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Comparative Analysis of Due Process of Law: USA & India

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Abstract
The Second World War has impressed upon the international community the importance of human rights. Amongst these, the right to life and liberty is the most important one as protection of human life is a preliminary condition for enjoyment of human rights. Due Process of Law has strengthened the process of realization of justice. It has ensured the existence of equality and fairness in the legal system. The fifth Amendment of US Constitution ensured that a person cannot be deprived of his life, liberty or property without due process of law which was applied only to federal laws. The fourteenth amendment ensured that due process would be applied even to state laws. The Article 21 of Indian Constitution uses the expression "Procedure Established by Law" which, as per the interpretation of the Apex Court, is the just, reasonable and fair means of ensuring justice. Present article investigates the conception of Due Process both in India and the USA and its realization in present form.

Keywords: *Due Process of Law, Procedure established by Law, Rule of Law, Constitution of India, US Constitution*

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I. INTRODUCTION

The history of democratic countries unfolds that realization of justice is the ultimate end of every nation. Obviously the realization of justice much depends upon the quality of legal system it has accommodated. Indeed the nation's quality of legal system is measured by its commitment to the rule of law, fairness of laws and respect for human rights. Second World War has made the international community to think seriously the promotion and implementation of human rights across the universe. India being democratic nation, committed to rule of law cannot be indifferent to promotion of human rights. In fact, the greatest heritage of democracy to mankind is the right of personal liberty.[1] The right to life and liberty is the most important rights among the human rights because existence and protection of life is precedent condition for the enjoyment of rest of human rights. The importance of right to life and personal liberty can be measured by the fact that it cannot be suspended even during emergency. Unlike Constitution of United States of America (hereinafter US Constitution), the Constitution of India, 1950 does not explicitly mention the familiar constitutional expression of 'due process of law' in any part of it. Fourth and Fifteenth Amendment has inserted the due process law to the US Constitution. Undoubtedly this concept has given vast and undefined powers to the American judiciary over federal and state legislatures and their actions. Despite its deliberate omission by the makers of the Indian Constitution, the Supreme Court of India by a process of interpretation of two Articles of the Constitution, namely Articles 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'.[2] The process of realization of justice over the period of time has transited savage and crude procedure of law into refined and civilized procedure. Further due process concept has strengthened procedure of law by integrating all of its components and by addressing each of them with the principle of equality and fairness.[3]

HISTORY

Dicey's rule of law is unique characteristic of the English Constitution which suggest that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In other words, the rule of law is contrasted

[1] P.J. FITZERALD, SALMOND ON JURISPRUDENCE 102 (New Delhi: Universal Law Publishing Co. Pvt. Ltd. 2013).

[2] T.R. Andhyarujina, The Evolution of Due Process of Law by the Supreme Court in SUPREME BUT NOT INFALLIBLE 193 (B.N. Kripal et al. eds., New Delhi: Oxford University Press 2011).

[3] P. ISHWARA BHAT, FUNDAMENTAL RIGHTS 90 (Kolkata: Eastern Law House Private Ltd. 2004).

with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[4] Dicey's rule of law is nothing but the due process of a law which is emerged from the customary rules of common law. Due process has ancient history which is traceable from the Magna Carta. Magna Carta was not a statute but was merely a personal treaty between King John and the enraged upper classes.[5] Section 39 of the Magna Carta of 1215 has led the foundation for the terminology of due process which runs as follows: "No freeman shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land." The due process in common legal system is shaped and nursed by customary practice. 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. US 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.[6] The history of the Bill of Rights clearly showed that the authors of the amendments to Constitution intended to apply only to federal laws but not to state laws. Therefore, 14th Amendment has applied due process to state.

