



## EVOLUTION OF DUE PROCESS IN INDIA

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### **ABSTRACT**

*The phrase 'due process of law' implies that it is not sufficient that a law has been enacted by following the required procedure but it must also be just, fair and reasonable. This phrase holds great significance as it has been used extensively over the years in interpreting various provisions of the Constitution and in shaping the judicial interpretation of the fundamental rights, especially Article 21. However, this view of the apex court has been arrived at after decades of reinterpretation and is not one that the court has held since the enactment of the Constitution. This article aims to cover this history as to how the understanding of Article 21 has evolved over the years and how the concept of 'due process' gained prominence in the Indian scenario. The article also looks at the tussle between 'procedure established by law' and 'due process of law' and the inherent conflict that existed within Article 21. It also emphasises on the drastic change in the ratios given in the cases of A.K Gopalan and Maneka Gandhi and why these judgments were crucial in shaping the Judiciary's understanding of 'due process of law'.*

**Keywords:** Due process of law, Procedure established by law, Constitution, Article 21

### **1. INTRODUCTION**

Justice means giving someone what is 'due' to them. The word 'due' becomes important

here as it refers to something being just, fair and reasonable. Article 21 of the Indian Constitution ensures the Right to life and personal liberty of a person as his/her fundamental right and forms the backbone of all the other rights guaranteed by the Constitution. This is because Article 21 is a natural right of a person i.e. such a right is available to a person by virtue of them being a human being. This right to life and liberty can neither be given nor be taken away by anyone. Every person is born with this right. Article 21 of the Constitution states that: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'<sup>1</sup> The phrase 'procedure established by law' means that any law which the legislature has enacted by following the required procedure would qualify as a means to deprive any person of their right to life and liberty. The flaw with such an understanding is that it does not create a distinction between a procedure that is arbitrary and unjust and a procedure that is just, fair and reasonable.<sup>2</sup> This where the distinction between 'procedure established by law' and 'due process of law' becomes important.

The Indian Constitution does not mention the phrase 'due process of law' anywhere in its text. However, it has borrowed the understanding of this phrase from the US Constitution, inserted by the 5<sup>th</sup>

<sup>1</sup> Article 21, *Constitution of India*, 1950

<sup>2</sup> Clear IAS, *Procedure Established by Law v. Due Process of Law*, (2018),

<https://www.clearias.com/procedure-established-by-law-vs-due-process-of-law/>, (last visited on October 14<sup>th</sup> 2018)



Amendment.<sup>3</sup> This concept played a major role in shaping the doctrine of judicial review and the role of judiciary in US since then.<sup>4</sup> The absence of due process of law from the Indian Constitution does not mean that the Supreme Court has completely overlooked it but rather, through a continuous interpretation of Articles 14, 19 and 21, the apex court has time and again emphasised on following a ‘due process of law’ especially since the emergency period.

## 2. DUE PROCESS OF LAW

The US Courts have interpreted the word ‘due’ to mean just, reasonable and fair and therefore, it gives powers to the courts to declare any law that is unfair or arbitrary or goes against the basic rights of people as *void ab initio*.<sup>5</sup> This understanding is what significantly distinguishes this phrase from a ‘procedure established by law’. While a procedure established by law implies that any law which has followed the due procedure, irrespective of whether it is just and reasonable, shall qualify under it, the phrase ‘due process of law’, on the other hand, implies that only those laws which have followed the due procedure and at the same time are just, fair, reasonable and *intra vires* of the powers of the legislature shall be

valid. It holds the government to be subservient to the laws of the land.<sup>6</sup>

‘Due process of law’ therefore, can be understood as a tool of Constitutionalism and an extension of the rule of law. Constitutionalism, simply put, means adherence to the Constitution. It refers to a limited government or control on the powers of the state. It seeks to ensure that the state does not use the powers, conferred upon it by the Constitution, in an arbitrary and unchecked manner. ‘Due process of law’, acts as a tool to achieve this. It ensures that the laws made by the state are just and do not merely seem to be just. In a broader context, the two are often considered to be synonymous, though Constitutionalism has a wider ambit with concepts like ‘rule of law’ and ‘due process of law’ acting merely as means to achieve this Constitutionalism.

