after judgment, especially after *Maneka Gandhi*¹, over past three decades or so has assumed wider connotations and implication. Under this noble concept everyone in this country has been guaranteed the right to life and liberty. Indian Judiciary though is restrained, in many ways has evolved itself as a savior of mankind by applying its judicial activism. The realist movement the latest branch of sociological jurisprudence which concentrates on decisions of law courts, regard and contend that law is what Courts say². Public interest litigation changed the character of judicial process by expending the *locus standi* rule³. Right to life and personal liberty is the most cherished and pivotal fundamental human rights. The Indian Supreme Court has created major reforms in the protection of human rights. Taking a judicial activist role, the court has put itself in a unique position to intervene when it sees violations of these fundamental rights.

The right to protection of life and liberty is the main object of Article 21 and it is a right guaranteed against state action as distinguished from violation of such right by private individual Under Art. 21 right to life

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¹ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597: (1978) 1 SCC 248.

² See also, Dr. K.S. Rathore, "Role of Judicial Activism towards protection and promotion of constitutional rights", All India Reporter Sep. 2010, Vol. 97, Part - 1161.

³ Prof. (Dr.) D.K. Bhatt, "Judicial Activism through Public Interest Litigation: Trends and Prospects", Indian Bar Review Vol. XXV (1) 1998.

includes the right to live with “Basic Human Dignity” with the necessities of life such as nutrition clothing, foods, shelter over the head, facilities for cultural and socio-economic well being of every individual. Art. 21 protects the “Right to life” a guaranteed and derived there from the minimum needs for existence including a better tomorrow.

Article 21, though couched in negative language, confers on every person the fundamental right to life and personal liberty which has become an inexhaustible source of many other rights⁴. On the question of applicability of Art. 21 to non-citizens, the Supreme Court has emphasized that even those who come to India as tourists also “have the right to live, so long as they are here, with human dignity, just as the state is under an obligation to protect the life of every citizen in this country, so also the state is under an obligation to protect the life of the persons who are not citizens”⁵. These rights have been given paramount position by our courts.⁶

The Supreme Court of India played a vital role in almost every part of the society through its self generated concept of judicial activism⁷. In the area of human rights it has been facilitated in considerable measure by PIL. Executive excesses resulting in denial of basic rights of detenus and under trials have continued to engage the court’s attention in this jurisdiction which has made possible the access of these causes to the court in a direct and expeditious manner.⁸

The 5th Amendment of the U.S. Constitution lays down *inter alia* that “no person shall be deprived of his life, liberty or property, without due process of law”. In India, this expression was changed to procedure established by law. In the United States this phrase “due process” has been one of the areas of Constitutional law involving more cases and controversies.

⁴ Bhagwati, J. in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597, 620.

⁵ *Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988 at 998: (2000) 2 SCC 465.

⁶ *Kehar Singh v. Union of India*, (1989) 1 SCC 204: AIR 1989 SC 653.

⁷ See also, Dr.K.S.Rathore, “Historical Overview of Judicial Activism in India”, *Indian Bar Review* Vol. XXXIX (2) 2012.

⁸ S. Muralidhar, “Public Interest Litigation” *Annual Survey of Indian Law* Vol. XXXI : 1995.

Due process consists of two parts: procedural and substantive. Procedural due process requires fair procedure, i.e., notice and hearing. Substantive due process, on the other hand examines substantive content of legislation⁹.

The expression “procedure established by law” means procedure laid down by statute or procedure prescribed by the law of the state¹⁰. Accordingly, first there must be a law justifying interference with the person’s life or personal liberty, and secondly, the law should be a valid law, and thirdly, the procedure laid down by the law should have been strictly followed. In the absence of any procedure prescribed by the law sustaining the deprivation of personal liberty, the executive authorities shall violate Article 21 of the interfere with the life or personal liberty of the individual.

