DUE PROCESS OF LAW VS. PROCEDURE ESTABLISHED BY LAW

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ABSTRACT

The history of democratic countries reveals that understanding of justice is the ultimate end of every nation. Apparently, the understanding of justice much depends upon the eminence of legal system it has accommodated. Indeed, the nation's quality of legal system is dignified by its commitment to the rule of law, fairness of laws and respect for human rights. Unlike, Constitution of USA, Indian Constitution does not clearly mention the familiar constitutional expression of 'due process of law' in any part of it. Fourth and Fifth Amendment has inserted the due process law to the US Constitution. Certainly, this concept has given vast and undefined powers to the American judiciary over federal and state legislatures and their actions. Notwithstanding its cautious omission by the makers of the Indian Constitution, the Supreme Court of India by a process of elucidation of two Articles of the Constitution, namely Article 14 and 21, tries to read the due process in the Constitution of India. Thereby Indian judiciary acquired vast power to supervise and invalidate any union or state action, whether legislative or executive or of any public authority perceived by the court to be arbitrary or unreasonable. In this article author elaborate on this new development and its pros and cons.

Keywords*: due process, Procedure established, law, democracy, judiciary, amendment, legislative, executive, constitution.*

"The Principles of Natural Justice are Easy to Proclaim but their Precise Extent is far less easy to define"

-Evershed M R

INTRODUCTION

Two recent judgments[i] of the Supreme Court of India again confirm, strengthen and re-affirm the omnipresence of due process of law in the Constitution. The decisions appear to be a departure from the earlier approach of 'minimalism and highlight a paradigm shift in approach to original constitutional norms[ii]. In its most generic sense, due process refers to the exercise of governmental power under rule of law with due regard to rights and interests of individuals. The concept of procedural due process embraces administration's obligation to provide notice and fair hearing to individuals before depriving them of "life, liberty or property". Due process was, broadly speaking, a general substantive limitation upon the power of the state[iii]. Under both the Fifth and Fourteenth amendments to the U.S. Constitution no person may be deprived of "life, liberty or property, without due process of law". Substantive due process has been erected by U.S. Supreme Court as the essential bulwark against arbitrary governmental action[iv].

The concept of Due Process originated in English Common Law. The rule that individuals shall not be deprived of life, liberty, or property without notice and an opportunity to defend themselves predates written constitutions and was widely accepted in England. The MAGNA CARTA, an agreement signed in 1215 that defined the rights of English subjects against the king, is an early example of a constitutional guarantee of due process. That document includes a clause that declares, "No free man shall be seized, or imprisoned … except by the lawful judgment of his peers, or by the law of the land". This concept of law of the land was later transformed into the phrase "Due Process of law".[v] Being a part of the British system of administration in the past India inherited most of the English principles, practices and institutions in the matter of administering justice to the people. One such principle introduced by British here was the theory of Due Process of Law[vi].

But what we have to note is that there is the concept of due process of law very much part of the legal system of our country owing to the legal traditions and the principles enshrined in the Constitution. For example, the Preamble of the Constitution declares the high ideals for which the Constitution has been adopted. These high ideals are the effect that justice, liberty, equality

and fraternity will be the goal of the new Republic. Among the specific provisions enacted in the Constitution are the provisions dealing with Life, Liberty and Property. Although the Constitution and the laws do not in so many words declared Due Process theory as is done by the Constitution of the United States of America but the implications of the principle of Rule of Law, the principle of Equity and the principle of Natural Justice are that the principle of Due Process of Law impliedly operates in our country in regard to several aspects of the State Administration.[vii]

The concept of right to 'Life and Liberty' as enshrined under Article 21 of the Constitution of India, being a guaranteed fundamental right undoubtedly is very wide in its scope and applicability and with the advent of the modern strides in jurisprudence, with revolutionary pronouncements by the Apex Court in judgment after judgment, especially after *Maneka Gandhi*[viii], over past three decades or so has assume wider connotations and implications. Indian judiciary though is restrained, in many ways has evolved itself as savior of mankind by applying its judicial activism. The realist movement the latest branch of sociological jurisprudence which concentrates on decisions of courts regards that law is what Courts say.[ix] Public Interest Litigation changed the character of judicial process by expanding the *locus standi* rule.[x] Right to life and personal liberty is the most cherished and pivotal fundamental human rights. The Indian Supreme Court has created major reforms in the protection of human rights. Taking a judicial activist role, the court has put itself in a unique position to intervene when it sees violation of these fundamental rights.[xi]