Due process of law has two aspects. It can either be procedural or substantive. Procedural due process of law ensures that no person’s life and liberty is taken away without following the required procedure. This means that every person must have the right to a free and fair trial, an opportunity to be produced before a magistrate, to be heard and to be subjected to an unfair trial.<sup>7</sup> When such a procedure has not been followed, it constitutes a direct violation of the powers conferred upon the state by the Constitution.<sup>8</sup> This is the reason why the

<sup>3</sup> A.H Hawaldar, *Evolution of Due Process in India*, Manupatra, (Dec 2014), Available at <http://docs.manupatra.in/newslines/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf>(last visited on October 14<sup>th</sup> 2018)

<sup>4</sup> MP Jain, *Indian Constitutional Law*, Pg. 1161, (8<sup>th</sup> Edition, Lexis Nexis, India, 2018)

<sup>5</sup> MP Jain, *Indian Constitutional Law*, Pg. 1161, (8<sup>th</sup> Edition, Lexis Nexis, India, 2018)

<sup>6</sup> A.H Hawaldar, *Evolution of Due Process in India*, Manupatra, (Dec 2014), Available at <http://docs.manupatra.in/newslines/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf> (last visited on October 14<sup>th</sup> 2018)

<sup>7</sup> MP Jain, *Indian Constitutional Law*, Pg. 1161, (8<sup>th</sup> Edition, Lexis Nexis, India, 2018)

<sup>8</sup> A.H Hawaldar, *Evolution of Due Process in India*, Manupatra, (Dec 2014), Available at



Constitution has given the powers of judicial review to the Judiciary in order to ensure that a system of checks and balances deters each of the three organs of the government from acting in a manner *ultra vires* of their powers. Substantive due process of law ensures that the provisions of law and in consonance with the essence of the Constitution and that the substance of the law enacted is not in violation with the *lex loci*.<sup>9</sup>

### **3. A.K GOPALAN: THE OLD APPROACH TO ARTICLE 21**

The Supreme Court was faced with the dilemma of interpreting ‘procedure established by law’ in the famous case of *A.K Gopalan v. State of Madras*<sup>10</sup> and this interpretation held the field for almost three decades from 1950 to 1978. The *Gopalan* case questioned the constitutionality of the Preventive Detention Act, 1950 and challenges his detention has violative of the rights guaranteed under Article 19(1) of the Constitution. It was also contended that the freedom of movement was a part and parcel of Article 21 which guaranteed right to life and personal liberty.<sup>11</sup>

The *Gopalan* case holds significance for two reasons. Firstly, the majority opinion in the case was that the Articles 19, 21 and 22 were mutually exclusive of one another and a law to which Article 21 applied, Article 19

was not to be applied to it.<sup>12</sup> The second dilemma settled by the case was that Article 21 does not encompass natural justice or due procedure and any procedure followed by the parliament shall make the law valid.<sup>13</sup> The judgment clearly gave immense powers to the state as Article 21 provided no protection against unchecked legislative powers and any law which has merely followed the procedure could be used to strip a person off his life and personal liberty irrespective of whether the law was just or not.

The Supreme Court’s rejection to the inclusion of natural justice within the purview of Article 21 were based on several reasons. Apart from the omission of the word ‘due’ from the wordings of Article 21, another reason was that the draft Constitution had included the phrase ‘due process of law’. The mere fact that this was omitted in the actual text of the Constitution implied that the Constituent Assembly did not intend to introduce procedural due process in India. The concept of natural justice was seen as too vague and uncertain and therefore, something that could not be included under Article 21.<sup>14</sup> The apex court’s decision was criticised and scrutinised and much of the majority’s reasons could not stand the scrutiny that came its way. The court was seen as relying too much on the literal interpretation of the provision and missing the inherent essence of right to life and personal liberty.