In United States of America

Evolution of the Due process doctrine after the ratification of the Fourteenth Amendment in 1868 provides considerable insight into the Court's general intellectual transformation during the late nineteenth and the twentieth centuries. Initially, the Court defined the protected interests under 'procedural due process' by determining the importance of the interest at issue. The Courts did not categorize the interest as an interest in "life, liberty, or property" per se. The other major strand of due process is 'substantive due process', which refers to due process limits on government regulatory authority. This approach is associated with the Court's famous decision in Lochner v. New York [198 U.S. 45 (1905)]. An important precondition to the development of substantive due process occurred in 1872, when the Court in Slaughter-House Cases [83 U.S. 36, 77–81 (1872)] held that the Privileges or Immunities Clause should be read very narrowly, thus excluding coverage of substantive rights. This narrow reading of Fourteenth Amendment for substantive rights has faced stiff opposition, but still applies today. The development of substantive due process produced three subcategories of rights as recognized in Washington v. Glucksberg [521 U.S. 702, 767 n.9 (1997)]. The first subcategory included "non-fundamental" rights that trigger low-level, rational basis judicial review. The second covered unenumerated substantive rights that the Court identified as fundamental, which trigger elevated judicial scrutiny. The third subcategory included enumerated fundamental rights that the Court derived selectively from the Bill of Rights.

In India

The expression "procedure established by law" under Article 21 of the Indian Constitution was meant to include 'any' sort of procedure, laid down in a law enacted by the Indian legislature. This view of the founding fathers of the Constitution is evident from the constituent assembly debates of December 6, 1948. In the year 1950, the Supreme Court of India in A.K. Gopalan v. State of Madras [AIR 1950 SC 27], reflecting on the intentions of the Constitution makers, held that "procedure established by law" only meant that a procedure had to be set by law enacted by a Legislature. However, three decades later, in Maneka Gandhi v. Union of India [AIR 1978 SC 597], the Supreme Court rejected its earlier interpretation and held that the procedure contemplated under Article 21 is a just and fair procedure, and not an arbitrary procedure. The procedure, which is reasonable and fair, must be in conformity with Article 14 of the Constitution. By virtue of this decision 'procedure established by law' has now, in effect become, 'Due Process of law'. Since then every case of infringement of fundamental rights has undergone judicial scrutiny on the anvil of Article 14, 19 and 21. One of the critical features that is borrowed from the Japanese constitution is the "procedure established by law". This feature is in regard to the right to life and personal liberty of the Indian Constitution. Under Article 31 of the Japanese Constitution which mentions the right to life and personal liberty, no criminal liability shall be imposed except according to the procedure of law. This article is very similar to Article 21 of the Indian Constitution.

[4] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 110 (Indianapolis: Liberty Classics, 8th ed. 1982).

[5] MOTT, DUE PROCESS OF LAW 4 (New York: DA CAPO PRESS 1973).

[6] JOHAN NOWAK, CONSTITUTIONAL LAW 387 (St Paul Minnesota: St Paual Minn., West Publishing Co. 1978).

DUE PROCESS OF LAW: USA

The Constitution's Fifth Amendment adamantly commands that no person may be "deprived of life, liberty or property without due process of law" by any act of the federal government. Then, the Fourteenth Amendment, ratified in 1868, steps up to use exactly the same phrase, called the Due Process Clause, to extend the same requirement to the state governments.

In making due process of law a constitutional guarantee, America's Founding Fathers drew on a key phrase in the English Magna Carta of 1215, providing that no citizen should be made to forfeit his or her property, rights, or freedom except "by the law of the land," as applied by the court. The exact phrase "due process of law" first appeared as a substitute for Magna Carta's "the law of the land" in a 1354 statute adopted under King Edward III that restated the Magna Carta's guarantee of the liberty.

The exact phrase from the 1354 statutory rendition of the Magna Carta referring to "due process of law" reads:

"No man of what state or condition he be, shall be put out of his lands or tenements nor taken nor disinherited, nor put to death, without he be brought to answer by due process of law." (Emphasis added).
At the time, "taken" was interpreted to mean being arrested or deprived of liberty by the government.

'Due Process of Law' and 'Equal Protection of the Laws'

While the Fourteenth Amendment applied the Bill of Rights' Fifth Amendment guarantee of due process of law to the states it also provides that the states may not deny any person within their jurisdiction "the equal protection of the laws." That's fine for the states, but does the Fourteenth Amendment's "Equal Protection Clause" also apply to the federal government and to all U.S. citizens, regardless of where they live?

