PHRASEOLOGICAL ANALOGY OF ARTICLE 21 OF THE CONSTITUTION OF INDIA

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ABSTRACT

A high rising debate has always prevailed as to what would be the correct interpretation of the Article 21 of the Constitution of India. Today, it has been settled by various Landmark judgments passed by the Hon'ble Supreme Court of India. However, its journey has been uncommon. This article is about the journey of the phrase "procedure established by law" gaining its significance as the "due process of law". The article consists of a historical reference of the choosing of the phrase, "procedure established by law", a clear distinction between the two phrases, and how the interpretation and the distinction worked while pronouncing the judgment passed in *Ak Gopalan Vs the State of Madras 1950.* The topic regarding this seems common, but have been left unexplored, hence, a careful study about the journey to gaining the Right to Life and Liberty.

INTRODUCTION

The right to life and personal liberty has been of the foremost importance to our constitution, and likewise, has been held so, in various Landmark judgments by the Hon'ble Supreme Court of India over the years including ***Maneka Gandhi vs the Union of India*** *& the most recent being* ***Puttaswamy (RETD) vs Union of India and Ors*** *in 2017. However, the Hon'ble Supreme Court of India had once delivered a judgment which was in contradiction to the very principle of Article 21 of the Constitution of India.*

This judgment delivered by the Hon'ble Supreme Court of India on 19th May, 1950 was the judgment of: ***Ak Gopalan Vs the State of Madras, 1950.***

BACKGROUND

The Constitution of India was an attempt to rectify every legislative wrong carried out by the other nations in the past, it is a perfectionist's constitution, with the perfect mould of rigidity and flexibility. The Constitution of India was honoured with the duty to uphold justice in our nation and in order to project the perfect amount of flexibility to our constitution, our drafting fathers were advised by various jurisprudents.

During the initial stages of drafting of the Indian Constitution, there was an apparent influence of United States Supreme Court Justice, Justice Felix Frankfurter on Constitutional Adviser Sir B.N. Rau, who travelled to Britain, Ireland, the United States, and Canada in 1947 to meet with jurists regarding the drafting and framing of the Indian Constitution, more so to avoid any legislative wrongs while framing our constitution. In doing so he was with the view that the US Constitution in adopting the "due process" clause which was developed by clause 39 of the Magna Carta, the Americans has given undue invitation to a series of cases and litigation. The phrase, "due process of law" being a part of the US Constitution was also a result of one of the areas with major controversies and he agreed with the view that such clause was not needed and was burdensome to the judiciary because it gave unnecessary responsibilities to judges.

However, Dr. Ambedkar was of a different view; from his aspect, the phraseology used in "due process of law" raises a question as to the validity of the law whether it is *intra vires* or *ultra vires*. It gives the judiciary an independence, to raise question about such law passed by the legislature as to whether the legislature in passing a particular law was correct. As a result, it would prevent the legislature from passing a law which might be in blatant contradiction to the law of the land. It was ultimately decided the substantive due process clause should be removed because it could have impeded "social legislation". So due process clause was replaced with "procedure established by law" which was borrowed from Japanese Constitution and the principle of it was borrowed from the *clause* 39 of *Magna Carta.*

There happens to be a further background of the two phraseologies, "the due process of law" and "procedure established by law".

In simple words, the term, "due process of law" means, by the process of general law, and by the term, "procedure established by law" it means, the process of the law of that particular land or the law of the land; whatever may that be.

> The phrase, "due process of law" first appeared in a statute of 1354 of King Edward III of England, in its 28th Year stating, *"None shall be condemned without due process of law".* Later it was developed as the clause 39 of *Magna Carta, "No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land".*

Later, the term "due process" was not upheld in England but was accepted in the Constitution of the United States.

