



DUE PROCESS OF LAW VIS A VIS PROCEDURE ESTABLISHED BY LAW

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Abstract

Judicial approach has made the 'procedure established by law' synonymous with the concept of "due process of law". 5th Amendment of US Constitution lays down *inter alia* that "no person shall be deprived of his life, liberty or property, without due process of law". This expression was changed to procedure established by law in India. In US this phrase "due process" has been one among the areas of Constitutional law involving more cases and controversies. Due process consists of two parts: procedural due process and substantive due process. Procedural due process of law requires fair procedure, i.e., notice and hearing. Substantive due process of law, on the opposite hand examines substantive content of legislation. "Procedure established by law" means procedure laid down by statute or procedure prescribed by the law of the state. Accordingly, first there must be a law justifying interference with the person's life or personal liberty, and secondly, the law should be a legitimate law, and thirdly, the procedure laid down by the law should be strictly followed. In absence of any procedure prescribed by the law sustaining the deprivation of Individual liberty, executive authorities shall violate Article 21 of the interfere with the life or personal liberty of the individual. Article 21 was restricted to life and personal liberty. But even with respect to liberty, the

Constitution makers were apprehensive of judicial review. They'd provided for preventive detention, which till then had been used only during emergencies like war or rebellion. The words 'procedure established by law' was specific and it had been hoped that they'd not give any scope for judicial veto against such legislation. While doing so, they unknowingly made fundamental right to life and liberty entirely dependent on the goodwill of the legislature.

**KEYWORD: DUE PROCESS OF LAW,
PROCEDURE ESTABLISHED BY LAW,
LIFE, LIBERTY,**

Procedure established by law: Meaning and Scope

Article 21 of the Indian Constitution reads as: "No person shall be deprived of his life or personal liberty except according to the procedure established by law."¹

It implies that a law that is duly enacted by legislature or the concerned body is valid if it followed the proper procedure. Following this doctrine means, someone may be deprived of his life or personal liberty in keeping with the procedure established by law. So, if parliament pass a law, then a life and personal liberty of an individual will be taken in line with the provisions and procedures of the that law. This doctrine incorporates a major flaw what's it?

It doesn't seek whether the laws made by parliament is fair, just and not arbitrary. "Procedure established by law" means a law duly enacted is valid whether or not it is opposite to principles of justice and equity. Following procedure established by law in strictly sense may raise the chance of

¹ Art 21, Constitution of India



compromise to life and private liberty of individuals because of unjust laws made by the law-making authorities as we've seen the term "procedure established by law" is employed directly within the Indian Constitution. Due process of law has much wider significance, but it's not explicitly mentioned in Indian Constitution. The due process doctrine is followed in US, and Indian Constitution framers purposefully left that out.

Article 21 was confined to life and personal liberty excluding property. But even with regard to liberty, framers of the Constitution were apprehensive of in-depth review. They had provided for preventive detention, which till then had been used only during emergencies like war or rebellion. The words "procedure established by law" was specific and it had been hoped that they'd not give any scope for judicial veto against such legislation. While doing so, they unknowingly made the precious fundamental right to life and personal liberty dependent on the goodwill of the legislature².

Intervening in this debate, DR. B. R. Ambedkar had said:

"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 judgement, would give the judiciary the power to question the law is in keeping with certain fundamental

*principles relating 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."*³

What is Due Process of Law?

The due process in common system is formed and nursed by customary practices. But the American system went one step ahead and gave a statutory recognition to the due process of law. The terms 'the law of the land' and 'due process of law' were transplanted to American soil by English colonists. U.S. Congress incorporated the human rights within the Constitution by first ten Amendments that are called Bill of Rights. The Fifth Amendment is most significant because it lays down that person's life, liberty or property wouldn't be deprived without due process of law. The history of the Bill of Rights clearly showed that the authors of the amendments to the Constitution intended to use only to federal laws but to not state laws. Therefore 14th Amendment has applied due process to state.⁴

The due process of law has derived its meaning from the word 'the law of the land' employed in section 39 of Magna Carta of 1215. Due process of law the principle that

² S.P. Sathe, Judicial Activism in India Transgressing Borders and Enforcing Limits (Oxford University Press, 2 nd Edn.).

³ CAD VOL. 7, P. 1000.