The Equal Protection Clause was mainly intended to enforce the equality provision of the Civil Rights Act of 1866, which provided that all U.S. citizens (except Indigenous Americans) should be given "full and equal benefit of all laws and proceedings for the security of person and property."

So, the Equal Protection Clause itself applies only to state and local governments. But, enter the U.S. Supreme Court and its interpretation the Due Process Clause.

In its decision in the 1954 case of Bolling v. Sharpe, the U.S. Supreme Court ruled that the Fourteenth Amendment's Equal Protection Clause requirements apply to the federal government through the Fifth Amendment's Due Process Clause. The Court's Bolling v. Sharpe decision illustrates one of the five "other" ways the Constitution has been amended over the years.

As the source of much debate, especially during the tumultuous days of school integration, the Equal Protection Clause gave rise to the wider legal tenet of "Equal Justice Under Law."

The term "Equal Justice Under Law" would soon become the foundation of the Supreme Court's landmark decision in the 1954 case of Brown v. Board of Education, which led to the end of racial segregation in public schools, as well as dozens of laws prohibiting discrimination against persons belonging to various legally define protected groups.

Key Rights and Protections Offered by Due Process of Law

The basic rights and protections inherent in the Due Process of Law clause apply in all federal and state government proceedings that could result in a person's "deprivation," basically meaning the loss of "life, liberty" or property. The rights of due process apply in all state and federal criminal and civil proceedings from hearings and depositions to full-blown trials. These rights include:

- The right to an unbiased and speedy trial.
- The right to be provided with notice of the criminal charges or civil action involved and the legal grounds for those charges or actions.
- The right present reasons why a proposed action should not be taken.
- The right to present evidence, including the right to call witnesses.
- The right to know the opposing evidence (disclosure).
- The right to cross-examine adverse witnesses.
- The right to a decision based solely on the evidence and testimony presented.
- The right to be represented by a lawyer.
- The requirement that the court or other tribunal prepare a written record of the evidence and testimony presented.
- The requirement that the court or other tribunal prepare written findings of fact and reasons for its decision.
- Fundamental Rights and the Substantive Due Process Doctrine.

While court decisions like Brown v. Board of Education have established the Due Process Clause as sort of a proxy for a wide range of rights dealing with social equality, those rights were at least expressed in the Constitution. But what about those rights not mentioned in the Constitution, like the right to marry the person of

your choice or the right to have children and raise them as you choose?
Indeed, the thorniest constitutional debates over the last half century have involved those other rights of "personal privacy" like marriage, sexual preference, and reproductive rights. To justify the enactment of federal and state laws dealing with such issues, the courts have evolved the doctrine of "substantive due process of law."

As applied today, substantive due process holds that the Fifth and the Fourteenth Amendments requires that all laws restricting certain "fundamental rights" must be fair and reasonable and that the issue in question must be a legitimate concern of the government. Over the years, the Supreme Court has used substantive due process to emphasize the protections of the Fourth, Fifth and Sixth Amendments of the Constitution in cases dealing with the fundamental rights by constraining certain actions taken by police, legislatures, prosecutors, and judges.

The Fundamental Rights

The "fundamental rights" are defined as those having some relationship to the rights of autonomy or privacy. Fundamental rights, whether they are enumerated in the Constitution or not, are sometimes called "liberty interests." Some examples of these rights recognized by the courts but not enumerated in the Constitution include, but are not limited to:

- The right to marry and procreate
- The right to have custody of one's own children and to raise then as one sees fit
- The right to practice contraception
- The right to identify as being of the gender of one's choice
- The right work at the job of one's choice
- The right to refuse medical treatment

The fact that a certain law may restrict or even prohibit the practice of a fundamental right does not in all cases mean that the law is unconstitutional under the Due Process Clause. Unless a court decides that it was unnecessary or inappropriate for the government to restrict the right in order to achieve some compelling governmental objective the law will be allowed to stand

MEANING AND KINDS OF DUE PROCESS OF LAW

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 by the statute. 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.9 Therefore, every form of review other than that involving procedural due process is a form a substantive review. This interpretation has been proven controversial, and is analogous to the concepts 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 recognize 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.

