

# INCORPORATION OF DUE PROCESS OF LAW IN INDIA: AN EVOLUTION THROUGH THE GATE OF CONSTITUTIONAL SILENCES.

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**Abstract**-The article explores how the idea of "Due Process of Law" has changed throughout India's constitutional history. The Indian Constitution does not include the phrase "Due Process of Law" specifically, but its underlying principles have progressively come to light through a number of court interpretations and developing legal theories.

The analysis begins by examining the Indian Constitution's lack of the phrase "Due Process" and the justifications for choosing a more specific "Procedure Established by Law" provision. It investigates the constitutional omissions that have permitted the judiciary to interpret and apply the rules of due process to uphold individuals' rights to fundamental freedoms and safeguard them against arbitrary state actions. The following section of the essay examines significant instances and court rulings that have helped the Indian legal system incorporate due process ideas. It demonstrates how the judiciary's active engagement has broadened the definition of "Procedure Established by Law" to include real justice and fairness, ensuring that constitutional protections are not just formalities but actual safeguarding of rights.

The study also looks at how integrating due process concepts will affect government, the legal system, and the defense of human rights in India. It examines how the expanding definition of due process has improved governmental accountability and justice, advancing the rule of law and strengthening the credibility of the judiciary. In conclusion, this paper presents a comprehensive analysis of the incorporation of due process of law in India, emphasizing its development through the gate of constitutional silences. It recognizes the vital role played by the judiciary in shaping and expanding the concept to protect the rights and liberties of the citizens in the absence of an explicit constitutional provision. The research contributes to a deeper understanding of the evolution of due process principles and their significance in upholding the values enshrined in the Indian Constitution.

**KEY WORDS:** Due Process of Law, India, Constitutional Silences, Evolution, Procedure Established by Law, Judicial Interpretations, Fundamental Rights, Judicial Decisions, Human Rights, Rule of Law, Judiciary, Constitutional Development.

## INTRODUCTION

The concept of due process of law was not explicit in the Indian Constitution as the roots of Indian Constitutional System was in the traditions of British concept of Parliamentary Sovereignty and legal positivism but over the time the judiciary developed this concept to be firmly a part of Indian Constitutional law. Earlier at the time of framing of the constitution, the framers has rejected the proposal of including "the due process clause" in Article 21 of the Indian constitution which states "No person shall be deprived of his life or personal liberty except according to procedure established by law."<sup>1</sup>

The American experience suggested that by incorporating the word "due process" in the American Constitution, the Supreme Court of America had acquired extreme power for itself and it has become the most powerful organ. In India, we wanted to avoid that and we wanted to keep all the three organs at par and therefore deliberately we did not use the word due process but A major flaw of the doctrine of 'procedure established by law' is that it does not grant the courts the power to access that whether the law in question is fair Just and non-Arbitrary? According to this doctrine, a law that is made by a competent legislature and has been formed by following all the right

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<sup>1</sup> Art 21 of the Constitution of India.



procedures should be allowed to deprive a person of his life and liberty even though it is unjust and arbitrary. It does not grant power to the courts to question the intent of a particular legislation. With *Maneka Gandhi v. Union of India*<sup>2</sup> judgment, it can be said that the due process clause was brought into the Indian Constitution indirectly.

In *Maneka Gandhi*<sup>3</sup> case, it was held that the procedure of deprivation of life and personal liberty has to be just, fair and reasonable. There can't be any such action in the Constitution which is devoid of the principles of natural justice. Natural justice, reasonableness, non-arbitrariness are the essential principals of the basic structure. Krishna Iyer J. in *Sunil Batra v. Delhi Administration*<sup>4</sup> has clearly held "true our Constitution does not have any due process clause unlike the American Constitution through its eighth amendment, with the *R.C. Cooper* and *Maneka Gandhi* judgments, the consequences are the same. It is not about incorporating or not incorporating the due process clause rather the moment it is provided that a person's life and personal liberty can be restricted, it is per se logical that a procedure of such restriction has to be reasonable, just and fair. It is implicit in the Constitution in itself.