Article 21 was confined to life and personal liberty and did not include property. But even with regard to liberty, the makers of the Constitution were apprehensive of extensive judicial review. They had provided for preventive detention, which till then had been used only during emergencies such as war or rebellion. The words ‘procedure established by law’ was specific and it was hoped that they would not give any scope for judicial veto against such legislation. While doing so, they unknowingly made the valuable fundamental right to life and liberty entirely dependent on the goodwill of the legislature.¹¹ Intervening in this debate, *Dr. B.R. Ambedkar* had said:¹²

“The question of ‘due process’ raises, in my judgment, the question of the relationship between the legislature and the judiciary to decide whether any particular law passed by the legislature is ultra vires or intra vires in reference to the powers of legislation which are granted by the Constitution to the particular legislature..... The ‘due process clause’, in my judgment, would give the judiciary the power to question the law is in keeping with certain fundamental principles relating

⁹ Dr. K.C. Joshi, ‘The Constitutional law of India’, Ist (ed.) 2011 p.244

¹⁰ V.N. Shukla; Constitution of India 11th ed. P.199.

¹¹ S.P. Sathé; “Judicial Activism in India Transgressing Borders and Enforcing Limits” 2nd (ed.) Oxford University press.

¹² CAD VOL. 7, P. 1000.

to the right of the individual. In other words, the judiciary would be endowed with the authority to question the law not merely 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 made by the State on the ground that they violate certain fundamental principles."

II. Strict interpretation era and Governmental reaction to emerging trends of "judicial activism" and activist judges

In *A.K. Gopalan v. State of Madras*¹³ it was held that the expression "procedure established by law" means procedure enacted by a law made by the state. The Supreme Court, by a majority, rejected the argument that the "Law" in Article 21 is used in the sense of jus and lex the just law and that it means the principles of natural justice on the analogy of "due process of law" as interpreted by the American Supreme Court. That in effect amounted to holding that Article 21 was a protection only against the executive and not against the legislature. This interpretation was taken to its logical end in *ADM, Jabalpur v. Shivkant Shukla*¹⁴ where the Supreme Court held that Article 21 was the sole repository of the right to life and personal liberty against its illegal deprivation by the executive and in case enforcement of Article 21 was suspended by a presidential order under Article 359, the court could not enquire whether the execution action depriving a person of his life or personal liberty was authorized by law.

It was contended that the obligation of the Government to act according to law stems from the suspension of the rule of law, and the suspension of Article 21 did not automatically entail the suspension of rule of law, the Supreme Court, with the dissent of Khanna, J., legitimized the suspension of the writ of habeas corpus during the period of Emergency on the basis of higher claims of national security.¹⁵

¹³ AIR 1950 SC27.

¹⁴ (1976) 2 SCC 521: AIR 1976 SC 1207.

¹⁵ V.N. Sukla, 'Constitution of India', 11th (ed.).

The majority opinions by and large relied primarily on the language of the Presidential Order. The order, unlike the order of 1962 impugned in *Makhan Singh*¹⁶ which was confined to detentions under the Defence of India Act, and the rules made under it, was of general nature which applied to all detentions without reference to any law.

Before *Maneka Gandhi*¹⁷ there were few instances where the judges played positivist role by giving their majority or minority judgments. In this connection since 1951, questions have been raised the scope of the constitutional amending process in Article 368. The basic question raised has been whether the Fundamental Rights were amendable so as to dilute or take away any fundamental right through a constitutional amendment?

In *Shankari Prasad Singh v. Union of India*¹⁸, the first case on the above question came before the Supreme Court for interpretation. The court held that the terms of Article 368 are perfectly general and empower Parliament to amend the Constitution without any exception. The same question was raised again after 13 years in 1964 in *Sajjan Singh v. State of Rajasthan*.¹⁹ The conclusion of the Supreme Court in *Shankari Prasad* as regards the relation between Arts. 13 and 368 was reiterated by the majority. Though there of the five judges (Gajendragadkar C.J. and Wanchoo and Dayal JJ.) in that case fully approved *Shakari Prasad* case two of them (Hidayatullah and Mudholkar, JJ.) in their separate but concurring opinions expressed serious doubts whether fundamental rights created no limitation on the power of amendment.

As will be seen, *Golak Nath*²⁰, the next case, was based on Hidayatullah, J's argument of non-amendability of Fundamental Rights, but Kesavananda was based on Mudholkar, J's view of basic features.