CONSTITUENT ASSEMBLY DEBATES INDIA

Constituent Assembly debated in depth over drafting of Article 15 which finally becomes Article 21 of the Indian Constitution in the background of the many amendments was moved over the Article 15. Kazi Syed Karimuddin who was Constituent Assembly member contented that if the words 'according to procedure established by law' are retained it would open a sad chapter in the history of constitutional law.[7] The Advisory Committee on Fundamental Rights appointed by the Constituent Assembly had endorsed Kazi Sayed Karimuddin's opinion by suggesting that no person shall be deprived of his life or liberty without due process of law. Kazi Syed Karimuddin cautioned that if the words 'according to procedure established by law' are enacted, then there will be very great injustice to the people and nation. Once the legislature lays down procedure by enacting law and such procedure is complied by the authority. Then the courts cannot question the decision of

[7] 3 INDIA CONST. ASSY. DEB. 842-43.

the authority even though that decision is unjust or taken malafidely. Therefore, he suggested that the words 'except according to procedure established by law' should be replaced by the words 'without due process of law'. On the other hand, B.N. Rao, the Constitutional Advisor to the Constituent Assembly, believed that due process would provide excessive powers to the courts. He stated that: "The courts, manned by an irremovable judiciary not so sensitive to public needs in the social or economic sphere as the representatives of a periodically elected legislature, will, in effect, have a veto on legislation exercisable at any time and at the instance of any litigant". Further B.N. Rao warned that 40% of the litigation before the United States Supreme Court during the past 50 years had centered on due process and due process meant only what court meant it. The words 'without due process of law' have been taken from the American Constitution and they have come to acquire a particular connotation. The term 'without due process of law' has a necessary limitation on the powers of the state, both executive and legislative. The doctrine implied by 'without due process of law' has a long history in Anglo-American law. It does not lay down a specific rule of law but it implies a fundamental principle of justice. These words have nowhere been defined either in the English Constitution or in the American Constitution but meaning can be found through reading the various antecedents of this expression. Due process means that the substantive provisions of law are fair and just and not unreasonable or oppressive or capricious or arbitrary. That means that the judiciary is given power to review legislation. In America that kind of power which has been given to the judiciary undoubtedly led to an amount of conservative outlook on the part of the judiciary and to uncertainty in legislation. Due process phrase is to guarantee a fair trial both in procedure as well as in substance. The procedure should be in accordance with law and should be appealable to the civilized conscience of the community. It also ensures a fair trial in substance, that is to say, that substantive law itself should be just and appealable to the civilized conscience of the community. The various decisions of the American Supreme Court when analyzed, will stress the four fundamental principles: First, that a fair trial must be given; second, the court or agency which takes jurisdiction in the case must be duly authorized by law to such prerogative; third that the defendant must be allowed an opportunity to present his side of the case; and fourth that certain assistance including counsel and the confronting of witnesses must be extended. These four fundamental points guarantee a fair trial in substance. Shri K.M. Munshi also supported the words 'without due process of law' because it would strike the balance between individual liberty and social control. Even Shri Alladi Krishnaswami Ayyar lent his support for 'due process'. Mr. Z.H. Lari said that it is necessary not only in the interest of individual liberty but in the interest of proper working of legislatures that such a clause as due process of law should find a place in the Constitution. Even Dr. B.R. Ambedkar confessed that he was in a somewhat difficult position with regard to the words 'procedure established by law' and 'due process'. One point of view was that due process of law must be there in this article; otherwise the article is a nugatory one. The other point of view is that the existing phraseology is quite sufficient for the purpose. He further commented that the question of 'due process' raises, the question of the relationship between the legislature and the judiciary. In a federal constitution, it is always open to 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, would give the judiciary the power to question the law made by the legislature on another ground. That ground would be whether that law is in keeping with 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 law may be perfectly good and valid so for as the authority of the legislature is concerned. But it may not be a good law, that is to say, it violates certain fundamental principles; and the judiciary would have that additional power of declaring the law invalid. We have no doubt given the judiciary the power to examine the law made by different legislative bodies on the ground whether that law is in accordance with the powers given to it. 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. There are two views on this point. One view is that the legislature may be trusted not to make any law which would abrogate the fundamental rights of a man. Another view is that it is not possible to trust the legislature; the legislature is likely to err, is likely to be led away by passion, by party prejudice, by party considerations, and the legislature may make a law which may abrogate what may be regarded as the fundamental principles which safeguard the individual rights of a citizen. We are therefore placed in two difficult positions. One is to give the judiciary the authority to sit in judgment over the will of the legislature and to question the law made by the legislature on the ground that it is not good law, in consonance with fundamental principles. Is that a desirable principle? The second position is that the legislature ought to be trusted not to make bad laws. It is very difficult to come to any definite conclusion. There are dangers on both sides. Further Dr. Ambedkar opined that it is not possible to omit the possibility of a legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, he expressed another