In the evolving phase of due process, phrase acquired "substantive" and "procedural" meanings which only enhanced the power of judiciary. This distinction has been made as per the definitions of substantive and procedural law. Substantive law creates, defines and regulate rights whereas procedural laws enforce those rights or seeks redressal in case of violation. Procedural due process determines whether governmental entity has taken an individual's life and liberty without the fair procedure required by the statute.<sup>5</sup> 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 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 constitutionality of the underlying rule rather than the fairness of the process of the law.<sup>6</sup> In this assignment, the author intends to study the evolution of both the constitutions and how much 'procedure established by law' has evolved into 'Due process of Law' and the types of due process of law.

### DUE PROCESS OF LAW: AN AMERICAN CONCEPT

Due process of law is a constitutional requirement that protects governments from abusing citizens. Due process in its current version encompasses both procedural norms that courts must maintain in order to protect people's personal liberty and a spectrum of liberty interests that statutes and regulations must not violate. Its origins can be traced back to Chapter 39 of King John's Magna Carta, which states that no freeman will be seized, deprived of his property, or harmed unless "by the law of the land," an expression that referred to court customary practices. The phrase "due process of law" originally emerged as a replacement for Magna Carta's "the law of the land" in a 1354 statute of King Edward III that reiterated Magna Carta's guarantee of subject liberty.<sup>7</sup>

According to the Fifth Amendment, no one shall be "deprived of life, liberty, or property without due process of law."<sup>8</sup> The Due Process Clause of the Fourteenth Amendment, passed in 1868, employs the same eleven words to describe a legal requirement of all states. The basic promise of these phrases is that all levels of American government must function within the law ("legality") and provide fair procedures. The majority of this essay is on that promise. However, we should briefly mention three other uses of these phrases in American constitutional law.<sup>9</sup>

<sup>2</sup> (1978) 1 SCC 248.

<sup>3</sup> *Ibid.*

<sup>4</sup> 1980 SCR (2) 557.

<sup>5</sup> JOHAN E. NOWAK, op. cit. supra note 7, at 381.

<sup>6</sup> JOHAN E. NOWAK, op. cit. supra note 7, at 381.

<sup>7</sup> Magna Carta: Muse and Mentor, India, available at: <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/due-process-of-law.html> (last visited on July 1, 2023)

<sup>8</sup> U.S. Constitution, 5<sup>th</sup> Amendment.

<sup>9</sup> *Ibid.*



The reference to "due process" in the Fifth Amendment is just one of several pledges of protection made by the Bill of Rights to citizens against the federal government. Originally, these assurances had no application against the states; given the discussions surrounding its enactment and the language employed elsewhere in the Constitution to limit State power, the Bill of Rights was deemed to only apply against the federal government. (See, for example, *Barron v City of Baltimore*<sup>10</sup> (1833)) However, this changed following the adoption of the Fourteenth Amendment and a series of Supreme Court decisions that began imposing the same restrictions on states as the Bill of Rights. Initially, the Supreme Court only extended Bill of Rights provisions against the states piecemeal, as in *Chicago, Burlington & Quincy Railroad Company v. City of Chicago*<sup>11</sup> (1897), in which the court merged the Fifth Amendment's Takings Clause into the Fourteenth Amendment.

The Court saw these safeguards as a result of the Fourteenth Amendment's Due Process Clause, not because the Fourteenth Amendment made the Bill of Rights applicable to states. Later, in the middle of the twentieth century, a series of Supreme Court judgments determined that the Due Process Clause "incorporated" most of the essential aspects of the Bill of Rights and extended them to the states. If a Bill of Rights guarantee is "incorporated" into the Fourteenth Amendment's "due process" requirement, state and federal requirements are identical.<sup>12</sup> The words "due process" implies a concern with procedure rather than substance, and this is how many people interpret the Due Process Clause, including Justice Clarence Thomas, who said that<sup>13</sup> "the Fourteenth Amendment's Due Process Clause is not a secret repository of substantive guarantees against unfairness." Others, however, believe that the Due Process Clause includes substantive due process protections, such as Justice Stephen J. Field, who wrote in a dissenting opinion to the Slaughterhouse Cases that "the Due Process Clause protected individuals from state legislation that infringed upon their 'privileges and immunities' under the federal Constitution."