It is worth noting that these two judges who delivered these two minority opinions were considered as positivist judges and it was their approach that played a significant role in the Indian judiciary in later years.

Perhaps, encouraged by the above-stated remarks of these two judges, the question whether any of the Fundamental Rights could be

¹⁶ *Makhan Singh v. State of Punjab*, AIR 1964 SC 381.

¹⁷ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

¹⁸ AIR 1951 SC 458.

¹⁹ AIR 1965 SC 845.

²⁰ *L.C. Golak Nath v. State of Punjab*, AIR 1967 SC 1673 : 1967 (2) SCC 762.

abridged or taken away by parliament in exercise of its power under Article 368 was raised again in *Golak Nath* in 1967.²¹

The majority now held, overruling the earlier cases of *Shankari Prasad*²² and *Sajjan Singh*²³, that the Fundamental Rights were non-amendable through the Constitutional amending procedure set out in article 368.

The majority judgment had taken the view that the word “law” in Art. 13 included a constitutional amendment as well, not be curtailed or diluted.²⁴

In, 1971, Parliament enacted the Constitution (Twenty Fourth) Amendment Act introducing certain modification in Art.13 and 368 to get over the *Golak Nath* ruling and to assert the power of parliament, denied to it in *Golak Nath*, to amend the Fundamental Rights.

As could be expected, the Constitutional validity of both the Amendments, viz, 24th and 25th, was challenged in the Supreme Court through an Art.32 writ petition in *Kesavananda Bharati v. State of Kerala*²⁵. The matter was heard by a bench consisting of all the 13 judges of the court because *Golak Nath*, the 11-judge Bench decision was under review.

The court now held that the power to amend the Constitution is to be found in Art. 368. The amending power was now subjected to one very significant qualification, viz, that the amending power cannot be exercised in such a manner as to destroy or emansculate the basic or Fundamental Features of Constitution.

The supersession of the three senior judges (Shelat, Hegde and Grover JJ.) in the matter of the appointment of the Chief Justice of the Supreme Court, on the day after the Supreme Court delivered its judgment in the Fundamental Rights case ignited a controversy throughout the Country.²⁶

²¹ L.C. Golak Nath v. State of Punjab, AIR 1967 SC 1673 :1967 (2) SCC 762.

²² AIR 1951 SC 458.

²⁴ Supra no. 18.

²⁵ AIR 1973 SC 146.

²⁶ K. Subba Rao, “The Supersession of Judges - The Price of Executive Interference” “A Judiciary made to Measure” Edited by N.A. Palkhivala.

After the Emergency the fierce light of controversy has been turned on the Supreme Court. The controversy was sparked off by the incredible order passed by the Supreme Court in the *A.D.M. Jabalpur*²⁷ and this fierce light has blazed even more fiercely because when faced with the stern test posed by the Emergency the High Court's rose to the occasion by upholding the rule of law and the personal liberty of citizens. Faced with the same test the Supreme Court sank under the test when in the *Habeas Corpus case*, it passed an order which in effect declared that law had ceased to operate in India in respect of the personal liberty of the citizen. If for example, Khanna J. had been preventively detained for delivering, a brave dissenting judgment, a judgment which the censor had blacked out, no court could have given him relief against such outrageous violation of the law.²⁸

Mrs. Gandhi had superseded Khanna J., the senior most judge, for the office of the Chief Justice of India because of his brave dissenting judgment in the *Habeas Corpus case*.

III. 'Procedure established by law' in pre-*Maneka Gandhi* era

Immediately after the Constitution became effective, the question of interpretation of these words arose in the famous *Gopalan*²⁹ where the validity of the Preventive Detention Act, 1950, was challenged. The main question was whether Article 21 envisaged any procedure laid down by a law enacted by a legislature or whether the procedure should be fair and reasonable.

On behalf of *Gopalan*, an attempt was made to persuade the Supreme Court to the reasonableness of the Preventive Detention Act, or for that matter, any law depriving a person of his personal liberty. One of the main arguments was the expression 'procedure established by law' introduces into India the American concept of procedural due process which enables the courts to see whether the law fulfils the requisite elements of a reasonable procedure.

