

JOURNEY FROM “PROCEDURE ESTABLISHED BY LAW” TO “DUE PROCESS”

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ABSTRACT

The ultimate aim and objective of any democratic country is the attainment of justice and the Members of the Constituent Assembly has made every strive to achieve it. The attainment of this objective depends upon the legal system of the country. The soundness, solidity, integrity and strength of any legal system depends on the fairness of law, rule of law and concern for human rights. In a country like India being the largest democratic country embeds the valuable human rights as a special pearl or jewel in its Constitution. The Right to liberty and life is the core of human rights as it is a precondition and qualification for the enjoyment of rest of the rights. The extraordinary importance of the right to life and liberty is very much evident as it cannot be suspended even during emergency.

To uphold this sacrosanct right, Article 21 is enshrined in the Constitution of India. Article 21 of the Constitution provides for ‘procedure established by law’ whereas the US constitution provides for ‘due process of law’. The terms ‘due process of law’ gives vast and enormous powers to the American Judiciary whereas this is not the same with the Indian Judiciary due to the terms ‘procedure established by law. Despite deliberate omission by the forefathers of the Constitution the Honorable Supreme Court has interpreted the Constitution in such a way that the ‘due process’ has been embraced. This adoption has thereby given the Indian Judiciary vast powers to supervise and invalidate any Union or State action, whether legislative or executive or of any public authority which is perceived by the Court to be ‘arbitrary’ or ‘unreasonable’. Moreover the due process concept has empowered the procedure of law by integrating all of its components and by addressing each one of them with equity, fairness and reasonableness.

KEYWORDS: Article 21, Just, Fair, Reasonable, Due Process, Procedure established by Law

MEANING OF PROCEDURE ESTABLISHED BY LAW

The law which is duly enacted by the legislature is valid if it followed the correct procedure. Thus, it means that a person can be deprived of his life or personal liberty according to the procedure established by law. This means even if the laws are not just, fair and reasonable they are valid. Therefore there may arise risk of compromise to life and personal liberty of individuals due to unjust law.

MEANING OF DUE PROCESS

Due process means that the government as to protect its people from the excesses of the authorities and the government cannot be unjust and unfair or unreasonable. This is what the due process mainly means. Whenever the government abridges the rights of the people without following the proper course established by law then it means that the government is violating the due process and is also against the rule of law. In substantive due process the court checks the constitutionality of the law enacted by the Legislature And the court possesses the power to struck down the law when the court finds that the law is unreasonable, unjust or unfair. In other words we can say that due process involves natural principle of Justice and commands the commands the government not to be unfair to its people. The procedure of government which reduces or deprives person's life and liberty must follow due process. However the due process does not have any exact definition and it varies depending on various factors.

MATHEMATICAL FORMULA OF “DUE PROCESS”

Due Process = Procedure established by law + Justness + Fairness + Reasonableness

EXPLANATION OF THE ABOVE FORMULA

Due process is different from procedure established by law. So, let us first understand what 'procedure established by law means' and then we can strive to understand what 'due process' means. Procedure established by law confers huge power authority upon the government to enact laws. This power to the government makes the government very powerful and mighty and the government becomes the last body to determine what shall be the law, this means that there is no check on the government to ensure that the government will always want the Welfare of the people as because we know and history is evident that governments have done blunder in preserving and protecting the fundamental rights of people and also they legal rights many a times. But in due process the government has to follow fairness, justness and reasonableness. In due process the government is not the ultimate body to enact the laws and implemented it as in due process the courts are conferred with use powers to invalidate any law which doesn't possesses fairness, justness and reasonableness. This makes it evident that in due process the people are in safer hands.

DEVELOPMENT OF DUE PROCESS IN INDIA

The development and enrichment of due process in India has come into play due to two major factors which are as follows :

1. Firstly, due to the interaction between Article 14, 19 and 21.
2. Secondly, due to the interrelation between Articles 20, 21 and 22.¹

Regarding the first reason, the Constitution Makers preferred a neutral phrase "procedure established by law" in Article 21 for the protection of life and personal liberty of persons with a clear intention to avoid the possible judicial vicissitudes pertaining to due process of law.