Substantive due process has been considered to encompass the right to work in a regular job, marry, and raise one's children as a parent. In *Lochner v. New York*<sup>14</sup> (1905), the Supreme Court declared invalid a New York statute controlling bakers' working hours, saying that the public benefit of the law was insufficient to satisfy the bakers' substantive due process right to labor on their own terms. Today, substantive due process is still used in cases, although it is not without criticism.<sup>15</sup> The construction of a substantive due process provision in America fulfills the first promise made in the introduction - to identify the bounds of a 'substantive due process' clause in US law.<sup>16</sup>

#### **EVOLUTION OF DUE PROCESS IN INDIA (In reference to Article 21 of the Constitution of India)**

The due process clause developed in India mainly by the principle that all the Fundamental Rights in the Constitution are intertwined. Article 21 does not prescribe any standard but it has to be fair because it is compelled to receive radiation from the companion Fundamental rights.

*Constitutional Assembly Debate:* The phrase "procedure established by law" was not simply introduced to the constitution without opposition. Many members of the constituent assembly sought motions to change Art. 15 (now Art. 21) of the constitution from "procedure established by law" to "due process of law," which Ayyar and Dr. Ambedkar vehemently opposed.

<sup>10</sup> 7 Pet. 243 (1833).

<sup>11</sup> 166 U.S. 226 (1897).

<sup>12</sup> Incorporation Doctrine, India, available at: [https://www.law.cornell.edu/wex/incorporation\\_doctrine](https://www.law.cornell.edu/wex/incorporation_doctrine) (last visited on June 21, 2023).

<sup>13</sup> Magna Carta: Muse and Mentor available at: <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/due-process-of-law.html> (last visited on June 21, 2023).

<sup>14</sup> 198 U.S. 45 (1905)

<sup>15</sup> Substantive Due Process as a Two-Way Street available at: <https://www.stanfordlawreview.org/online/substantive-due-process-as-a-two-way-street/> (last visited on June 1, 2023).

<sup>16</sup> A tale of two judgments available at <https://www.thehindu.com/opinion/lead/a-tale-of-two-judgments/article8586369.ece> (last visited on May 26, 2023).



- *Kazi Sayed Karimuddin:*

This member academic moved an amendment

“in article 15, for the words ‘No person shall be deprived of his life or personal liberty except according to procedure established by law’ the words ‘No person shall be deprived of his life or liberty without due process of law’”<sup>17</sup>

He explained his amendment by stating

“if the words “according to procedure established by law” are enacted, there will be very great injustice to the law courts in the country, because as soon as a procedure according to law is complied with by a court, there will be an end to the duties of the court and if the court is satisfied that the procedure has been complied with, then the judges cannot interfere with any law which might have been capricious, unjust or iniquitous. The clause, as it stands, can do great mischief in a country which is the storm centre of political parties and where discipline is unknown”<sup>18</sup>

He also quoted an American constitutional law case *Chambers v. Florida* where a law was challenged on the ground that it was unjust and feared if ‘due process of law’ is not added then something similar could not be challenged in the courts which would make judges only spectators.

- *Mehboob Ali Beig Sahib Bahadur:*

This constituent assembly member from Madras moved an amendment in Art. 15 of the draft constitution

‘That in article 15 for the words “except according to procedure established by law” the words, “save in accordance with law” be substituted.’<sup>19</sup>

He questioned Dr Ambedkar that if the legislature passes a bill denying a person who has been detained to go to the court to prove his innocence, then in such a scenario what would happen? According to ‘procedure established by law’, the hands of the courts would be tied in such a scenario. He also gave the example of the Japanese constitution where ‘procedure established by law’ is used in Art 31 however there is a protection regarding right to access the court which is absent in Indian constitution. He said that if any provision is added to the Indian constitution which clearly states that no person can be deprived of his liberty without his being given the chance to go to court and all assistance given to him only then ‘procedure established by law’ can be added to the constitution.

- *Pandit Thakur Dass Bhargava:*

Mr Bhargava raised another important question as to what ‘Law’ is? Whether it includes both procedural law and substantive law or just procedural law? He was of the view that Law should be given such a meaning as it is under the American law when they talk about ‘due process of law’. So according to him, the constitution should not just have the term ‘due process of law’ but also it should be interpreted in a similar manner as is done in United States.