⁴ A.H. Hawaldar, "Evolution of Due Process in India", Bharati Law Review, (2014).



the govt must respect all of the right that's owed to an individual in line with the law. Due process of law holds the govt. subservient to the law of the land and protects individuals from the excesses of state. Due process of law is either procedural or substantive. Procedural due process of law determines whether governmental entity has taken an individual's life and liberty without the fair procedure required require by the statutes. When a government harms an individual without following the precise course of the law it constitutes a due process of law violation that offends against the rule of law. It should involve the review of the overall fairness of a procedure authorized by the legislation. Substantive due process of law means the judicial determination of the compatibility of the substances of a law with the Constitution. The court is worried with the Constitutionality of the underlying rule instead of the fairness of the method of the law. Therefore, every kind of review aside from that involving procedural due process of law may be a style of substantive review. This interpretation has been proven controversial, and is analogous to the concept of natural justice. This interpretation of due process of law is usually expressed as a command that the govt shall not be unfair to the people. Various countries recognise some kind of due process of law under their system but specifics are often unclear. The method of state, which deprives a person's life and liberty, must befits the due process of law clause. However, the 'due process' isn't a term with a transparent definition and also the nature of the procedure clause depends on many factors. Two major events made 1868 a landmark within the development of due process of law. They were publications of

Thomas M. Cooley's classic work, *Constitutional Limitations* and also the adoption of the XIV Amendment.

In *Wynehamer v. New York*⁵ the court held that the statute prohibiting sale of liquor curtailed the economic liberty of tavern owner who had been prosecuted under the Act. The court of appeals held that state police power couldn't be accustomed deprive the tavern owner of his liberty to practise his livelihood, a liberty protected by due process of law clause.

Following adoption of XIV Amendment lawyers representing business interests opposed growing state regulation by raising substantive due process of law arguments. The arguments drew heavily on the treatise "Constitutional Limitation". First published in 1868, the year during which the XVI Amendment was ratified, the treatise went through several editions in late 1800s and had a big impact on the constitutional jurisprudence of laissez-faire era. Substantive due process of law focuses on the reasonableness of legislation. In contrast the procedural aspect emphasizes how government should enforce the legislation in individual cases.

Due process in India: A historical approach
 "How is all this relevant to India? A little background provides the answer."

The story of personal liberty does not begin with the enactment of India's Constitution on January 26, 1950. It is unfolded in the story of its framing. The inclusion of a set of Fundamental Rights in India's Constitution had its genies in the forces that operated in the National Struggle against British rule,

⁵ 13 NY 378 (1856).



with frequent resort by British authorities in India to such arbitrary acts as internments, detentions and deportations without trial, in the earlier decades of this century. Following the publication of the Montague-Chelmsford Report (1918) the Indian National Congress in its special session held that year demanded that the new Government of India Act should include a “declaration of rights of the people of India as British citizens”. The Resolution also demanded “the immediate repeal of all laws, regulations, ordinances restricting the free discussion of political questions, and conferring on the executive, the power to arrest, detain intern, extern or imprison any British subject in India outside the process of ordinary civil or criminal law...”⁶

But in the Government of India Act, 1935 (British India’s First Constitution passed by the British Parliament) there was no clause protecting the life or liberty of British citizens in India only a limited protection of their property: Section 299 of the Act, 1935, stipulated that “no person shall be deprived of his property in British India save by the authority of law”. After the British decision to leave the governance of India to Indians, the British Cabinet Mission (1946) recognised the need for a written guarantee of Fundamental Rights in the proposed Constitution of India. In its statements of May 16, 1946, it envisaged a Constituent Assembly for framing India’s Constitution and recommended the setting up of an Advisory Committee to report inter alia on Fundamental Rights.

The Sub-Committee on Fundamental Rights after discussing the need for protection of life

and liberty recommended in its Draft Report the following clause: “No person shall be deprived of his life, liberty or property without due process of law”.

Mr. B. N. Rao, Constitutional Advisor, in reproducing this recommendation (in clause 16 of his Draft Constitution of October, 1947), restricted the scope of the expression ‘liberty’ by adding the word ‘personal’ before it – this change had the approval of the Drafting Committee; since otherwise in their view “the word ‘liberty’ by itself might be construed very widely”.⁷

Soon after this Mr. B. N. Rao visited various countries including the U.S., to talk to justices, Constitutional Experts and Statesmen about the framing of India’s Constitution. In USA he met with Supreme Court Justice Felix Frankfurter, who was of the opinion that the power of ‘Judicial Review’ underlying the ‘Due Process Clause’ wasn’t only undemocratic but imposed an unfair burden on the Judiciary. It absolutely was Rao’s enthusiastic espousal of Frankfurter’s view that prompted the Drafting Committee to re-phrase the Life-and-Liberty-Clause in Draft Constitution by replacing the expression “without due process of law of law”, by words: “except in keeping with procedure established by law”. The text of draft Article 15, as recast by the Drafting Committee in the Draft Constitution of February 1948 (prepared by the Committee) read: “No person shall be deprived of his life or personal liberty except according to procedure established by law...”