But the basic question which haunts the legal mind is – How Legitimate is the incorporation of "Due Process" in our Constitution? In other words – Was 'Due Process' due? The courts game of hide and seek with due process has simply sometimes baffling. ***Gopalan***[xii] had explicitly exiled 'due process' from Article 21. However, with the help of ***cooper***[xiii] it was repatriated in ***Maneka*** **i**n the guise of ***'reasonableness'.*** The post-***Maneka*** period saw an outburst of 'Due Process' decisions.[xiv] In ***Sunil Batra***[xv]Justice Krishna Iyer reaffirmed the region of 'due process' – "True, our Constitution has no 'due process' clause… but… after ***Cooper*** and ***Maneka Gandhi*** the consequences are the same". Then all of a sudden, the *NSA*[xvi]decision seems to be indicating the beginning of the decline of the 'due process' era. And Justice Bhagwati's minority opinion in ***Bachan Singh***[xvii]is an indicator that 'due process' is merely

hibernating. This judicial somersault is perplexing. Till date options remain open for the court – to adopt or to reject "due process".[xviii]

PROCEDURE ESTABLISHED BY LAW

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".* It means that a law that is duly enacted by legislature or the concerned body is valid if it followed the correct procedure. Following this doctrine means that, a person can be deprived of his life or personal liberty according to the procedure established by law. So, if parliament pass a law, then a life and personal liberty of a person can be taken off according to the provisions and procedures of the that law. This doctrine has a major flaw. What is it? It does not seek whether the laws made by parliament is fair, just and not arbitrary. "Procedure established by law" means a law duly enacted is valid even if it's contrary to principles of justice and equity. Strictly following procedure established by law may raise the risk of compromise to life and personal liberty of individuals due to unjust laws made by the law-making authorities As we have seen the term "procedure established by law" is used directly in the Indian Constitution. Due process of law has much wider significance, but it is not explicitly mentioned in Indian Constitution. The due process doctrine is followed in United States of America, and Indian Constitution framers purposefully left that out[xix].

Article 21 was confined to life and personal liberty and did not include property. But even with regard to liberty, the makers of the Constitution were apprehensive of extensive judicial review. They had provided for preventive detention, which till then had been used only during emergencies such as war or rebellion. The words "procedure established by law" was specific and it was hoped that they would not give any scope for judicial veto against such legislation. While doing so, they unknowingly made the valuable fundamental right to life and personal liberty dependent on the goodwill of the legislature.[xx] 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."[xxi]

DUE PROCESS OF LAW

The due process in common legal system is shaped and nursed by customary practices. But the American legal system went one step ahead and gave a statutory recognition to the due process. 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 in the Constitution by first ten Amendments that are known as Bill of Rights. The Fifth Amendment is most important because it lays down *that person's life, liberty or property would not 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 apply only to federal laws but not to state laws. Therefore, 14th Amendment has applied Due Process to State.[xxii]

The due process has derived its meaning from the word 'the law of the land' used in the Section 39 of *Magna Carta* of 1215. Due process is the principle that the government must respect all of the legal right that is owed to a person according to the law. Due process holds the government subservient to the law of the land and protects individuals from the excesses of state. Due process is either procedural or substantive. Procedural due process 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 a person without following the exact course of the law it constitutes a due process violation that offends against the rule of law. It may involve the review of the general fairness of a procedure authorized by the legislation. Substantive due process means the judicial determination of the compatibility of the substances of a law with the Constitution. The court is concerned with the

Constitutionality of the underlying rule rather than the fairness of the process of the law. Therefore, every form of review other than that involving procedural due process is a form of substantive review.[xxiii]

