

ARTICLE ON “DUE PROCESS OF LAW V/S PROCEDURE ESTABLISHED BY LAW AND INDIA’S POSITION”

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ARTICLE

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I. INTRODUCTION

The Indian judiciary has continuously guided the course of the Indian Constitution since its inception. The journey of “procedure established by law” is one such instance of judicial interpretation that has positively impacted the Indian democracy.

The “due process” doctrine is said to have originated from the American Legal System but, unlike the US Constitution, the Indian Constitution does not explicitly mention the phrase “due process of law”. The Indian Constitution uses the doctrine of “procedure established by law” that was deliberately inserted into the constitution after much debate by the members of the constituent assembly. The Indian Judiciary has tried to diminish the difference between the two doctrines. The Judiciary has acquired the powers to invalidate the laws that breach the rights of citizens through its judgements. This could not have been possible if the doctrine of “procedure established by law” was followed in its strict sense.

This article tries to elucidate the difference between the two doctrines and India’s current position with respect to “procedure established by law” mentioned in Article 21 of the Constitution. The role of Judiciary in expanding the scope of Article 21 has also been discussed in this article.

II. DUE PROCESS OF LAW

The phrase “Due process of law” has its genesis in the term “law of the land” used in Section 39 of the *Magna Carta* of 1215². Statutory recognition was given to due process by the American legal system. The 5th Amendment to the US Constitution laid that ***person’s life, liberty or property would not be deprived without due process of law***³.

Due process of law suggests that if the procedure laid down by the legislature encroaches upon the personal life and liberty of an individual, then it must be fair, just, reasonable and free from arbitrariness⁴. The government, while making any law, must respect the principles of natural justice. The “due process” doctrine places the judiciary on a higher pedestal vis-à-vis the legislature and grants full authority to the judiciary to check whether the procedure is oppressive or not. If the judiciary is of the opinion that the legislation is fanciful or oppressive then it has the authority to strike down that legislation. The Indian Constitution does not explicitly mention the term “due process of law.”

Due Process has the following 2 parts-

(a) **Procedural**- The procedure enshrined in the legislature must not be tyrannical. For instance, procedural due process will ensure that the measures taken by the police authorities to collect evidence from the accused are not oppressive.

(b) **Substantive**- It deals with the content of the legislation and prevents unjust intrusion upon the liberties of the citizens. So, if the government introduces a law which breaches the privacy of citizens without any reasonable grounds, then such a law can be held unconstitutional.

III. PROCEDURE ESTABLISHED BY LAW

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² Evolution Of Due Process In India, (Mar. 2, 2017), <http://docs.manupatra.in/newsline/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf>.

³ U.S. Const. amend. V.

⁴ Supra note 1.

This phrase was borrowed from **Article 31⁵** of the post-World War 2 **Japanese Constitution** and it finds a mention in **Article 21** of the Constitution of India which states that “**No one shall be deprived of his life or personal liberty unless in accordance with the procedure established by law.**”⁶

The expression “procedure established by law” means procedure laid down by statute or procedure prescribed by the law of the state.⁷ It implies that there must be a law, which the legislature has passed, that provides the procedure by which the “life” and “personal liberty” of an individual can be taken away. If the procedure enshrined in the law has been followed properly, then a person can be deprived of his life irrespective of the arbitrariness or unfairness of the procedure. Under this doctrine, the Parliament has been lavished with wide powers. The principle of “Procedure established by law” is narrow in sense and restricts the power of Judiciary. The Judiciary is not allowed to check whether the procedure goes against the principles of natural justice or not.

This doctrine has been incorporated purposefully in the Indian constitution as the drafters were anxious of Judicial overreach. The details have been discussed at a later stage in this article.

IV. WHY WAS “PROCEDURE ESTABLISHED BY LAW” INTRODUCED IN THE INDIAN CONSTITUTION?

The advisory committee on Fundamental Rights presented **draft article 15** (which later became article 21 of the Indian Constitution) before the constituent assembly on 23 April, 1947 which had the following clause-

“No person shall be deprived of his life, liberty or property without due process of law”⁸

The members of the constituent assembly debated upon the terms used and when the final draft of the Constitution was submitted in February 1948, the term “personal” was added before liberty and “due process of law” was replaced by “procedure established by law”.⁹

Mr. B. N. Rao, Constitutional Advisor, was of the belief that judicial review would hamper the introduction of beneficial social legislation. Rao met US Supreme Court Justice Felix Frankfurter during his visit to USA. Justice Frankfurter told Rao that the power of judicial review implicit in the due process clause was undemocratic and burdensome on the judiciary¹⁰. This meeting fortified the beliefs of Rao. Consequently, he protested against the introduction of “due process of law” in the Indian Constitution and persuaded the constituent assembly to replace it with “procedure established by law” and was successful in doing so.