⁶ F. S. Nariman, “Due Process of Law- Its origin and Current Manifestation in the USA and its Relevance to

Constitutional Law in India”, Vol. 24, Indian Advocate 1-13, (1992).

⁷ *Ibid.*



The reason given was that the words “except according to procedure established by law” are more specific than “due process of law”. When draft Article 15 came up for consideration before the Constituent Assembly on 6th December, 1948, nearly 20 proposed amendments were tabled seeking to replace the expression “procedure established by law” with “due process of law”. The debate in the Constituent Assembly reflects the fear (of Founding Fathers) of executive excesses and of repression, fears rooted in British India’s preventive detention laws. Although all the proposed amendments for resorting the words “due process of law” were negative by the vote of the Constituent Assembly, the controversy was not set at rest. A large number of members of the Constituent Assembly, including DR. B.R. Ambedkar himself (who was Chairman of the Drafting Committee), remained dissatisfied with the wording of the Article as passed. “No part of our Constitution”, said DR. Ambedkar in his report to the Constituent Assembly in September, 1949,” ... has been so violently criticised as Article 15”.⁸

DR. B.R. Ambedkar, the Chairman of the Drafting Committee observed: “The ‘due process’ clause, in my judgment, would give the judiciary the power to question the law made by the legislature on another ground. That ground would be whether the law is in keeping with the certain fundamental principles relating to the rights of the individual. In other words, 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 made by the State on the ground that they violate certain fundamental rights”.⁹

Is it desirable to leave the question of liberty of the individual to the majority in legislature or is it desirable to leave it to a few judges? DR. Ambedkar observed that, “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 to the House to decide in any way it likes.”¹⁰

DR. Ambedkar compared the legislature and judiciary with Scylla and Charybdis – two monsters in Greek mythology. This can be indicative of the mental dilemma he faced and which he never tried to resolve. The speech also reflects the dilemma of the scope of review. The speech clearly shows that the suggestion that framers deliberately rejected the principles of due process is much from accurate.

Although the draft constitution contained Article 15, it didn’t contain anything corresponding to Article 22 of the Constitution. The members of the Assembly were Dissatisfied with the deletion of due process of law which continued inside and out the assembly. On September 15, 1949 Ambedkar moved that a new Article 15 A be adopted. He said thus: “We are therefore now, by introducing Article 15 A, making, if

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<http://164.100.47.194/loksabha/writereaddata/cadebat/efiles/C16091949.html> viewed on 11-06-2021 06:55.

⁹ CAD VOL. 7.

¹⁰ *Ibid.*



I may say so, compensation for what was done then in passing Article 15. In other words, we are providing for the substance of the law of “due process” by the introduction of Article 15 A. Article 15 A merely lifts from the provision of the Criminal Procedure Code two of the most fundamental principles which every civilised country follows as principle of international justice. It is quite true that these two provisions contained in clause (1) and clause (2) are already to be found in the Criminal Procedure Code and therefore probably it might be said that we are really not making any very fundamental change. But we are, as it contends, making a fundamental change because what we are doing by the introduction of Article 15 A is to put a limitation upon the authority both of Parliament as well as of the Provincial Legislature not to abrogate these two provisions, because they are now introduced in our Constitution itself’.¹¹

Most members of the Constituent Assembly argued in favour of due process of law as they felt that parliamentary power emanating from “procedure established by law” might be misused by passing majorities to curb personal liberty of people.

Kazi Syed Karimuddin (CP and Berar: Muslim) and H.V. Pataskar strongly argued that procedure established by law didn’t makes the rights inalienable. They drew attention to the very fact that new democratic India would have a party government, and also the party machine at works was likely to prescribe procedures leading to nullification of Fundamental Rights.

Other members who supported the ‘due process’ against ‘procedure established by law’ such as Krishna Chandra Sharma and K.M. Munshi also thought that it’d provide a necessary protection to personal liberty and fundamental rights against state. Thus, they felt that ‘due process’ which originated in England much before it came to USA meant fair trial both in procedure and substance, it could protect fundamental rights better. K.M. Munshi too felt that there seemed to be unreasonable suspicion of ‘Due Process’ despite the fact that it had not upset legislative process in US as in 90% of cases legislation had been upheld.