view that, how five or six gentlemen sitting in the federal or the Supreme Court examining laws made by the legislature and by dint of their own individual conscience or their bias or their prejudices be trusted to determine which law is good and which law is bad. It is rather a case where a man has to sail between Charybdis and Scylla and therefore would not say anything. Finally, he left the matter to the House to decide in any way it likes. Finally the House adopted the Clause as drafted by the Drafting Committee, rejecting 'due process'. The result is that Article 21 gave 'a carte balance to make and provide for the arrest of any person under any circumstances as Parliament may think fit'. Article 22 was introduced with a view to imposing some limitations upon the legislature.

JUDICIAL ANALYSIS-INDIA

Early Years

A. K. Gopalan v. State of Madras[8] was one of the first cases to be decided under the newly minted Article 21. Gopalan challenged his detention under the Preventive Detention Act, 1950 as being violative of Arts. 13, 19, 21 and 22, claiming that 'personal liberty' included the freedoms guaranteed under Article 19 as well. The majority decision, authored by Chief Justice Kania, did not accept the argument that Articles 19 and 21 should be read together as the former dealt with substantive rights and the latter with procedural rights. It was emphatic in ruling that 'procedure established by law' did not mean 'due process of law'. Article 19 did not apply to laws dealing with preventive detention even though the rights guaranteed by the provision would be in a way abridged by such detention.

It can be seen that the Supreme Court held the rights guaranteed under Arts. 14, 19 and 21 (which later came to be referred as the 'golden triangle') as mutually exclusive and used a formalist approach of construction to interpret the right guaranteed by Article 21.[9] Justice Mukherjea referred to the Constituent Assembly Debates in his opinion to hold that the obvious intention behind qualifying liberty with 'personal' was to exclude the contents of Article 19 from that of Article 21.[10] Chief Justice Kania also referred to the Debates to show how the idea of legislative prescription was brought out by the omission of the word 'due' and qualification of 'procedure' by the word 'established'. The Constitution clearly gave the legislature the power of final determination of law as a result of which Chief Justice Kania arrived at this narrow interpretation of Article 19 and limited the scope of judicial function, apparently using both tools of original intent and textual analysis.

The sole dissent in this case was issued by Justice Fazl Ali who opined that preventive detention directly infringed the right guaranteed by Article 19(1)(d) and even by a narrow construction of this provision, preventive detention laws would be subject to the limited judicial review provided therein.