<http://docs.manupatra.in/newsline/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf>

(last visited on October 14<sup>th</sup> 2018)

<sup>9</sup> MP Jain, *Indian Constitutional Law*, Pg. 1161, (8<sup>th</sup> Edition, Lexis Nexis, India, 2018)

<sup>10</sup> AIR 1950 SC 27

<sup>11</sup> *A.K Gopalan v. State of Madras*, AIR 1950 SC 27

<sup>12</sup> MP Jain, *Indian Constitutional Law*, Pg. 1163, (8<sup>th</sup> Edition, Lexis Nexis, India, 2018)

<sup>13</sup> MP Jain, *Indian Constitutional Law*, Pg. 1163, (8<sup>th</sup> Edition, Lexis Nexis, India, 2018)

<sup>14</sup> MP Jain, *Indian Constitutional Law*, Pg. 1162, (8<sup>th</sup> Edition, Lexis Nexis, India, 2018)



Contrary to this, the dissenting opinion given by Fazi Ali J. implied that Article 21 was an umbrella provision that included natural justice as well as due process. He interpreted that 'procedure established by law' included 'due process' which further covered every person's right to free and fair trial and the same is recognised by every modern legal system.<sup>15</sup> His opinion suggested that Articles 19, 21 and 22 should be not always be read in isolation but can also be mutually dependant depending on the circumstances of the case. While the majority's view was upheld and led to several anomalous judgements, the dissenting opinion in the case played a major role in changing the judicial perception towards Article 21 in the upcoming years.

#### **4. JUDICIAL INTERPRETATION OF PROCEDURE ESTABLISHED BY LAW**

The judgement given in *A.K Gopalan v. State of Madras*<sup>16</sup> was reiterated in *Kharak Singh v. State of Uttar Pradesh*<sup>17</sup>, where the 'domiciliary visits' of the police to the houses of habitual offenders was seen as violative of Article 21 however, the majority, following the ratio laid in the *Gopalan* case, refused to examine the issue under Article 19(1)(d)<sup>18</sup>. The minority

opinion in the case was given by Subba Rao J., who was of the opinion that a law must not be in contravention to both Article 21 and Article 19 in order to qualify as a reasonable restriction.

This minority opinion in the *Kharak Singh* case was adopted as the majority judgment in the case of *Satwant Singh Sawney v. Union of India*<sup>19</sup>, where the apex court held that the rights of the petitioner under both Article 14 and under Article 21 had been violated. This view was further strengthened by the case of *R.C Cooper v. Union of India*<sup>20</sup>, also known as the *bank nationalisation* case where the constitutional validity of the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1969 was challenged.<sup>21</sup> The act was declared as void for violating Articles 14, 19 and 31 of the Constitution. The Court, in this case, took the view that Article 21 should be read with Article 14 in order to strengthen the right to life and personal liberty and do away with the dilemma created by 'procedure established by law'.<sup>22</sup> The *bank nationalisation* case, hence marked the new trend of shift towards the understanding of 'due process of law'.

<sup>15</sup> A.H Hawaldar, *Evolution of Due Process in India*, Manupatra, (Dec 2014), Available at <http://docs.manupatra.in/newslines/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf> (last visited on October 14<sup>th</sup> 2018)

<sup>16</sup> AIR 1950 SC 27

<sup>17</sup> AIR 1963 SC 1295 : (1964) 1 SCR 332

<sup>18</sup> A.H Hawaldar, *Evolution of Due Process in India*, Manupatra, (Dec 2014), Available at <http://docs.manupatra.in/newslines/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf>

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<sup>19</sup> (1967) 3 SCR 525