Ambedkar felt that it was a difficult choice and did not show any particular preference, for either, leaving the choice to members. Who eventually voted to retain ‘procedure established by law’ as proposed by drafting committee?

Due process of law in USA and its relevance to constitutional law in India

On 4th March, 1991, the Supreme Court of the United States upheld an award of punitive damages against Insurance Company (Pacific Mutual)- for the fraud of its agent. The punitive damages award was more than four times the compensatory damages awarded to the assured. On account of the misappropriation by Ruffin of premiums (paid to him) the health insurance policies taken out by Ms. Haslip were treated as lapsed. Consequently, Haslip had personally to meet hospital and medical charges during the period covered by the policies. Ruffin agent of Pacific Mutual having collected the premiums failed to remit them to Pacific

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<http://164.100.47.194/loksabha/writereaddata/cadebat/efiles/C16091949.html> viewed on 11-06-2021 06:55.



Mutual and hence the health insurance policy lapsed without the knowledge of the assured (Haslip). A suit was filed by Haslip claiming damages for fraud against Pacific Mutual and on trial by Jury, the Jury held that fraud was established, and the Insurance Company was liable for the fraud of its agent on the theory of Respondent Superior. The Jury awarded a verdict of US Dollars 1,040,000 (in favour of Haslip) which included a punitive damage component of at least US Dollars 840,000. Judgment was entered by the Civil Court against Pacific Mutual as well as against Ruffin. On appeal by Pacific Mutual, the Supreme Court of Alabama by majority upheld the award- it ruled that while punitive damages were not recoverable in the State of Alabama for misrepresentations made innocently or by mistake, such damages were recoverable for deceit or wilful fraud, and that on the evidence in this case a jury could not have concluded that Ruffin's misrepresentation were made either mistakenly or innocently. The majority in the Alabama Supreme Court also specifically upheld the punitive damages award holding that it did not violate Pacific Mutual due process rights under the Fourteenth Amendment. Pacific Mutual then brought the case on review by the way of certiorari to the Supreme Court. It challenged the award of punitive damages in Alabama as the product of "unbridled jury discretion" and as violative of its due process rights.¹²

In its judgment handed down on March 4, 1991, Justice Blackmun delivered the opinion of the Supreme Court – during which chief justice Rehnquist and Justice white, Marshall and Stevens joined. They (the majority) affirmed the judgment of the

Supreme Court of Alabama, and held that the damages award didn't violate the substantive due process of law rights of Pacific Mutual, that the Punitive Damages assessed against Pacific Mutual, though large compared to the compensatory damages (claimed by Haslip) didn't violate due process of law, since the award did not lack objective criteria and was subject to the complete panoply of procedural protections. Justice Scalia and Justice Kennedy filed opinions concurring in result except for reasons different from that of majority. Justice O'Connor filed an opinion. It is not the opinion of the *Justice Blackmun* that is of any significance to us in India – under the English law of Torts applicable and applied in India, punitive damages cannot be awarded. What is of Interest in India, however, is the Judgment of Justice Anthony Scalia. Noting that punitive and exemplary damages had long been a firmly established features of American Law, and that the Common Law system of awarding punitive damages had been firmly rooted in American legal history, Justice Scalia held that this itself was dispositive of the argument that the award violated due process. For this conclusion Justice Scalia relied upon the historical background of the procedural due process, and made a searching analysis of the phrase "*due process of law*". The relevant part of the opinion is worth reading and is reproduce in the Appendix. It shows the tortuous transformation of the phrase "Due Process" as understood in American Law. Rooted in first in historical tradition of The Magna Carta and "the law of the land" the phrase was understood, for more than a century, as meaning no more that "process according to law of the land". It then slowly evolved by

¹² F.S. Nariman, "Due process of Law- Its Origin and Current Manisfestation in the USA and its Relevance

to Constitutional Law in India", Vol. 24 , Indian Advocate, (1992).



judicial dicta into and was equated with “*fundamental principles of liberty and justice*”, not confined to merely procedural safeguards against executive usurpation but, in course of time, “*due process*” became an effective bulwark even against arbitrary legislation.¹³