Deprivation of right to life or personal liberty is unusual course of action taken by the state against any person. The action of deprivation hugely impacts the enjoyment of rights or equality of opportunity. Article 21 of the Constitution of India provides that " No person shall be deprived of his life or personal liberty except according to procedure established by law". The article envisages that if at all life of personal liberty shall be deprived Legal procedure has to be followed, this amplifies the safeguard under which the deprivation has to take place whenever required for .Article 21 prescribe for no definite parameters for the procedures to be laid down but compels the receiving of the radiation from Articles 14 , 19 ,20 , 21 in order to meet the ends of Justice.

PONDERANCE AND DISCUSSION IN THE COUNSTITUENT ASSEMBLY

The Drafting Committee moved the second amendment because it thought that the word due process was abused in American legal system. Further, it was the result of a discussion which the Constitutional Assembly Advisor, Sir B.N. Rau had with Frankfurter J. of the United States of America Supreme Court who expressed that due process clause is undemocratic and burdensome to the judiciary, because it empowered judges to invalidate the legislation enacted by democratic majorities.²

Honorable Dr. B. R. Ambedkar had put forward their submissions at length and delved very deep into this aspect. Hence, there was lots of confusion in this legal position. . Finally, Ambedkar, left the matter to be decided by the Constituent Assembly.³ So, the result, as stated by Dr. Ambedkar, at a later stage,⁴ is that Article 21 gave "a *carte blanche* to make and provide for the arrest of any person under any circumstances as Parliament may think fit." Subsequently, in a close voting, it was decided that the provision of due process of law in the Article for deprivation of life and personal liberty should be removed and the expression

¹ *Jogindar Kumar v. State of U.P. (1994) 4 SCC 260.*

² B.N. Rau had met Justice Felix Frankfurter of the United States Supreme Court for advice in the drafting of the Indian Constitution. Frankfurter told him that he considered the power of judicial review implied in the due process clause both undemocratic – because a few judges could negate legislation enacted by the representatives of a nation and also burdensome to the judiciary. See, Granville Austin, *The Indian Constitution Corner Stone of a Nation*, (New Delhi: Oxford University Press, 2010).

³ Dr. B. R. Ambedkar, *Constituent Assembly Debates*, Vol. VII, (New Delhi: Secretariat, Government of India, 1948-1949), pp. 999-1001.

⁴ M.P.Jain, *Indian Constitutional Law*, 6th edn. (Nagpur:LexisNexis Butterworths Wadhwa, 2010), p.1183.

'according to procedure established by law' be substituted. However, as a mitigation of the members' fear that 'the procedure established by law' would allow the legislature to prescribe any procedure it deemed fit to deprive a person of his life or liberty, a new Article 22 was brought. Dr. Ambedkar said that the Article 'compensated' for what had been done in passing Article 21.

APPROACH OF JUDICIARY TOWARD DUE PROCESS

In the course of time the judiciary of India has played a great role in deciding the future of India and thus, the following has happened :

The terms "procedure established by law" means procedure laid down by a statute or procedure prescribed by the law of the State. After the adoption of the Constitution of India, the words used in the Article 21 came under the light of scrutiny of the Honorable Supreme Court in the historical *Gopalan's* case in which the legality of the *Preventive Detention Act, 1950*⁵ was challenged.⁶ The petitioner Challenged his detention on the ground, *inter alia*, that his detention has affected his rights guaranteed under Article 19 (1) (a), (b), (c), (d), (e), and (g). Further, the petitioner alleged that Section 3(1) of the *Preventive Detention Act, 1950*⁷ gives unreasonable restrictions on the use of rights conferred by Article 19. The petitioner also submitted before the Honorable Court that the law under Article 21 must fulfill the criteria of the due process. That means the law must be not be *lex but jus*. The Honorable Supreme Court held in this very case that the rights guaranteed under Article 19(1) are separate from and independent of the right to personal liberty. Supreme Court also observed that the legislation has hit the article 19 of the Constitution of India. The Right approach is considered the directness of the legislation and not what the conclusion of the detention is. The doctrine of exclusiveness which has been adopted by the Honorable Supreme Court also laid down that laws pertaining with preventive detention and excluded the application of Article 19 and the majority of the judges came at an ending about the non-application of Article 19 in the sphere of Article 21 on the above reasoning, it was considered that the requirement of reasonableness either of law or of procedure could not be super-added to Article 21.⁸ The judges of the Honorable Supreme Court relied on the principle of literal interpretation in respect of "procedure established by law" and neglected the principle of functional interpretation. The perennial question was whether the procedure envisaged by Article 21 may be any procedure laid down by a law enacted by the legislature or whether the procedure should be reasonable and fair.