The words 'procedure established by law' was also construed liberally to include all those essential aspects of procedure that constitute

²⁷ *A.D.M. Jabalpur v. Shivkant Shukla* AIR 1976 SC 1207.

²⁸ H.M. Seervai, "Constitutional Law of India", 4th (ed.) vol.3.

²⁹ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27: 1950 SCR 88.

the due process of law. The makers of the Constitution had purposely avoided the use of that expression because they were apprehensive of the import of the substantive due process concept into the Constitution. But procedural due process provides the essentials of the rule of law. In *Gopalan*, the court had held that the procedure established by law meant the procedure prescribed by the enacted law. Between the two meanings of the word 'law', namely 'lex' (enacted law) and 'Jus' (Justice), the court had chosen the former and rejected the latter³⁰.

On the other hand, Fazl Ali, J., disagreeing with the majority view, held that the principle of natural justice that 'no one shall be condemned unheard' was part of the general law of the land and same should accordingly be read into Art. 21.

It was contended in *Gopalan* that the expression 'procedure established by law' Art. 21 was synonymous with the American concept of 'due process' and therefore, the reasonableness of the Preventive Detention Act, or for that matter, of any law affecting a person's life or personal liberty, should be justifiable in order to assess whether the person affected was given a right of fair hearing. The Supreme Court rejected the contention giving several reasons:

First, the word 'due' was absent in Art. 21. This was a very significant omission for the entire efficacy of the procedural due process concept emendates from the word 'due'.

Secondly, the draft Constitution had contained the words 'due process of law' but these words were later dropped and the present phraseology adopted instead. This was strong evidence to show that the Constituent Assembly did not desire to introduce into India the concept of procedural due process.

Thirdly, the American doctrine generated the countervailing, but complicated, doctrine of police power to restrict the ambit of due process. If the doctrine of due process were imported into India then the doctrine of police power might also have to be imported which would make things very complicated³¹.

³⁰ S.P. Sathe; "Judicial Activism in India Transgressing Borders and Enforcing Limits" 2nd (ed.) Oxford University press.

³¹ M.P. Jain, 'Indian Constitutional law' 5th (ed.) pp 1260-1263.

The judgment in *ADM, Jabalpur v. Shiv Kant Shukla*³² has been characterized as one of the worst decisions rendered by the Supreme Court in its entire career because it struck at the very foundations of Constitutionalism and the rule of law in the country.

The most crucial question which was raised in this connection was regarding the scope of judicial review of a detention order issued under the provisions of MISA. Was it possible to challenge an order of preventive detention on the ground that it was inconsistent with the provisions of MISA, or that it was mala fide.

By a majority 4 to 1 the Supreme Court overruled the views expressed by the various High Courts and held that in view of the presidential order of 1975, no person had any *Locus Standi* to move any petition before a high court under Art. 226 for a writ of habeas corpus, or any other writ, to challenge the legality of a detention order or any ground whatsoever, e.g., it was not under, or, in compliance with the Act, or was illegal, or was based on extraneous considerations.

Khanna, J., maintained that even in the absence of Art. 21, the State has no power to deprive a person of his life or liberty without the authority of law. “This is the essential postulate and basic assumption of the rule of law and not of men in all civilized nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning.”

IV. “Procedure established by law” after Maneka Gandhi

The word ‘life’, ‘personal liberty’ and ‘procedure established by law’ were debatable among the members of the Constituent Assembly. The most important words in this provision are procedure established by law.

Judicial activism can be attributed to the court to merely two of its path breaking, pioneering decisions viz., *Maneka Gandhi v. Union of India*³³ and *Sunil Batra v Delhi Administration*³⁴. Notwithstanding the long, tedious and heated debate that occurred in the Constituent Assembly on the issue of whether ‘due process of law’ should be the guiding beacon

³² AIR 1976 SC 1207 : (1976) 2 SCC 521.

³³ Supra no. 1.