Due process not part of Indian Law – till 1968

Indian Constitution was brought into force on January 26, 1950. The Constituent Assembly (which became India’s provisional Parliament) passed free India’s first Preventive Detention Act, 1950 – only a month later, on February 26, 1950. Under its provisions: Courts were expressly forbidden from questioning the necessity for any detention order passed by government; no evidence could be given in any court either by the detinue or the authority of the grounds of the detention, nor could the court could compel its disclosure; and, the courts could not enquire into the truth of facts placed by the executive as grounds for detaining the individual. Mr. A.K. Gopalan, a communist detinue, challenged in the Supreme Court of India by a writ petition under Article 32 the constitutional validity of the Preventive Detention Act, 1950 – principally on the ground that it violated Article 21 i.e., protection of life and personal liberty and Article 19 (1)(d), i.e., right of citizen to move freely throughout India subject to reasonable restrictions imposed by law. The challenge was repelled. The historical background in which Article 21 had taken its final shape was determinative of the decision. The Attorney General had reminded the judges during arguments that the Constituent Assembly had

consciously rejected “due process” in Article 21 – and therefore, the unreasonableness of the law of preventive detention could not be examined by the Court: whatever the procedure prescribed by enacted law even if unfair or unreasonable that would be sufficient justification for deprivation of life or liberty. The Attorney-General’s contentions were accepted by a Constitution Bench of five judges of the Court.¹⁴

The decision in Gopalan’s case considerably inhibited judicial protection of human rights in fifties and sixties.

It took the Supreme Court over twenty-five years to free itself from the shackles of Gopalan in Maneka Gandhi’s case 1978. Till then, the Article didn’t mean much; the protection it afforded was only peripheral – every challenge to personal liberty under Article 21 may well be successfully met by showing the terms of the enacted law: its reasonableness, or the extent of its arbitrariness was irrelevant. The ghost of Gopalan (1950) was finally laid to rest in Maneka Gandhi case.

A Constitutional Bench of seven judges (overruling Gopalan) read into Article 21 something not expressly there: it absolutely was not enough, said the court that the law prescribes some semblance of procedure for depriving an individual of his life and personal liberty, the procedure prescribed by the law had to be reasonable, fair and just in the opinion of the court, if not, the law would be held void as violating the guarantee of Article 21. It’s this reconstruction of Article 21 that has helped the Apex Court in its new

¹³ Rookes vs. Barnard 1964 (1) All E.R. 367 H.L. ; followed in Charanlal Sahu vs. Union of India (AIR 1990 SC 1480).

¹⁴ A.K. Gopalan vs. State of Madras A.I.R. 1950 S.C. 27



role – because the Institutional Ombudsman of Human Rights in India. The decision in *Maneka Gandhi* (1978) became the start line, the spring board, for spectacular evolution of the law regarding judicial intervention in Human Rights cases.¹⁵

In *Hoskot vs. State of Maharashtra*¹⁶ the right of a prisoner to be supplied a copy of a judgment (imprisoning him) to enable him to appeal from it, was read as following from the fundamental right guaranteed by Article 21; and in *Hussainara Khatoon vs. State of Bihar*¹⁷, the court held that the right to a speedy trial was comprehended in Article 21, and prolonged detention of those awaiting trial violated the constitutional guarantee of a reasonable, just and fair procedure.

In *Sunil Batra vs. Delhi Administration*¹⁸, it was held that “personal liberty” of a prisoner included his liberty to move, mix, mingle and talk with and share company with coprisoners and others and direction to the contrary of jail authorities would be struck down as violative of Article 21, where such directions are unjust or arbitrary.

The right not to tortured by the incarcerating State authority (has been held by the Court) to flow from Article 21. It was the life convict Sunil Batra though denied relief in his own case who rendered considerable service to prison reform. He addressed a letter to the court complaining of a brutal assault by the Head Warden of jail on another prisoner, one Prem Chand. The Judges entertained the complaint, appointed an amicus to appear,

and called for affidavits from the jail authorities. The record disclosed a sorry state of affairs. He was hardly able to walk; and then after being hospitalized for a while he was transferred to a “punishment cell” specially reserved by the jail authorities for prisoners who could not or would not pay money to prison officials.

The court invoking the UN Declaration against Torture – the Declaration of the Protection of all Persons from Torture and other inhumane and Degrading Punishment (adopted by the U.N. General Assembly in December, 1975) issued writs against the Jail Superintendent and the Lt. Governor of Delhi directing that the prisoner Prem Chand should not be subjected to physical manhandling by any jail official.

The torture to which Prem Chand had been subjected was described as “a blot on Government’s claim to protect human rights”. Prem Chand was directed to be released from the “punishment cell”. But the judges did not stop there. They set down guidelines for the protection of prisoners, directing that these guidelines be prescribed and followed. Similarly manacling the legs of an under-trial prisoner named Charles Sobhraj – a foreigner, was proclaimed “inhumane” and violative of Article 21.¹⁹ Since, then after 1978 “the right to life” had been further conceptualised to include “the right to livelihood” and even extended to include “the right to enjoy pollution free air and water”.²⁰

¹⁵ *Maneka Gandhi vs. Union of India* A.I.R. 1978 S.C. 597.