This interpretation has been proven controversial, and is analogous to the concept of natural justice. This interpretation of due process is sometimes expressed as a command that the government shall not be unfair to the people. Various countries recognise some form of due process under their legal system but specifics are often unclear. The process of government, which deprives a person's life and liberty, must comply with the due process clause. However, the 'due process' is not a term with a clear definition and the nature of the procedure clause depends on many factors.[xxiv]

Two major events made 1868 a landmark in the development of due process. They were publications of Thomas M. Cooley's classic work, *Constitutional Limitations* and the adoption of the XIV Amendment. In ***Wynehamer v. New York***[xxv] 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 could not be used to deprive the tavern owner of his liberty to practise his livelihood, a liberty protected by due process clause.[xxvi]

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

DUE PROCESS IN INDIA: A HISTORICAL BACKGROUND

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, 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…"[xxviii]

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".[xxix]

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.[xxx]

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".

There was strong opposition to the protection of property by "due process of law"; accordingly, clause 9 of the Report of the Drafting Committee submitted to the Constituent Assembly recommended the following:

"No person shall be deprived of his life or liberty 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".[xxxi]

Soon after this Mr. B. N. Rao visited various countries including the United States, 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' implicit in the 'Due Process Clause' was not only undemocratic but imposed an unfair burden on the Judiciary. It was Rao's enthusiastic espousal of Frankfurter's view that prompted the Drafting Committee to re-phrase the Life-and-Liberty-Clause in the Draft Constitution by replacing the expression "without due process of law", by words: "except according to 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…"

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".[xxxii]

Thus one of the sources of abuse of power of judicial review was removed when due process was omitted from the Constitution. While doing so they unknowingly made the valuable fundamental right to and liberty entirely dependent on the goodwill of the legislature.

Intervening in the debates, Dr. B.R. Ambedkar, the Chairman of the Drafting Committee observed thus:

"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".[xxxiii]

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.[xxxiv]

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

Although the draft constitution contained Article 15, it did not contain anything corresponding to Article 22 of the Constitution. The members of the Assembly were dissatisfied with the deletion of due process and that continued inside and outside 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 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 contend, 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".[xxxvi]

The speech show that framers though it desirable to have some substantial limitations on the legislative character. Obviously Nehru believed that once colonial rule was eliminate, there would be no threat to freedom of the individual because democracy would take care of it. Ambedkar had fought not only against foreign rules but also against the tyranny of the caste Hindus and social injustice that existed in the polity. He was therefore doubtful of the supremacy of the legislature and wanted a counter majoritarian safeguard such as judicial review. Even the British distrust of the judicial review of legislation seems to have softened when newly emerged nations adopted bill of rights in the constitutions. According to Prof. S.A. de Smith judicial review tends to make for uncertainty and to give rise to a long drawn out, expensive and often trivial litigation; but on great issues it may well be found that basic rights of individual received better protection from court than from legislature.[xxxvii]

Most members of the Constituent Assembly argued in favour of due process as they felt that parliamentary power emanating from "procedure established by law" could be misused by passing majorities to curb personal liberty of individuals. Kazi Syed Karimuddin (CP and Berar: Muslim) and H.V. Pataskar strongly argued that procedure established by law did not makes the rights inalienable. They drew attention to the fact that new democratic India would have a party government, and the party machine at works was likely to prescribe procedures leading to nullification of Fundamental Rights.[xxxviii]

Mahboob Ali Baig Shah Bahadur (Madras: General) for example, wanted 'except according to procedure established by law' be substituted with 'save in accordance with law' because the concept of procedure established by law was taken from Article 31 of the Japanese Constitution, which ensure life and liberty without providing the safeguard available against misuse of authority by the Japanese law enforcing agencies in subsequent Articles 32, 33, 34 and 35. He has no objections to the change made by the Drafting Committee, provided the four articles from the Japanese Constitution were also incorporated to ensure the legal safeguards. Z.H. Lari supported the view and observed that the provisions of the Japanese Constitution had

stood the test of time and had safeguarded the liberty of individual and also guaranteed the integrity of the state. Due Process of law could exist without jeopardizing the existence of the State.[xxxix]