ANALYSIS OF THE PHRASEOLOGIES AS PER AK GOPALAN SUPRA

Article 21 of the Constitution of India states,

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

For the first time in the case *AK Gopalan vs The State of Madras (AIR 1950 SC 27),* the interpretation to Article 21 of the Constitution of India was given by the Hon'ble Supreme Court of India. In this judgment the question, whether "due process' is to be followed, or "procedural due process" is to be followed, was answered in a somewhat restrictive and overly careful manner as if not wanting to disturb the newly made Constitution.

The facts being that, A.K. Gopalan was detained under a preventive detention law. He was a communist leader who had been imprisoned by the state of Madras in 1947 under convictions of ordinary criminal law; however, those convictions were set aside. While he was imprisoned, he was served with another order of detention under the Preventive Detention Act, IV of 1950. A.K. Gopalan challenged the constitutionality of the said act and filed a Writ Petition under Article 32 of the Constitution of India challenging the violation of his rights under Articles 19, 21 and 22 of the constitution.

Issues were such,

Does the Preventive Detention Act, 1950 contravene the provisions of Article 19 and 21 of the Constitution of India?

Are the Preventive Detention Act's provisions in accordance with Article 22 of the Constitution of India?

A K Gopalan supra was a significant decision because it represented the first case where the court meaningfully examined and interpreted key fundamental rights enlisted in the constitution including **article 19** and **21.** A Writ of Habeas Corpus was filed. The contention was whether under this Writ and the provisions of the then prevalent "**THE PREVENTIVE DETENTION ACT, 1950**" were a violation of his fundamental rights Under **Article 13, 19, 21** and **22**. The counsel on behalf of the petitioner argued that the right to movement was a

fundamental right under **Article 19** and hence the defence counsel must prove and state as to how the law of preventive detention was a reasonable restriction.

In other words, the ground of the petitioner's case was that his client was detained without any relevant cause and it did not follow the "procedure established by law" as laid down under Article 21 and violated such constitutional protection guaranteed under the Constitution of India.

It was initially contended by the Attorney General that the term in Article 21, "procedure established by law" simply means that any procedure that has been established by a state made law.

On the other hand, such contention was attacked by the petitioner that the term, "procedure established by law" should be interpreted in a much wider sense. It should not only restrict to the procedures those are established by the state, whereas the procedures should cover the standards of law, morally. There should be a "due process of law" (as understood by the American Constitution) by which the petitioner should be detained, and if such due process is not found, then the petitioner is detained by not following such due process of law.

It was held by the Hon'ble Supreme Court that without taking into fact what the American Constitution has laid down. If the Article 21 is simply read, it must mean that a person may be detained but with only such "procedure established by law" i.e. by such state made laws; whatever they might be. Unfortunately, the term, "due process of law" is not present in the Indian Constitution. The petitioner contends that the Article 21 should be interpreted as "due process of law". But the apex court therein held that ***"one may like that right to cover a larger area, but to give such a right is not the prerogative of the Court; it is the prerogative of the Constitution".***

The Hon'ble Supreme Court of India not only held that a right to cover a larger area under article 21 should not be given, but in holding so, it also latently held that the Hon'ble Supreme Court of India was a mere law interpreter.

It was further contended by the petitioner's counsel that the term, "law" should mean law in the sense of natural law i.e. jus, and not only the state made laws i.e. lex.

The majority of the court did not accept such contention. According to the majority, the word "law" in Article 21 was not used in the sense of "general law" connoting what had been described as the principles of natural justice outside the realm of positive law; and "law" in that Article was equivalent to State-made law or as we may say the law of the land.

Reading the word, “law” and by interpreting it as the rules of natural justice will be difficult, for there shall be the rules of natural justice as the “procedures”. In interpreting the “law” by natural law, it will make the “rules of natural justice” the “procedures” of such natural law. However, such interpretation shall be vague.

The fathers of our constitution have deliberately omitted such “due process of law” and adopted the term, “procedure established by law”. Be for any reason, the constituent assembly did not want to give a meaning of such broad nature. The very term, “established” shows that the law has been established by an agency, be that the legislature or an agreement or the state. Therefore, the term, “law” cannot be held as natural law. It is bound to mean state-made laws.