³⁴ AIR 1980 SC 1579.

for article 21 and its rejection, the Supreme Court in *Maneka Gandhi v. Union of India*³⁵ held that procedure established by law meant procedure that eventually was reasonable fair and just. This decision rendered void the plain and simple meaning of ‘procedure established by law’ and introduced for the first time the grand canon of ‘due process of law’. In *Sunil Batra v. Delhi Administration*³⁶ the court accepted a mere epistle addressed to the chief Justice of India as writ petitions and decided to act upon it. The case redefined the scope of *Locus Standi* under the Indian Constitution and introduced what later came to be known as the epistolary jurisdiction. There two judgments echo the core of judicial activism in India.

In *State of Maharashtra v. Praful B. Patel*³⁷, a Division Bench of S.N. Variava and B.N. Agrawal, JJ. of the Supreme Court considered an important issue whether recording of evidence by way of video-conferencing violated ‘procedure established by law’? Section 373 of the Code of Criminal Procedure, 1973 provides that evidence in the course of trial or other proceedings shall be taken in the presence of the accused or in the presence of his pleader except as otherwise expressly provided. It was contended that video conferencing could not be allowed as the rights of an accused person under Article 21 cannot be subjected to a procedure involving visual reality. The court taking into account the advancement of science and technology held that video-conferencing has nothing to do with virtual reality so long as the accused and his pleader are present when evidence is being recorded by video-conferencing. Such evidence, if recorded in the presence of the accused would fully meet the requirements of sec. 373 Cr.P.C. Recording of such evidence would be as per ‘procedure’ established by law and valid under Article 21 of the Constitution of India.³⁸

V. ‘Free, fair and speedy trial’ as a necessary corollary of ‘procedure established by law’

“A free and fair trial is a sine qua non of Article 21 of the Constitution. It is well established law that justice should not only be done

³⁵ Supra no. 1.

³⁶ AIR 1978 SC 1675 : AIR 1980 SC 1579: (1980) 3 SCC 488.

³⁷ AIR 2003 SC 2053 : (2003) 4 SCC 601.

³⁸ AIR 2003 SC 2053, para 19.

but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the minds of the petitioner³⁹.”

In *Zahira Habibulla*⁴⁰ free and fair trial the atmosphere in which the case is tried should be conducive to the holding of a fair trial. The absence of a congenial atmosphere for such a fair and impartial trial was held to be a good ground for transfer of case from Gujarat to Maharashtra further, the court said, the golden thread which runs said through all the decisions cited on behalf of the parties, is that justice must not only be done, but must also be seen to be done.

The liberty of an accused cannot be interfered with except under due process of law. The expression ‘due process of law’ shall deem to include fairness in trial. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of fair investigation and trial. Every effort should be made by the print and electronic media to ensure that the distinctions between trial by media and informative media should always be maintained. Trial by media should be avoided particularly, at a stage when the suspect is entitled to the Constitutional protections. Invasion of his rights is bound to be held as impermissible.⁴¹

In *Nupur Talwar v. Central Bureau of Investigation Anr.*⁴² a Division Bench of the Supreme Court consisting A.K. Patnaik and Jagdish Singh Khehar JJ. held that while dealing with issues as in the instant case, High Courts and this Court have repeatedly observed in their orders, that the trial court would determine the controversy uninfluenced by observations mad. Yet, inferences and conclusions drawn by superior courts, on matters which are pending adjudication before trial courts (or other subordinate

³⁹ [(2004) 3 SSC 788]: (AIR 2004 SC 2753:2004 AIR SCW 1240).

⁴⁰ *Zahira Habibulla H.Sheikh v State of Gujarat*, AIR 2004 SC 3114: 2004 AIR SCW 2325.

⁴¹ *Sidhartha v Vashisht @ Manu Sharma v. State (N.C.T. of Delhi)*. AIR 2010 SC 2352.

⁴² AIR 2012 SC 1921.

courts) cannot be easily brushed aside. I shall, therefore, endeavor not to pre-maturely record any inferences which could/would prejudice one or the other side.

Fair trial includes open trial of an offender where the public, media, etc. have full access which is also a requirement of section 327, Cr P C. A trial held inside jail premises cannot be considered to be unfair for this reason alone if the lawyers, media and public were free to watch the court procedures. In *Md. Shahabuddin v. State of Bihar*⁴³ in exercise of its administrative powers under Cr. P.C., the Patna High Court had issued the impugned notification that for expeditious trial, all pending session cases against the appellant shall be tried inside the Siwan district jail premises. The court found nothing wrong in the impugned notification as the trial continues to be fair irrespective of the place where it is held provided all are allowed subject to security.