The term 'law' in Article 21 does not mean enacted law but incorporates or comprehends principles of natural justice so that a law to deprive a person of his life or personal liberty cannot be valid unless it incorporates these precepts in the procedure laid down by it.

The reasonableness of the law of the preventive detention under Article 22 is ought to be judged under Article 19. The expression 'procedure established by law' introduces in India the American concept of procedural due process which confers power on the courts to judge whether the law fulfils the requisite elements of a reasonable procedure.

Therefore, in *Gopalan case*,⁹ an attempt was made to interpret the 'due processes into 'procedure established by law' under Article 21. The Apex Court, by majority rejected all above arguments and held that the word 'law' in Article 21 could not be brought in the same surface to the principles of natural justice because it considered these principles abstract, indefinite . Inclusion of such vague principles in the law brings confusion and uncertainty, therefore the term 'law' was used in the sense of *lex* and not *jus*. Therefore the expression 'procedure established by law' would mean the procedure as laid down in an enacted law.

In *Kharak Sing case*¹⁰, the constitutional validity of regulations 228¹¹ and 236¹² of the *Uttar Pradesh Police Regulations*, in

⁵ Act No. 4 of 1950.

⁶ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 at 91-92.

⁷ Section 3(1) of the *Preventive Detention Act, 1950* empowered the Central or State Government to issue detention order to prevent a person from on the grounds that his acts are prejudicial to security, defense of India, or Security of State or the maintenance of public order or services essential to the community or who is foreigner within the meaning of the *Foreigners Act, 1946* (XXXI 31 of 1946).

⁸ *Ibid.*, at p. 39 and 102.

⁹ AIR 1950 SC 27.

¹⁰ *Kharak Singh v. State of U.P.*, AIR1963 SC 1295.

¹¹ Regulation 228 of *Uttar Pradesh Police Regulations* has defined "history-sheets" as "the personal records of criminals under surveillance". That regulation further directs that a "history-sheet" should be opened only for persons who are or are likely to become habitual criminals or the aiders or abettors of such criminals.

Chapter XX which provided for 'domiciliary visits'¹³ and police surveillance of a suspect's home was challenged before the Supreme Court as violative of Articles 19 (1)(d) and 21 of the Constitution of India. The Honorable Supreme Court observed that only process laid down by valid law could deprive the person's right to life and personal liberty under Article 21. Thus, right to personal liberty and life cannot be deprived on the basis of administrative direction. Obviously, Honorable Supreme Court invalidated an administrative direction of Regulation 236(b) justifying 'domiciliary visits' of police authorities in to the houses of habitual offenders as violative of Article 21. The Honorable Supreme Court depends on the concept laid down in the *Gopalan case*, and refused to scrutinize the issue under Article 19 (1) (d).

In *Nationalisation Bank Case*¹⁴ the Honorable Supreme Court observed that the term Law in Article 21 of the Indian Constitution shall be read with Articles 14, and 19, whenever necessary with a view to enhance the right to personal liberty and to overawe the feebleness of the guarantee of procedure that is established by law. In the Landmark Case of *A.D.M. Jabalpur v. Shivkanth Shukla*,¹⁵ which is considered to be "self wounded" case and it is a black spot on the history of Indian Judiciary, the Government of India challenged the decisions of the nine High Courts of India which had stated that even during the episode of suspension of Fundamental Rights on the basis of internal emergency writ of *habeas corpus* can be admitted to determine the validity of arrest under the Section 3(1) of the *Maintenance of Internal Security Act, 1971*.¹⁶ The Honorable High Courts were unanimous in holding that confinement of persons under *Maintenance of Internal Security Act, 1971* could be set aside on the ground of abuse of power, *mala fides* and non- application of mind to substantiate the detention because the common law and rule of law are not suspended. The Honorable High Courts were of the vision that since the cherished Part III of the Constitution is not the sole repository of personal rights, suspension of Part III rights which are the most crucial rights does not affect application of common law principle. Surprisingly the Honorable Supreme Court stated that executive action cannot be challenged before the Courts on any points because the Fundamental Rights under Articles 14, 19, 21 and 22 are suspended. The right to personal liberty and life under Article 21 is acknowledged by the state. Therefore, if such right is suspended, it cannot be implemented in any manner.