Expressing similar sentiments, Chimanlal Shah (Saurashtra) felt that, the connotation ('without due process of law') was that in reviewing legislation, court would have the power to see not only that the procedure was followed, viz. that warrant was in accordance with law or that signature and seal were there; but it had also power to see that substantive provisions of law were fair and just and not unreasonable or oppressive or capricious or arbitrary. That meant the judiciary has power to review legislation.[xl]

Other members who supported the 'due process' against 'procedure established by law' such as Krishna Chandra Sharma (U.P.: General) and K.M. Munshi also thought that it would 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 appeared to be unreasonable suspicion of 'Due Process' despite the fact that it had not upset legislative process in the US as in 90% of cases legislation had been upheld.[xli]

Ambedkar in his reply to the debate 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.[xlii]

The issue was again reopened nine months later (15 Sept, 1949) when Ambedkar introduced draft Article 15 A (now Article 22) for discussion, taking account of sensibilities of the members of the Assembly by elevating two clauses from Cr.P.C. to the status of Fundamental Rights – virtually taking them away from the Parliament's amending power. That he claimed, brought in the spirit of substantive due process in the functioning of the procedure established by law.[xliii]

Referring to the dissatisfaction of the Assembly including his own for giving parliament a carte blanche to "make and provide for the arrest of any person under any circumstances as Parliament may think fit" he introduced Article 15 A to provide for substantive due process.[xliv]

DUE PROCESS OF LAW IN THE 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 (one Mr. Ruffin)[xlv]. 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 Mutual* and hence the health insurance policy lapsed without the knowledge of the assured (Haslip). A suit was filed by Haslip caliming 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.[xlvi]

In its judgment handed down on March 4, 1991, Justice Blackmun delivered the opinion of the Supreme Court – in 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 punitive damages award did not violate the substantive due process rights of *Pacific Mutual*, that the punitive damages assessed against *Pacific Mutual*, though large in comparison

to the compensatory damages (claimed by Haslip) did not violate due process, since the award did not lack objective criteria and was subject to the full panoply of procedural protections. Justice Scalia and Justice Kennedy filed opinions concurring in the result but for reasons different from that of the majority. Justice O'Connor filed a dissenting opinion.[xlvii]

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[xlviii]. 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 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 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.[xlix]

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 detenue 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 detenue, 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 (protection of life and personal

liberty) and Article 19 (1)(d) (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.[l]

The decision in ***Gopalan's*** *case* considerably inhibited judicial protection of human rights in the fifties and sixties. It took the Supreme Court more than twenty-five years to free itself from the shackles of ***Gopalan*** (which it ultimately did, in the Constitution Bench decision (of seven Judges) in ***Maneka Gandhi's*** *case* 1978. Till then, the Article did not mean much; the protection it afforded was only peripheral – every challenge to personal liberty under Article 21 could be successfully met by showing the terms of the enacted law: its reasonableness, or the extent of its arbitrariness was irrelevant.[li]

The ghost of ***Gopalan*** (1950) was finally laid to rest in ***Maneka Gandhi*** *case*[lii]. A Constitutional Bench of seven judges (overruling *Gopalan*) read into Article 21 something not expressly there: it was not enough (said the court) that the law prescribe some semblance of procedure for depriving a person 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 is this reconstruction of Article 21 that has helped the Apex Court in its new role – as the Institutional Ombudsman of Human Rights in India. the decision in ***Maneka Gandhi*** (1978) became the starting point, the spring board, for spectacular evolution of the law relating to judicial intervention in Human Rights cases.[liii]

In ***Hoskot vs. State of Maharashtra***[liv] 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***[lv], 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.[lvi] In ***Sunil Batra vs. Delhi Administration***[lvii] it was held that "personal liberty" of a

prisoner included his liberty to move, mix, mingle and talk with (and share company with) co-prisoners 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.[lviii]

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-trail prisoner (Charles Sobhraj) – a foreigner, was proclaimed "inhumane" and violative of Article 21[lix].[lx] Since then (after 1978) "the right to life" had been further conceptualised to include "the right to livelihood"[lxi] and even extended to include "the right to enjoy pollution free air and water"[lxii].[lxiii]

CONSTITUTIONALISM AND THE 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.[lxiv]