He said that if this amendment is carried and if ‘due process of law’ is added to Art 15 then it will constitute the bed-rock of our liberties. This will be a Magna Carta, this will further improve checks and balances b/w Judiciary and the Legislative. In his words

“In fact we want two bulwarks for our liberties. One is the Legislature and the other is the judiciary. But even if the legislature is carried away by party spirit and is sometimes panicky the judiciary will save us from the tyranny of the legislature and the executive.”<sup>20</sup>

- *K.M Munshi:*<sup>21</sup>

Mr Munshi also spoke in favour of the proposed amendment for replacing ‘procedure established by law’ by ‘Due process of law’. He said that if the said amendment is not made to the draft constitution then it would have no meaning at all, this clause would have meaning if the courts could examine not merely that the conviction has been according to law or according to proper

<sup>17</sup> Constituent Assembly Debates, vol VII, pg 842

<sup>18</sup> *Id.*, at 843

<sup>19</sup> *Supra* note 16 at 846.

<sup>20</sup> *Supra* note 16 at 487.

<sup>21</sup> *Supra* note 16 at 851.



procedure, but that the procedure as well as the substantive part of the law are such as would be proper and justified by the circumstances of the case.

He also warned that if the amendment is not passed then there is a possibility that the legislative might give sweeping powers to the executive and the police and the judiciary won't be able to do anything about it and it would lead to the destruction of all those democratic principles which this constitution and this constituent assembly aims to preserve.

However there were a few members who defended Art 15 in its present form and tried to pursue the house not to pass the said amendment as suggested by Kazi Sayed Karimuddin and Mehboob Ali Beig Sahib Bahadur as it would be against the democratic principles of the country and such a wide discretionary power should not be given to 3 or 5 gentlemen sitting in a court of law to decide what due process is. The 2 major members who objected to the amendment were Shri Alladi Krishna Swami Ayyar and Dr B.R Ambedkar.

- *Alladi Krishna Swami Ayyar:*

Mr Ayyar was amongst the first members of the constituent assembly to speak against the amendment and favoured 'procedure established by law' rather than 'Due process of Law'. He gave the interpretation of Due Process as given by English Judges and said

"expression 'due process' itself as interpreted by the English Judges connoted merely the due course of legal proceedings according to the rules and forms established for the protection of rights, and a fair trial in a court of justice according to the modes of proceeding applicable to the case. Possibly, if the expression has been understood according to its original content and according to the interpretation of English Judges, there might be no difficulty at all"<sup>22</sup>

He called the interpretation of Due Process as flawed and said that there is nothing like uniformity it all depends upon a judge's interpretation of Individual liberty. He said it won't be in interest of the country to give such power to an organ of the government with such uneven stances.

- *Dr. B.R Ambedkar:*

Dr Ambedkar explicitly didn't side with any of the two sides but none the less gave his views on the amendments moved. He said that Judiciary already has a power to declare a particular law as ultra vires or intra vires. If the law made by a particular legislature exceeds the authority of the power given to it by the Constitution, such law would be ultra vires and invalid. However the due Process would give judiciary the power to question made by law in another ground and the ground would be that whether the law is consistent with certain fundamental principles.

He was aware that both the organs have the capacity to become despotic and he himself was not sure that this power should be vested in whom. He ended the speech by saying:

"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 it to the House to decide in any way it likes."<sup>23</sup>

The house unanimously voted against all the amendments and Art 15(now Art 21) was added to the constitution with "procedure established by law".

*Participation of Judiciary:* Judiciary has been trying to evolve the 'procedure established by law' doctrine since the 1950s. The first case that came before the Supreme where it had to deal with the question of the extent to which procedure established by law would apply was that of AK Gopalan v. State of Madras<sup>24</sup> since then the jurisprudence regarding this topic has been growing.

*AK Gopalan v. State of Madras*<sup>25</sup>: This was a significant decision because it represented the first case in which the Court meaningfully examined and interpreted key Fundamental Rights provisions of the Constitution including the scope of 'personal liberty' and that of 'procedure established by law'. In his judgement Justice Kania in all his wisdom separated art 21 and rest of the provisions in part 3 of the constitution. This isolation of Articles effectively restricted the scope of Fundamental rights.

<sup>22</sup> *Supra* note 16 at 853.

<sup>23</sup> *Supra* note 16 at 1000.

<sup>24</sup> AIR 1950 SC 27.