Many members, including B.R. Ambedkar, were unhappy with the wording of the Article 21. Most of the members argued that the wide powers imparted to the legislature by “procedure established by law” could be detrimental for the rights and liberties of the citizens as Judiciary is placed subservient to the Parliament. They were anxious about cruel preventive detention laws and arbitrariness of the executive. To resolve this issue, **draft Article 15A** (which later became article 22 of the Constitution) was introduced to prevent arbitrary arrests.

V. POST- INDEPENDENCE SCENARIO IN INDIA

The Indian Constitution was adopted on 26 November, 1949 and it came into effect on 26 January, 1950. The **A.K. Gopalan case**¹¹ came shortly after India adopted its constitution. A.K. Gopalan, a communist leader, filed a writ petition before the Hon’ble Supreme Court claiming that the Preventive Detention Act, 1950¹² is unconstitutional as it violates Article 19(1) (d) and Article 21.

In this case, a 6 Judge bench ruled that “procedure established by law” mentioned in Article 21 is not synonymous with “due process of law”. In the court’s view, the constituent assembly deliberately adopted the doctrine of procedure established by law and giving a wider interpretation to Article 21 was outside the purview of the court. The court also laid down that Preventive detention laws are constitutional and Article 19 and 21 are not related to each other. However, **Justice Fazl Ali** dissented and opined that Article 21 should be interpreted more liberally. In his dissenting judgement, he mentioned that Article 21 should be read with Article 19 as they are interrelated to each other.

⁵ Japan Const. art. XXXI.

⁶ Ind. Const. art. XXI.

⁷ V.N Shukla, Constitution of India (12th ed. 2013).

⁸ (Sept. 30, 2019), <https://thelawbrigade.com/wp-content/uploads/2019/09/Sugandha-1.pdf>.

⁹ Ibid.

¹⁰ Granville Austin, The Indian Constitution 103 (1966).

¹¹ *A.K. Gopalan v. State of Madras*, MANU/SC/0012/1950.

¹² Preventive Detention Act, (1950).

Things started to change after the **R.C. Cooper v Union of India**¹³ case, also known as the **Bank Nationalization case**. In this case, it was observed by a 11 judge bench of the Supreme Court that the Fundamental Rights guaranteed by the constitution are not mutually exclusive to each other. The court cited that “**law means a law which is within the competence of the legislature and does not impair the guarantee of the rights in Part III**”¹⁴. This gave a wider interpretation to Article 21 as laws inconsistent with fundamental rights can now be declared void.

VI. THE IMPACT OF MANEKA GANDHI JUDGEMENT

The principles asserted by the court in A.K. Gopalan judgement were finally laid to rest in the **Maneka Gandhi VS Union of India**¹⁵.

In this case, the government of India impounded the passport of Maneka Gandhi under section 10(3) (c) of the Passport Act, 1967 "in public interest"¹⁶. The petitioner thereupon filed a Writ Petition challenging the action of the Government in- impounding her passport and declining to give reasons for doing so¹⁷.

It was observed by a 7 Judge bench of the SC that procedure envisioned by Article 21 must be **just and fair, and not arbitrary, fanciful or oppressive**¹⁸. A procedure cannot go against the principles of natural justice and if any law passed by the legislature infringes the fundamental rights of the citizens then that law can be declared void by the Judiciary. The court supported the approach adopted in R.C. Cooper case and held that Article 14, 19 and 21 are connected and cannot be treated as 'watertight compartments'. This judgement was in stark contrast to the A.K. Gopalan Judgement and gave the widest possible interpretation to Article 21. Thus, “due process of law” became synonymous with “procedure established by law”.

VII. CONCLUSION

The framers of the Indian Constitution, while adopting the doctrine of procedure established by law, wished that the Judiciary should not interrupt the law-making process of the Parliament. However, while doing so, they left the citizens' rights and liberties at the legislatures' mercy.

As time progressed, the Judiciary expanded the rights covered under Article 21. The interpretation also evolved with time. Today, we can say that the SC's interpretation proved to be highly beneficial for India's democracy and choosing “procedure established by law” over “due process of law” did not harmed the rights of Indian citizens. **The judgement in the Maneka Gandhi Case changed India into a system of Constitutional Supremacy from a system of Parliamentary supremacy**. Today, in India, “due process” is synonymous with “procedure established by law”, with the Judiciary ensuring that no law can deprive the citizens of their fundamental rights.

¹³ MANU/SC/0011/1970.

¹⁴ Ibid.

¹⁵ MANU/SC/0133/1978.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.