<sup>20</sup> AIR 1970 SC 564

<sup>21</sup> A.H Hawaldar, *Evolution of Due Process in India*, Manupatra, (Dec 2014), Available at <http://docs.manupatra.in/newslines/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf> (last visited on October 14<sup>th</sup> 2018)

<sup>22</sup> *R.C Cooper v. UOI*, AIR 1970 SC 564



### 5. MANEKA GANDHI: THE NEW APPROACH

The view adopted in the Gopalan case was completely overturned in the landmark case of *Maneka Gandhi v. Union of India*.<sup>23</sup> In *Maneka Gandhi*, the petitioner had approached the Supreme Court after her passport had been impounded by the airport authorities under section 10(3)(c) of the Passport Act, 1967. This was challenged as violative of Article 21 of the Constitution especially as the order of passport impounding was given without giving the petitioner an opportunity of being heard in her defence. The verdict was delivered by a seven-judge bench with the leading opinion propounded by Justice Bhagwati.<sup>24</sup>

The court held that Articles 14, 19 and 21 did not exist in isolation but there existed a nexus between them. A law under Article 21 must satisfy the provisions under Article 14 and Article 19 as well. Further, simply any legislation passed by the parliament would not qualify as a law but the same must be just, fair and reasonable. It was held by Krishna Iyer J., that travel is an essential part of a person's liberty and therefore no one can be denied their right to travel abroad except according to procedure established by law.<sup>25</sup> This law was not to be arbitrary or vague but should be able to stand the test of reasonability. This means that the procedure must be 'right, just and fair' or it wouldn't qualify as a procedure under Article 21 at all. In such a case, the court would have the

<sup>23</sup> *Maneka Gandhi v. UOI*, AIR 1978 SC 597 : (1978) 1 SCC 248

<sup>24</sup> MP Jain, *Indian Constitutional Law*, Pg. 1166, (8<sup>th</sup> Edition, Lexis Nexis, India, 2018)

<sup>25</sup> MP Jain, *Indian Constitutional Law*, Pg. 1167, (8<sup>th</sup> Edition, Lexis Nexis, India, 2018)

powers to declare the law as unconstitutional by reading Article 21 along with Articles 14 and 19 as Article 14 of the Constitution provides no room for laws that are arbitrary and unreasonable.<sup>26</sup>

This judgment held in the case of *Maneka Gandhi* has since then stood strong with the ratio being reiterated in numerous cases in the decades ahead. This shift from a 'procedure established by law' to the new understanding of 'due process of law' has brought about remarkable shifts in the understanding of Article 21 and gave rise to a new era of constitutional interpretation.

### 6. CONCLUSION

The Supreme Court's understanding of due process of law stems from years of interpretation of the Indian Constitution. The Constitution has been, time and again, re-interpreted to suite the changing trends of the modern world with a special emphasis on increasing the ambit of Article 21. The apex court made a narrow interpretation of Article 21 in the *Gopalan* case, in which it was held that any law which has followed the procedure shall be capable of taking a person's life and liberty. It gave immense unchecked and arbitrary powers to the state and led to several faulty decisions for almost three decades. This understanding was however, later rejected in the *bank nationalisation* and *Maneka Gandhi* case where the majority of the view was that all the fundamental rights were mutually

<sup>26</sup> A.H Hawaldar, *Evolution of Due Process in India*, Manupatra, (Dec 2014), Available at <http://docs.manupatra.in/newslines/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf> (last visited on October 14<sup>th</sup> 2018)



dependant and could not exist in isolation from one another. Any law enacted by the parliament, especially with the aim of altering one's life and liberty must be fair, just and reasonable and any law that violates this shall be *void ab initio*. This reinterpretation of Article 21 and 14 in 1978 is a landmark in the Indian Judiciary as it not only increased the ambit for further interpretation by the judiciary but also provides a safeguard against unchecked and uncontrolled use of power by the state. Since 1978, the powers of judicial review, which was strengthened by the case of *Maneka Gandhi*, has evolved continuously in ensuring justice for the common man in India.

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