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 constitutionalisation. 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 principle instrument for constitutionalization.[lxv]

As already mentioned, the Indian Constitution does have a Bill of Rights. Article 20[lxvi] is the fountainhead of many a Fundamental Principle of law signifying acceptance of rule of law. It is not accidental that they are similar to the provision in the international instrument. In the same way Article 21[lxvii] and 22[lxviii] of Indian Constitution also plays significant role as a Fundamental Rights.[lxix]

The post-emergency stringency posture and frequent references of American decisions made the Indian Judiciary to turn a new leaf in the decisional jurisprudence in the country. It was in 1978 after the Emergency that the Supreme Court in ***Maneka Gandhi vs. Union of India***[lxx]turned around and overruled the reasoning in ***A.K. Gopalan***[lxxi]. In ***A.K. Gopalan***, the court took the view that each 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 that they could be construed accordingly.

Maneka could have been decided on the basis of the construction of the provisions in the Indian Passport Act. But Justice Krishna Iyer constitutionalized the issue by way of identifying right to travel in Article 21 and insisting for a fair and just procedure to answer the requirements of reasonableness under Article 14. The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. A law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation.

Maneka became a landmark not because it was a deviation from the earlier path but because of an array of decisions that sprout from it. These decisions conferred various rights on the citizens and it is neither necessary nor feasible to examine all these decisions.[lxxii].

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***[lxxiii]it 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."

The enthusiasm and the feeling of freedom from judicial restraint made the judges to resort to judicial legislation. Justice Krishna Iyer in ***Sunil Batra*** [lxxiv] 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***[lxxv] and ***Maneka Gandhi***[lxxvi] case the consequence is the same. For what is positively outrageous, scandalisingly unusual or cruel and rehabilitatively counterproductive, is unarguably unreasonable and arbitrary and is shot down by Artcile 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21."

Indeed, the Supreme Court could import 'due process' rights through the instrumentality of constitutionalization but the development was neither uniform nor unique. This become evident if one looks into the synthesis of certain rights from Article 21. As an institution the Supreme Court did not follow constitutionalization in every case even during 1978-79. In some cases where there was vaccum 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*[lxxvii] declared that there is right to speedy trial in Indian emanating from Article 21, Justice Krishna Iyer known for his urge for constitutionalisation pegged his decision in ***Nimeon Sangma v. Home Secretary, Meghalaya***[lxxviii] on to the provisions in Criminal Procedure Code. In other words, when Bhagwati looked at the delay in trail as violation of constitution, Justice Krishna Iyer considered it as violation of the statute.

It is interesting to see that the speedy trail right under Article 21 could not have the respectability of 'due process' rights emerging from ***Sunil Batra***. Its sustainability as a constitutional right is doubtful inasmuch as in many cases speedy trail right is not 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***[lxxix] it has been ruled by Justice Bhagwati that it is a constitutional right violation of which may result in vitiating the trail.

The Indian judiciary developed what is called a public law remedy for police touture. It was in ***Nilabati Behera***[lxxx] that the court put the remedy on firm footings:

"It may be mentioned straightway that award of compensation in a proceeding under Article 32 by this court or by the High Court under Article 226 of the Constitution is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort."

This reasoning was reinforced in ***Visakha***[lxxxi] 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 occupying 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***[lxxxii] wherever it justified its stand though it was told that the Government 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 pointed out by Mason, C.J. himself. The ratification of these conventions and covenants is done in most of the countries by the Executives acting alone and that the prerogative of making law is that of parliament alone, unless parliament legislates, no law can come into existence. It is not clear whether our parliament has approved the action of the Government of India ratifying the said 1966 covenant. Indeed, it appears that at the time of ratification of covenant in 1979, the Government of India, had made a specific reservation to the effect that the Indian Legal System does not recognise a right to compensation for victims of unlawful arrest or detention. This reservation, has of course, been held to be little relevance now in view of the decision in ***Nilabati Behera*** and ***D.K. Basu***. Assuming that, it has, the question may yet arise whether such approval can 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***[lxxxiii], every action of parliament cannot be equated with legislation. Legislation is no doubt the main function of Parliament but it also performs many other functions, all of which do not amount to legislation. In our opinion, this aspect requires deeper scrutiny than has been possible in this case. For the present, it would suffice to state that the provisions of the covenant elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those 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 constitutionalisation 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.