<sup>25</sup> *Ibid.*



Kania also gave a restrictive interpretation to Art 21 stating that the courts cannot be permitted to question the constitutionality of any penal law enacted by a competent legislature on the ground that the restriction imposed thereby is arbitrary or unreasonably and can check only if the right procedure is followed. Here Justice Kania used original intent theory and textualism by going into constitutional Assembly debates. He said:<sup>26</sup>

“I have no doubt in my mind that if the “due process” clause which appeared in the original draft was finally retained by the Constituent Assembly, it could be safely presumed that the framers of the Indian (1) Vide Willoughby on the Constitution of the United States Constitution wanted that expression to bear the same sense as it does in America. But when that form was abandoned and another was deliberately substituted in its place, it is not possible to say that in spite of the difference in the language and expression, they should mean the same thing and convey the same idea”

*Kharak Singh v. State of UP:*<sup>27</sup> This case was a very small but none the less important step towards liberalisation of Art 21 of the constitution. Again the dissenting judgement of more importance in the long run by Subba Rao, J. It laid down the platform for liberalisation of Art 21. He said:<sup>28</sup>

“If a person's fundamental right under Art. 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Art. 19 (2) so far as the attributes covered by Art. 19 (1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Art. 19 (2) of the Constitution.”<sup>29</sup>

Hence Justice Subba Rao in his minority judgement gave a different view than given in *AK Gopalan*<sup>30</sup> that Art 21 and 19 are not independent of each other.

*R.C Cooper v. Union of India:*<sup>31</sup> In the judgement by Justice Shah, similar view was taken as that of Justice Subba Rao in the *Kharak Singh* case and *Gopalan* was finally overruled. This 11 judge bench finally held that Articles I part III of the constitution cannot be interpreted in isolation. They said:<sup>32</sup>

“In our judgment, the assumption in A. K. Gopalan's case that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct.”<sup>33</sup>

This was the first time in India that a judgement regarding personal liberty was built on and relied on foreign judgements dealing with substantive due process. Later on this view given by Justice Subba Rao was recognised and became the majority opinion in *Satwant Singh Sawhney v. Union of India*. *ADM Jabalpur v. Shivkant Shukla:*<sup>34</sup> *ADM Jabalpur* was a dark case in the dark period of emergency in India with the only silver lining being the dissenting judgement given by Justice Khanna wherein he said even if Art 21 is suspended yet the state cannot deprive a person of his personal liberty without the procedure established by law thereby practically ending any scope of restricting Art 21 but alas it was only a minority judgement. He said that Art 21 merely codified the provisions relating personal liberty and rule of law however it was already present in India. Further, Justice Khanna stated:<sup>35</sup>

<sup>26</sup> *Supra* note 23.

<sup>27</sup> AIR 1963 SC 1295

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> (1970) (1) SCC 248

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> (1976) 2 SCC 521

<sup>35</sup> *Ibid.*



“I am unable to subscribe to the view that when right to enforce the right under article 21 is suspended, the result would be that there would be no remedy against deprivation of a person’s life or liberty by the State even though such deprivation is without the authority of law or even in flagrant violation of the provisions of law. The right not to be deprived of one’s life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force. The fact that the framers of the Constitution made an aspect of such right a part of the fundamental rights did not have the effect of exterminating the independent identity of such right and of making article 21 to be the sole repository of that right. Its real effect was to ensure that a law under which a person can be deprived of his life or personal liberty should prescribe a procedure for such deprivation or, according to the dictum laid down by Mukherjea, J. in *Gopalan’s* case, such law should be a valid law not violative of fundamental rights guaranteed by Part III of the Constitution.”<sup>36</sup>

*Maneka Gandhi v. Union of India*:<sup>37</sup> *Maneka Gandhi* was the first major decision of the Supreme Court involving personal liberty during the post Emergency period. It is arguably one of the most important and historic judgement given by the Indian Supreme Court where it broadened the scope of Art 21 by deviating from a more legalistic approach given by the court in *Gopalan v. State of Madras*<sup>38</sup>. It gave an expansive interpretation to the words ‘procedure established by law’ and said that even if the law depriving a person of his liberty, it is not sufficient that it is following the right procedure but also that the law must not be right and just and fair and not arbitrary, fanciful or oppressive.