¹⁶ A.I.R. 1978 S.C. 1548

¹⁷ A.I.R. 1979 S.C. 1369.

¹⁸ A.I.R. 1978 S.C. 1675.

¹⁹ *Charles Sobraj vs. The Suptd. Central Jail, Tihar* A.I.R. 1978 S.C. 1514.

²⁰ *Subhash Kumar vs. State of Bihar and ors* A.I.R. 1991 S.C. 420.



Protection of due process rights in the experience of India

India became a republic on 26th January, 1950. Its massive constitution came out of the discussion and debates charged with the serene ideas of individual freedom, rule of law and human rights. It was but natural that the Indian Constitution came to be inspired by the great ideals enshrined in the U.N. Charter and Declaration of Human Rights. The subsequent instrument such as the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights also came to be reflected in the Indian Constitution.

While Part III deals with civil and political rights, Part IV deals with economic, social and cultural rights. Part III is made justiciable. Part IV is not justiciable. Part III rights are to be exercised by the people. Part IV rights could be enforced depending upon the economic strength of the state. Till then they constitute only guidelines for the state for governance.²¹

Constitutionally speaking, India owes a great deal to the American Constitution. The very idea of Bill of Rights being included in the Constitution came from the USA. The conceptual ancestry and legislative history of many a provision indicate their origin and development in democratic Constitutions including those of Ireland, USA, France etc. Similarly, the indebtedness of the Indian Constitution to the International Documents on Human Rights cannot also be denied.

This relationship of the Indian Constitution with liberal constitutions and documents stressing on importance of human rights keeps the Indian Constitution law alive and relevant. It shows the vitality to contain the changes. It helps the legal system to be under constant constitutionalising. Though there is no explicit provision for Judicial Review in the Constitution, the legal fraternity accepts it as a basic feature of the Indian Constitution. And it is the principal instrument for constitutionalizing.²²

As already mentioned, the Indian Constitution does have a Bill of Rights. Article 20 is the fountainhead of many a basic principle of law signifying acceptance of rule of law. It's not accidental that they're the same as the provision within the international instrument. In same way Article 21 and 22 of Indian Constitution also plays significant Role as a Fundamental Rights.²³

The post-emergency stringency posture and frequent reference of US decisions made the Indian Judiciary to turn new leaf in decisional jurisprudence in country. It absolutely was in 1978 after the Emergency that the Supreme Court in Maneka Gandhi vs. Union of India turned and overruled the reasoning during A.K. Gopalan²⁴. In A.K. Gopalan, the court took the view that every fundamental right in part III of the Constitution is independent. This was overturned in Maneka by ruling that the Part III rights are inter-related and they May be construed accordingly.

²¹ K.N. Chandrasekharan Pillai, "Constitutionalism and the Protection of Due Process Rights in the Experience of India", Vol. 7, Journal of National Human Rights Commission 105-115 (2008)

²² Ibid

²³ (1978) 1 SCC 248

²⁴ AIR 1950 SC 27



Maneka could have been decided on the idea of the development of the provisions within the Indian Passport Act. But *Justice Krishna Iyer* constitutionalized the problem by way of identifying right to travel in Article 21 and insisting for fair and just procedure to answer the necessities of reasonableness under Article 14. The expression ‘personal liberty’ in Article 21 is of the widest amplitude and it covers a spread of rights which head to constitute personal liberty of man and a few of them are raised to the status of distinct fundamental rights and given additional protection under Article 19. A law depriving an individual of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 should stand the test of one or more of the elemental rights conferred under Article 19 which can be applicable in a given situation. Maneka became a landmark not because it had been a deviation from the earlier path but due to an array of decision that sprout from it. These decisions conferred various rights on the citizens and it’s neither necessary nor feasible to look at of these decisions.²⁵

The profound influence the American Constitutional interpretation had on the interpretation of our Constitution is admitted by the Supreme Court in *Deena v. Union of India* was a case in which the legality of hanging as the mode of carrying out death sentence was gone into. The court asserted: “Though Article 21 was the focal point of this case, almost every one of the learned counsels appearing on behalf of the petitioner drew inspiration from the Eighth Amendment to the U.S. Constitution which provides that ‘excessive bail shall not be

required, nor excessive fines imposed nor cruel and unusual punishment inflicted.”²⁶

The enthusiasm and the feeling of freedom from judicial restraint made the judges to resort to judicial legislation. Justice Krishna Iyer in *Sunil Batra*²⁷ declared that ‘due process’ clause of American Constitution was applicable to the Indian constitutional jurisprudence. His observation is pertinent: “True, our Constitution has no ‘due process’ clause or the VIII Amendment, but in this branch of law, after *Cooper and Maneka Gandhi* case the consequence is the same. For what is positively outrageous, scandalising unusual or cruel and rehabilitative counterproductive, is unarguably unreasonable and arbitrary and is shot down by Article 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21.”