THE NEW START: MANEKA GANDHI CASE

*Maneka Gandhi v. Union of India*¹⁷ is a land mark, crucial and famous case in the period aftermath emergency. Maneka Gandhi's passport was impounded by the executives on the ground of public interest under Section 10(3) (c) of the *Passport Act, 1967*¹⁸ without giving any chance of being heard to her. Ms. Maneka Gandhi, the petitioner challenged the above mentioned action on three points .

- She challenged that the *Passport Act, 1967* has given indeterminate authority of confiscating the passport by the authorities which is violative Article 14 of the Constitution of India .
- The petitioner's choice of speech and expression and liberty of occupation were incidentally taken away because of impounding of her passport - such deprival should be subject to reasonable restrictions provided in the Article 19 (2).
- Thirdly, that process established by law under Article 21 should in accordance to the principle of natural justice and should not be capricious.

The Honorable Supreme Court unanimously upheld the submissions of the petitioner. The Honorable Court stated that the process established under Article 21 of the Constitution should in accordance with the principle of natural justice in view of the dealings

¹² Regulation 236 of *Uttar Pradesh Police Regulations* empowers the Police Superintendent to (a) Secret picketing of the house or approaches to the house of suspects; (b) domiciliary visits at night; (c) through periodical inquiries of habits, associations, income, expenses and occupation; (d) directing the constables and chaukidars to report the movements and absence from home; (e) the verification of movements and absences by means of inquiry slips; (f) the collection and record on a history-sheet of all information bearing on conduct.

¹³ Domiciliary visit is a visit of police authorities to search or inspect a private house by entering the premises of the suspect, knock at the door and have it opened and search it for the purpose of ascertaining his presence in the house. See, *Kharak Singh v. State of U.P.* AIR1963 SC 1295 at 1296.

¹⁴ *R.C. Cooper v. Union of India*, AIR 1970 SC 564.

¹⁵ AIR 1976 SC 1207.

¹⁶ AIR 1976 SC 1207.

¹⁷ AIR 1978 SC 597

¹⁸ Act No. 15 of 1967. Section 10 (3) (c) of the *Passport Act, 1967* authorized the passport authority to impound a passport in the interest of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country, or in the interest of the general public.

of Articles 19, 14 and 21. Therefore the impounding of the passport without giving chance of being heard is unjust and unfair procedure and violative of Article 21. The crux of the Judgement is, the procedure designed under Article 21 should be non-arbitrary and non capricious and under Article 14 in addition to being just, fair and rational.

CONCLUSION

Both substantive and Procedural laws are significant. Procedural law paves the process through which justice will be attained and the substantive law deals with how or what shall be the justice, which means that the substantive law is the end of Justice. Hence, both the Procedural law and the substantive law has to be in accordance with the justness, fairness and reasonableness. If the laws are not in accordance with justness, fairness and reasonableness than that will not be in consonance with the requirement of Articles 14 and 21. The end and means are inter-related. Justice cannot be achieved unless the means are fair. Equally the means cannot be justified unless the end is fair. Ascertaining the true meaning of 'life,' 'personal liberty,' and 'procedure established by law' under Article 21 is an endless process. The extent of Article 21 is in the mode of expansion particularly after *Maneka Gandhi*. The new and liberal interpretation of procedure established by law in the famous *Maneka Gandhi case* marks the beginning of a new dimension of procedural due process especially in criminal justice system under Article 21 of the Constitution.