VI Amendment of the US Constitution gives right to a speedy trial to the accused person. There is no express provision in Indian Constitution. In *Mohd. Husain alias Julfikar Ali v. State (Govt. of NCT), Delhi*⁴⁴, the court held that legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by International Covenants and Human Rights Declarations. If an accused too poor to afford a lawyer is to go through the trial cannot be regarded as reasonable, fair and just.

In *Mohammed Ajmal Mohammed Amir Kasab v. State of Maharashtra*⁴⁵, 2 Judges Bench consisting justices Aftab Alam and Chandramauli Kr. Prasad of the Supreme Court held that the right to be defended by a legal practitioner comes into force only on the commencement of trial as provided under S. 304 of the Cr.P.C. He needs a lawyer at the stage of his first production before the Magistrate, to resist remand to police or jail custody and to apply for bail. He would need a lawyer when the charge-sheet is submitted and the Magistrate applies his mind to the charge-sheet with a view to determine the future course of proceedings. He would need a lawyer at the stage 3 of framing

⁴³ (2010) 4 SCC 653.

⁴⁴ 2012 Cri.L.J. SC 1069.

⁴⁵ 2012 Cri. L. J. SC 4770.

of charges against him and he would, of course, need a lawyer to defend him in trial. It is therefore, the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice that one would be provided to him from legal aid at the expenses of the state. The right flows from Articles 21 and 22(1) of the Constitution and need to be strictly enforced. Supreme Court as such directed all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned Magistrate liable to departmental proceedings.

Thus, in *Union of India v. G.S. Bajwa*⁴⁶, an Air Force officer claimed that he has been denied legal aid and thus his right to life has been infringed. There is no provision for such of such right in the Constitution of India. Law's delay is proverbial in India. Hundreds and thousands under-trial prisoners languish in jails in inhuman conditions for decades. The mental agony, expense and strain which a person proceeded against in criminal law has to undergo and which, coupled with delay, resulting in impairing the capability and ability of the accused to defend himself, have persuaded the constitutional courts of the country to hold the right to speedy trial a manifestation of fair, just and reasonable procedure enshrined in article 21 of the Constitution. *Rudal Shah v. State of Bihar*⁴⁷, is a glaring example. In *Hussainara Khatoon (I) v. Home Secretary, State of Bihar*⁴⁸, the Court held that though speedy trial is not specifically mentioned in our Constitution, it is implicit in the broad sweep and contents of Article 21 as interpreted in *Maneka Gandhi v. Union of India*⁴⁹. The Court held that 'procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable', fair and just unless that procedure ensures a speedy trial for determination of the guilt of such person.⁵⁰ Similarly, when investigation commenced in November 1976 and

⁴⁶ AIR 2004 SC 808; *Confederation of Ex. Servicemen Association v Union of India*, AIR 2006 SC 2945.

⁴⁷ AIR 1983 SC 1086 : (1983) 4 SCC 141.

⁴⁸ AIR 1979 SC 1360 : (1980) 1 SCC 81.

⁴⁹ AIR 1978 SC 597 : (1978) 1 SCC 248.

⁵⁰ *Kadra Pehadiya v. State of Bihar*, AIR 1981 SC 939.

the Court took cognizance after ten years in March 1986, the Supreme Court quashed the proceedings on the ground of delay in investigation and commencement trial.⁵¹

Personal liberty is one of the cherished goals of the Indian Constitution and the deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under article 21 of the Constitution. The Supreme Court has settled the legal position⁵² that to have speedy justice is a fundamental right, which flows from article 21 of the Constitution. Despite the clear pronouncements of the court on this point, cases involving delay in trial keep coming before the court.