“True, our Constitution has no ‘due process’ clause or the VIII Amendment, but in this branch of law, after *Cooper*²⁸ and *Maneka Gandhi* case the consequence is the same. For what is positively outrageous, scandalising unusual or cruel and rehabilitative counterproductive, is unarguably unreasonable and arbitrary and is shot down by Article 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21.”²⁹

Indeed, the Supreme Court could import ‘due process’ rights through the instrumentality of constitutionalising but the development was neither uniform nor unique. This becomes evident if one looks into the synthesis of certain rights from Article 21. As an institution the Supreme Court did not follow

²⁵ *Mukti Morcha v. Union of India*, (1984) 3 SCC 161

²⁶ (1983)4 SCC 645

²⁷ 1979 SCC (Cri) 155.

²⁸ *Cooper v. Union of India* (1970) 1 SCC 248

²⁹ *Maneka Gandhi v. Union of India* (1978) 1 SCC 248.



constitutionalizing in every case even during 1978-79. In some cases where there was vacuum it commanded to its aid provisions in the Constitution.

In certain other cases where statutory provisions existed some judges did not consider Constitution. For example, while Justice Bhagwati in *Hussainara Khatoon*³⁰ declared that there is right to speedy trial in Indian emanating from Article 21, Justice Krishna Iyer known for his urge for constitutionalising pegged his decision in *Nimeon Sangma v. Home Secretary*³¹, Meghalaya on to the provisions in Criminal Procedure Code. In other words, when Bhagwati looked at the delay in trial as violation of constitution, Justice Krishna Iyer considered it as violation of the statute.

Sunil Batra. Its sustainability as a constitutional right is doubtful inasmuch as in many Cases speedy trial rights isn't given effect to. Right to legal aid was however, synthesized and elevated as a constitutional right.

In *Suk Das v. Union Territory of Arunachal Pradesh*³² it's been ruled by Justice Bhagwati that it's a constitutional right violation of which can end in vitiating the trial. The Indian judiciary developed what's called a law remedy for police torture. It is in *Nilabati Behera*³³ that the court put the remedy on firm footings: "It may be mentioned straightway that award of compensation during a proceeding under Article 32 by this court or by the high court under Article 226 of the Constitution may be a remedy available in law contingent on strict liability

for contravention of fundamental rights to which the principle of sovereign immunity doesn't apply, while it's going to be available as a defence privately law in an action-based tort."

This reasoning was reinforced in *Visakha*³⁴ wherein the court observed thus: "The meaning and content of Fundamental Rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all facets of gender equality including prevention of sexual harassment or abuse, independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law in the field when there is no inconsistency between them and there is a void in the domestic law."

The Court was further in its conviction when it decided *People's Union for Civil Liberties v. Union of India*³⁵ wherever it justified its stand though it was told that the Govt. of India signed the covenant with the exception of not undertaking the obligation to pay compensation for violation of rights. The court observed: "The main Criticism against reading such conventions and covenants into national laws is one identified by Mason, C.J. himself.

The ratification of those conventions and covenants is carried out in most of the countries by the Executives acting alone which the prerogative of making law is that of parliament alone, unless parliament legislates, no law can exist. It's not clear whether our parliament has approved the action of the govt of India ratifying the said

³⁰ (1980) 1 SCC 93, 98 and 108.

³¹ 1980 SCC (Cri) 328

³² (1986) 2 SCC 401.

³³ (1993) 6 SCC 746.

³⁴ *Visakha v. State of Rajasthan* (1997) 6 SCC 241.

³⁵ 1997 SCC (Cri) 434.



1966 covenant. Indeed, it appears that at the time of ratification of covenant in 1979, the govt. of India, had made select reservation to the effect that the Indian system doesn't recognise a right to compensation for victims of unlawful arrest or detention. This reservation, has in fact, been held to be little relevance now in sight of decision in Nilabati Behera and D.K. Basu.