Justice Bhagwati said:

“The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. The question whether the procedure prescribed by a law which curtails or takes away the personal liberty guaranteed by article 21 is reasonable or not has to be considered not in the abstract or on hypothetical considerations like the provision for a full-dressed hearing as in a Courtroom trial, but in the context, primarily, of the purpose which the Act is intended to achieve and of urgent situations which those who are charged with the duty of administering the Act may be called upon to deal with.”<sup>39</sup>

The majority also overturned *Gopalan* in ruling that laws that restrict personal liberty would have to pass scrutiny not only under Article 21’s requirement of procedural due process, but also under Article 19 (personal freedoms), and Article 14 (non-arbitrariness). As a result, laws or regulations restricting personal liberty must also satisfy the “reasonableness” standard set forth in Article 19 which again is another facet of the due process doctrine. It was said in one of the most famous and brilliantly written passages of the present judgement, Justice Bhagwati further said:<sup>40</sup>

“The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the best of reasonableness in order to be in conformity with Article 14. It 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.”

In *Mohd. Arif v Supreme Court*<sup>41</sup>, tracing the history of the evolution of Article 21, Justice Rohinton Fali Nariman, speaking for the majority in the Constitution Bench, observed as follows:

“The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty.”<sup>42</sup>

<sup>36</sup> *Supra* note 34.

<sup>37</sup> (1978) 1 SCC 248

<sup>38</sup> *Supra* note 23.

<sup>39</sup> *Supra* note 2.

<sup>40</sup> *Supra* note 2.

<sup>41</sup> (2014) 9 SCC 737.

<sup>42</sup> *Ibid.*



In *Rajbala v. State of Haryana*<sup>43</sup>, Justice Chelameswar, ruling for a two-judge panel, has sounded a warning by pointing out the position that the phrase "due process of law" was purposefully removed during the writing process after the Constitution was framed. Therefore, the learned Judge believes that it would be incorrect to include US-adopted concepts of substantive due process while evaluating the legality of Indian law.

Recently, in *Justice K S Puttaswamy* judgment, it was held that the word "due process" was purposefully left out of the Constitution, and instead, the expression "procedure established by law" was used instead. However, Maneka Gandhi (supra) in 1978, followed by a number of judgements, have read what was expressly rejected by the framers into Article 21, so that by the time of Mohd. Arif (supra), this Court, at paragraph 28, was able to say that the wheel has turned full circle and substantive due process is now part and parcel of Article 21. Despite this, changed circumstances led to Maneka Gandhi (supra) in 1978, followed by a number of judgements.

### CONCEPT OF SUBSTANTIAL AND PROCEDURAL DUE PROCESS AND ITS STATUS IN INDIA

The birth of substantive due process can be traced from the dissenting opinion of Subba Rao J. in *Kharak Singh v. State of Uttar Pradesh*<sup>44</sup> argued that all of the provisions of Regulation 236, including those involving police surveillance, were unconstitutional as violative of Article 19(l)(d) and Article 21. In his dissent, Subba Rao began with a substantive-due-process based argument: the petitioner's fundamental right, if any, has to be judged on the basis that there is no such law. To state it differently, what fundamental right of the petitioner has been infringed by the acts of the police? If he has any fundamental right which has been infringed by such acts, he would be entitled to a relief straight away, for the State could not justify it on the basis of any law made by the appropriate Legislature or the rules made thereunder. Subba Rao J. used Field's dissent in *Munn* case, in which *Field* defined the term "life" as something more than mere animal existence.

Justice Subba Rao's dissent later helped and laid down the foundation for the Court's decisions in *Satwant Singh Sawhney* (1967), and *Maneka Gandhi* (1978) in support of substantive due process. In *Satwant Singh Sawhney* case, what was the dissenting opinion of Subba Rao J. in *Kharak Singh* case became the majority opinion in this case. The Court in this case held that the impounding of the passport of *Satwant Singh Sawhney* by the Government was violated Article 14 and 21. This judgment was the gateway for the use of foreign law in this area of law. This beginning got strengthened in the case *R.C. Cooper v. Union of India*<sup>45</sup> in which *Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969* was challenged before the Supreme Court. The Supreme Court's constitutional bench quashed the legislation as violative of Articles 14, 19 and 31. The apex court observed that 'law' under Article 21 is not mutually exclusive and is intertwined with Articles 19, and 14, whenever necessary with a view to strengthen the right to personal liberty and to overcome the weakness of the guarantee of 'procedure established by law'.