In *Sajjan Kumar v. CBI*⁵³, the appellant was accused of his involvement in anti-sikh riots which had taken place in October, 1984 and charges were framed against him in May 2010 by the trial judge under various sections of the Indian Penal Code, 1860. It was contended that the continuation of the prosecution after about 23 years was against the protection provided by article 21 of the Constitution. Sathasivam j, relying on his own decision in *P. Vijayan*, held that though delay was also a relevant factor and every accused was entitled to a speedy trial under article 21, it would depend on various factors/reasons and materials placed by the prosecution.

The Supreme Court in *Common Cause (I)*⁵⁴, *Common Cause (II)*⁵⁵, *Raj Deo Sharma (I)*⁵⁶ and *Raj Deo Sharma (II)*⁵⁷, laid down bars of limitation beyond which the trial shall not proceed and the accused shall be acquitted. These decisions were either of two judge bench or three judge bench strength. But these directions fixing the time limit within which the trial should be completed were contrary to the observation of

⁵¹ Srinivas Gopal v. U.T. of Arunachal Pradesh, AIR 1988 SC 1729 : (1988) 4 SCC 36.

⁵² Abdul Rehman Antulay v. R.S.Nayak, (1992) 1 SCC 225; Common Cause, A Registered Society v. Union of India (1996) 4 SCC 33; and (1996) 6 SCC 775 and Raj Deo Sharma v. State of Bihar, (1998). 7 SCC 149.

⁵³ (2010) 9 SCC 368.

⁵⁴ 'Common Cause' -A Registered Society v. Union of India, (1996) 4 SCC 33.

⁵⁵ 'Common Cause' -A Registered Society v. Union of India, (1996) 6 SCC 775.

⁵⁶ Raj Deo Sharma v. State of Bihar, (1998) 7 SCC 507.

⁵⁷ Raj Deo Sharma v. State of Bihar, (1999) 7 SCC 604.

the Constitution bench in *Abdul Rehman Antulay v. R.S. Naik*⁵⁸, wherein the Supreme Court had observed that “it is not possible to lay down any time schedules for conclusion of criminal proceedings” and it was further observed that “it is neither advisable nor feasible to draw or prescribe an outer time limit for conclusion of all criminal proceedings.”⁵⁹

In *Shatrughan Singh Chauhan vs. Union of India*⁶⁰, Supreme Court held that undue, inordinate and unreasonable delay in disposal of mercy petition violates Art. 21.

In *Mohd. Hussain Alias Julfikar Ali v. State (Govt. of NCT), Delhi*⁶¹, the Supreme Court held that ‘speedy trial’ and ‘fair trial’ to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed *vis-a-vis* the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused by it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of criminal trial should not operate against the continuation of prosecution and if the right to accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

⁵⁸ (1992) 1 SCC 225.

⁵⁹ Id. At 268-69.

⁶⁰ Cri. L.J. 2014 SC 1327.

⁶¹ (2012) Cri. L. J. SC 4537.

VI. Conclusion-

The true nature and scope of the function of the courts has since long been a matter of debate almost in all the countries regulated by written Constitutions⁶². *A. K. Gopalan* was the initial example where the Supreme Court did not favour the due process principle except Justice Fazl Ali in his dissenting opinion. Although the interpretation given by the Apex Court in *Gopalan* was very consistent with the intention of the framers of Constitution but the abrogation of individual's fundamental rights was a matter of debate. It is submitted that the liberal interpretation of the phrase 'procedure established by law' in *Maneka Gandhi* the court seems to have taken into account the philosophy of law in interpreting the phrase 'procedure established by law' in term of not only what "it is" but also what "it ought to be" and thereby seems to have moved towards due process. An unelected judiciary which is not accountable to anyone except its own temperament has taken over significant powers of Indian Governance⁶³. Further, enhancing personal liberty is a part of good governance. Thus, we can say that the phrase 'procedure established by law' under Art. 21 of the Indian Constitution has acquired the same significance as the 'due process of law' clause in the Constitution of United State of America.

⁶² Also see, Dr. K.S. Rathore, "Right to life and personal liberty in India. - an assessment", All India Reporter Jan 2014 Vol. 101 - Part 1201.

⁶³ See also, Dr. K.S. Rathore, "Institutional Strains Emanating from Judicial Activism in India : An Assessment", Civil & Military Law Journal, Oct. - Dec. 2013 Vol. 49.