Assuming that, it has, the question may yet arise whether such approval may be equated to legislation and invests the covenant with the sanctity of a law made by Parliament. As pointed out by this court in *S.R. Bommai v. Union of India*³⁶, every action of parliament can't be equated with legislation. Legislation isn't any doubt the foremost function of Parliament but it also performs many other functions, all of which don't amount to legislation. In our opinion, this aspect requires deeper scrutiny than has been possible during this case. For this, it'd suffice to state that the provisions of the covenant elucidate and visit effectuate the basic rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of these fundamental rights and hence, enforceable as such."

In short, the similarity of the provisions in the Constitution of India with those in the American Constitution, the common law moorings of the Indian Jurisprudence and the activist judiciary made the Indian Judiciary to resort to constitutionalising firstly as a mimetic exercise and later as an essential process which is congenial to a constitutional democracy. This process has in fact helped the Indian System to ass new dimensions to the human rights jurisprudence at international level.

³⁶ (1994) 3 SCC 1

Conclusion

In India a liberal interpretation is formed by judiciary after 1978 and it's tried to form the term 'Procedure Established by Law' as synonymous with 'Due Process' when it involves protect individual rights. in *Maneka Gandhi v. Union of India* (1978) Supreme Court held that – 'Procedure established by Law' within the meaning of article 21 must be 'right and just and fair' and not 'arbitrary, fanciful or oppressive' otherwise, it might be no procedure in the slightest degree and therefore the requirement of Article 21 wouldn't be satisfied. Thus, the 'procedure established by law' has acquired the identical significance in India because the 'due process of law' clause in America.

DR. Ambedkar while leaning on 'Procedure established by Law' attempted to occupy a neutral ground. He showed concern for private liberty moreover as for the spirit of 'due process' so as to stay a check on parliament and legislature in specific cases. However, his faith gave the impression to be more on elected bodies and he seemed prepared to provide the judiciary the role of a guardian only in specific cases. The interpretations of 'due process', except for the judiciary verses the legislature, are closely linked to police powers of the states. The 'Due Process of the Law' in England conveyed the concept of arrest or imprisonment consistent with the law of the land, as critical the arbitrary order of the king and his council and therefore the procedure safeguards wanted within the USA weren't a necessary a part of the concept in England.

The legal positivism and also the theory of 'original intent' of the manufacturers of the constitution propounded in Gopalan case was



abundant in favour of an interpretation that may ensure just and fair laws under the constitution. Thus, the procedure established by law under Article 21 of the Indian Constitution must satisfy the test laid down under Article 14. It means the procedure prescribed by law must not be discriminatory and arbitrary. An arbitrary law violates Article 14. Arbitrary procedure would be no procedure in the slightest degree and therefore the requirement of Article 21 wouldn't be complied with. A procedure which is unreasonable, harsh and prejudicial to the people can not be in consonance with Article 21. The judicial approach has made the 'procedure established by law' of Article 21 more or less synonymous with the concept of procedure due process of law obtaining under the u. s. Constitution. The new dimension added by interpretation of Article 21 ensured numerous rights to the accused, which weren't explicitly mentioned within the Constitution.

The object of substantive law is to produce justice to people which is an end of law. On the contrary hand, procedural law provides means to attain justice. the end and means are interrelated, justice can not be achieved unless the means are fair. Equally the means can not be justified unless the end is fair. The relation between the end and means is enriched in Art 21 of the constitution. Ascertaining the true meaning 'life', 'personal liberty', and 'procedure established by law' under Art 21 is an endless procedure. The scope of Art 21 is within the mode of expansion particularly after Maneka Ghandhi case. The narrow interpretation of Art 21 made by the Supreme Court in Gopalan case is gradually watered down and eventually buried. The liberal interpretation of procedure established by law in Maneka

Gandhi marks the start of a brand-new dimension of procedural due process of law in criminal justice system under Article 21 of the constitution. The Apex Court in numerous cases has observed that the procedure established by law must be just and fair. Procedure must be fair not only from the potential of accused but also from the attitude of victim of crime and society. Now, the Courts don't hesitate to quash the law if such law offends the due process of law requirement.

The re-interpretation of Article 21 and Article 14 by the court after 1978 marks a watershed within the development of Indian constitutional law. The vast extend of public law and public interest litigation and therefore the court's routine intervention in administration which is seen in Indian Courts today is that the results of the due process of law within the Indian Constitution. it's been aptly said that judicial review is often the function, so to talk, of the viable constitutional law of a specific period. The viable Constitutional law of India since 1978 has been the concept of due process of law of law within the constitution.