THE DIFFERENT VIEW

J. Fazl Ali, was the only one who felt otherwise, and contradicted the whole Bench of the Hon’ble Judges**.**

He was of the view that,

Professor Willis in his book of "Constitutional Law" in the statement that the essentials of due process were: (1) notice, (2) opportunity to be heard, (3) an impartial tribunal, and (4) orderly course of procedure.

The real principle here is that ***“No person can be condemned without a hearing by an impartial tribunal”.***

The same principle has been a huge part of the British system of law, from which we have inherited a lot. Moreover, such principle is also deeply rooted in our ancient legal history. J. Fazl Ali, also observed that there can be no revolutionary approach in following the said

principle. Such principle shall fall under the "procedure established by law" as that is already deeply rooting somewhere in our legal system, and our legal system must be include such principle.

"Principles set out in Professor Willi's book are different aspects of the same principle and which have no vagueness or uncertainty about them. These principles are not absolutely rigid principles but are adaptable to the circumstances of each case within certain limits." was also added by His Lordship.

A limited scope for judicial review of the 'procedure' and the 'law' made by the State for the deprivation of personal liberty in the Preventive Detention Act could have been secured if the liberal interpretation of the phrase, "procedure established by law" as adopted by Fazl Ali.J, had been accepted by the majority. The enquiry could have also been made by the Hon'ble Apex Court that whether the 'procedure' laid down by law for deprivation of personal liberty incorporated at least certain 'fundamental principles of justice. Such an interpretation would have made the phrase "procedure established by law" of a normative standard binding even on the Parliament, and, hence, restricting possible legislative irregularities of the State, making personal liberty as a fundamental right in its real sense. Had Justice Fazl Ali's liberal mode of constitutional interpretation been adopted by the majority, the growth of liberty jurisprudence in this country would not have been stalled for more than two and a half decades.

By taking a restrictive approach to this observation the apex court had blatantly refused the Right to personal liberty, amongst others, even if a person was detained by a law of the legislature, does not matter how much unreasonable or drastic the laws were, it was done by following the, "procedure established by law", and hence, was not unconstitutional.

The Court was not really searching for the intention of the Constituent Assembly in interpreting the real meaning behind adopting the phrase, "procedure established by law"; but it was only searching for a justification so that its decision can have support beyond doubt. In doing so, the Court seems to have thought it was evident that the Constituent Assembly deliberately rejected the term, "due process of law" by looking only to the Report of the Drafting Committee in order to make sure, with its help, that all the shadow of the 'due process of law' has been definitely and deliberately eliminated from Article 21. In parallel, the Apex Court while

considering the report of the drafting committee also should have considered the principle kept forward by Dr. B R Ambedkar in arguing for the phraseology, “due process of law”.

It is seemed that the role of "law-appliers" have been assumed and not "law-makers", for they claimed to have no discretion or any other way for choice, and consequently took no responsibility for their decision. The entire decision as projected by the majority of judges, later in time, as an inevitable consequence of constitutional compulsion.

CONCLUSION

After almost two and a half decades, ***In Maneka Gandhi Vs the Union of India (1978 AIR SC 597),*** the apex court held that the "procedure" under Article 21 has to be fair, just and reasonable, and would have to be also tested with Article 14 and 19. It was interpreted that the term, “procedure established by law” has to be held not only by what “it is” but also with what “it ought to be”, thereby moving a step further towards the due process.

With such substantial due process, Article 21 began expanding and the term "personal liberty" began to include a wide variety of things such as the right to health, the right to compensation, the right to a hearing, the right to a speedy trial and other such rights having been remarkably pronounced by Indian courts over the years. Hence, the term, “procedure established by law” over such years has acquired the same significance as the term, “due process of law”.

Not until 2017 that by the judgment ***Puttaswamy (RETD) vs Union of India and Ors.*** *The Hon’ble Supreme Court of India* not only reinstated the liberties and values outlined in the Preamble, but also corrected some past judicial wrongs.