CONCLUSION

In India a liberal interpretation is made by judiciary after 1978 and it has tried to make the term 'Procedure Established by Law' as synonymous with 'Due Process' when it comes to 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 would be no procedure at all and the requirement of Article 21 would not be satisfied. Thus, the 'procedure established by law' has acquired the same significance in India as 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 personal liberty as well as for the spirit of 'due process' in order to keep a check on parliament and legislature in specific cases. However, his faith appeared to be more on elected bodies and he seemed prepared to give the judiciary the role of a guardian only in specific cases. The interpretations of 'due process', aside from the judiciary verses the legislature, have been closely linked to police powers of the states. The 'Due Process of the Law' in England conveyed the idea of arrest or imprisonment according to the law of the land, as opposed to the arbitrary order of the king and his council and the procedure safeguards considered necessary in the USA were not a necessary part of the concept in England.

The legal positivism and the theory of 'original intent' of the makers of the constitution propounded in ***Gopalan case*** was abundant in favour of an interpretation that would 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 at all and the requirement of Article 21 would not be complied with. A procedure which is unreasonable, harsh and prejudicial to the people cannot 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 obtaining under the United States Constitution. The new dimension added by interpretation of Article 21 ensured so many rights to the accused, which were not explicitly mentioned in the Constitution.

The object of substantive law is to provide justice to people and that is an end of law. On the other hand, procedural law provides means to achieve justice. 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. The relation between the end and means is enriched in Article 21 of the constitution. Ascertaining the true meaning 'life', 'personal liberty', and 'procedure established by law' under Article 21 is an endless procedure. The scope of Article 21 is in the mode of expansion particularly after ***Maneka Ghandhi*** case. The narrow interpretation of Article 21 made by the Supreme Court in ***Gopalan*** case is gradually watered down and finally buried. The liberal interpretation of procedure established by law in ***Maneka Gandhi*** marks the beginning of a new dimension of procedural due process 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 prospective of accused but also from the perspective of victim of crime and society. Now, the Courts do not hesitate to quash the law if such law offends the due process requirement.

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

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[iii] *Ibid.*
[iv] *Hurtado v. California,* 110 U.S. 516, 532 (1884). Here the court considered whether the Grand Jury requirement of the Fifth Amendment is applicable to state criminal prosecution by way of Fourteenth Amendment, the court rejected the argument that the Grand Jury procedure required in federal criminal cases by the Fifth Amendment was the essential feature of due process and thus required in state criminal cases by the Fourteenth Amendment. Today, the Hurtdo decision remains good law; states are not required by the federal Constitution to use grand juries to bring criminal charges, although many still do.
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[xxiv] *Ibid.*
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[xxxv] *Ibid.*
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[xxxvii] *Id* at 124.
[xxxviii] *Ibid.*
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[xl] *Ibid.*
[xli] *Ibid.*
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[xlvii] *Id* at 2.
[xlviii] See *Rookes vs. Barnard* 1964 (1) All E.R. 367 H.L. ; followed in *Charanlal Sahu vs. Union of India* (AIR 1990 SC 1480).
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[lxii] *Subhash Kumar vs. State of Bihar and ors* A.I.R. 1991 S.C. 420.
[lxiii] *Supra* note 49 at 6.
[lxiv] 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).
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[lxvi] Article 20 reads as: "Protection in respect of conviction for offences: (1) No person shall be convicted of any offence except for the violation of the law in force at the time of the commission of the act charged as an offence, not be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence; (2) No person shall be prosecuted and punished for the same offence more than once; (3) No person accused of an offence shall be compelled to be a witness against himself."
[lxvii] Article 21 reads as: "Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law".
[lxviii] Article 22 reads as: "Protection against arrest and detention in certain cases: (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds of such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice; (2) every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond said period without the authority of a magistrate.
[lxix] *Supra* note 64 at 106.
[lxx] (1978) 1 SCC 248.
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