While previous Supreme Court judgments and opinions would at least theoretically reject American "due process," in the narco-analysis case<sup>46</sup>, Chief Justice K.G. Balakrishnan held that "substantive due process" is now a "guarantee" under the Constitution. The court stated that mental privacy is also a part of life and personal liberty and compulsory. Narco-analysis test etc. test is the violation of mental privacy. Moreover the court stated that it is the violation of principles of natural justice as the accused did not have freedom of choice at the time of test. Any compulsion to go for these tests is degrading, cruel and inhuman. Moreover it is the violation of right to fair trial also as in such a case accused at the time of an examination does not have the right to take legal advice.

<sup>43</sup> (2016) 2 SCC 445.

<sup>44</sup> AIR 1963 SC 1295.

<sup>45</sup> A.I.R. 1970 S.C. 564.

<sup>46</sup> *Selvi v. State of Karnataka* AIR 2010 SC 1974.





Later, the view was supported in *Union of India v. R. Gandhi* held that a Constitution Bench unanimously held that certain provisions of the Company (Second Amendment) Act, 2002, establishing the National Company Law Tribunal and Appellate Tribunal, suffered from unconstitutional “defects.” The Indian Constitution neither textually nor strictly permits the legislation to be struck down the provisions because they are “unfair” or “arbitrary,” in the absence of a violation of one of its enumerated provisions. To tackle this difficulty the Court in this case held that principles such as “independence of the judiciary” are part of the “essence” of the right to equality, and consequently must be enforced. The above application made by the Court is done in the same way as Justice Frankfurter would have done in the American due process cases. Here, the court applied what was for constitutional amendment to general law by following se constitutional principles which could be applied only if there is substantive due process.

### CONCLUSION

The answer to Constitutional silences is by the rule of purposive interpretation of the Constitution. While doing so we refer to the Constitutional Assembly Debates. In *A. K. Gopalan* case, the legal positivism and the theory of original intent of the constituent assembly propounded which was abandoned by the later judgments. Since the *R. C. Cooper* ruling, Article 21 has changed significantly in two key areas. First, the notion of basic rights as distinct units or airtight compartments has faded. As a result, Article 14 has been deemed to enliven Article 21's substance. Second, Article 21's reference to “procedure established by law” does not imply a formalistic requirement that a procedure must be present in all issued laws. This phrase has been used to describe the procedure's quality and substance, which must be fair, just, and reasonable. It is not enough to say that a law is constitutional merely because it allows for the taking of a person's life or personal freedom; the process also needs to be fair, just, and reasonable.

The attribute of reasonableness applies to the law's actual text as well as the details of the method it specifies in connection to Article 21. To put it another way, the criterion of Article 21 is not satisfied just by the adoption of fair and reasonable legal procedures, and a legislation that does so may still be subject to attack on the grounds that its provisions do not meet the standards of a valid law. If a basic right is violated, the legislation is subject to a substantive challenge.

The *Maneka Gandhi's* case ensures just, fair and reasonable laws under the Constitution which embodies the principals of non-arbitrariness and non-discriminatory. The unconnected and unattached judiciary to the societal realities changed their approach and view to evolve according to the socio-economic needs of the society.

Both substantive and procedural due process envelopes under Article 21 as a pivot. The substantive law provides the right and on its violation provides justice to it which is an end of law. On the other side procedural law provides the means to provide justice. Both the procedural and substantive law go hand in hand. One is the means and other is the end and both are inter-related to each other for providing the ends of justice. Justice can't be reasonable if either the means or the end is not fair. The interconnectedness of both, that is, the end and means can be seen entrenched in Article 21 of the Constitution. Article 21 needs to be interpreted purposely and widely for making the expansion of it as per the societal demands. What was neither implicit nor explicit in the Constitution is now implicit in the constitution with the help of judicial interpretations.

Famously discussed concept of “judicial activism” is acquired by the Court only because of the “due process clause” which is implicit in the Article 21 which puts on the duty on the Court to make the interpretation of the said article widely to fulfil the purpose of it. The vast extent 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.