Kharak Singh v. State of Uttar Pradesh[11] is widely construed to mark the beginnings of the right to privacy in India. Since right embodying privacy is not expressly mentioned in either Article 19 or Article 21, its only possible genesis lies in a substantive due process reading of Article 21. Uttar Pradesh Police Regulation 236, which allowed for night domiciliary visits and police surveillance of a suspect's home, was challenged as being violative of Articles 19(1)(d) and 21. The majority decision of the Court readily held that the impugned regulation was not passed under the authority of any law and thus opens to challenge. However, it struck down as unconstitutional only that provision of Regulation 236 which dealt with the domiciliary visits as being violative of Article 21. It went on to hold that the right to privacy was not one guaranteed under the Constitution and that an infringement of the rights under Part III must be both direct and tangible. While the majority opinion deemed it unnecessary to determine the precise relationship between Articles 19 and 21, it did hold that Article 21 comprised the residue of the rights not specifically covered under Article 19, thus taking a view different than the one taken by the Gopalan bench. The dissenting opinions of Justices Subba Rao and Shah did find a constitutional right to privacy in Article 21, stating that such a right was an essential ingredient of personal liberty. They also held that though Articles 19 and 21 dealt with two distinct and independent fundamental rights, there was considerable overlap between the two. Thus, the impugned law or regulation had to satisfy that both of these rights were not infringed.

It is interesting to note that both the majority and the minority opinions cited the American cases of Munn v. Illinois[12] and Wolf v. Colorado[13] to determine the nature of the right to liberty. While the majority

[8] 1950 S.C.R. 88 (India) [Hereinafter "Gopalan v. Madras").

[9] SEERVAI, at 701-2 (Seervai differs on this point. According to him, the majority did not hold these rights to be mutually exclusive and in fact rejected the contention that Article 21 guaranteed only procedural rights. Article 21 guaranteed both substantive and procedural rights because this was the only understanding that demonstrated that Arts. 19(1) and 21 could not be read together).

[10] Gopalan v. Madras, *Supra* note 36, at 262-63

[11] 1964 S.C.R. (1) 332 (India) [Hereinafter Kharak Singh v. U.P.].

[12] 94 U.S. 113 (1877).

opinion extended this analysis to only hold that domiciliary visits impinged upon the said right, the minority opinion went steps further to read a substantive due process right into Article 21. This dissenting opinion of then Justice Subba Rao went on to become the majority opinion in Satwant Singh Sawhney v. Assistant Passport Officer[14], a case that dealt with the infringement of the right to travel by virtue of impounding of passports. Chief Justice Subba Rao again relied on the American decisions in Kent v. Dulles[15] and Aptheker v. Secretary of State[16] to hold that 'liberty' in the Indian Constitution bore the same comprehensive meaning as given to it in the 5th and 14th amendments of the U.S. Constitution.

Though the Bank Nationalisation case[17] dealt with the right to property, it is apposite in this context as it considered and held as incorrect the reasoning in Gopalan about the mutual exclusivity of rights. Petitioner in the present case was a shareholder of one of the 14 commercial banks that were acquired and nationalized by the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969. The main issue, as was the case in all right to property cases, was one of compensation and petitioner contended that his fundamental rights under Arts. 19(1)(f) and 31(2) were infringed. The majority opinion considered the correlation between the two articles as well as the dicta in Gopalan, which was the source of the understanding that the extent of protection against infringement of fundamental rights was determined by the object of the state action and not by its operation on the individual's rights. This reasoning was transferred from the realm of preventive detention and personal liberty into that of property rights to result in a long line of cases that divorced the rights guaranteed by separate Articles, leading the Court to consider it. The majority opinion went on to hold this understanding as inconsistent with the scheme of the Constitution, in effect laying the groundwork for linking up and mutual inclusivity of rights and also overruling the ratio in Gopalan.

Seervai has severely criticized this decision as an unjustified display of judicial power, stating that there was absolutely no need for the Cooper bench to consider these questions as they were well settled in law and also because Gopalan dealt with a completely different sphere of preventive detention and not property rights. Nevertheless, this decision was cited by subsequent benches in their judgments[18] and proved instrumental in turning the initial understanding of the internal relationship of the fundamental rights on its head. Slowly but surely the Supreme Court was moving away from a Positivist interpretation and towards a Universalist interpretation of fundamental rights.

Emergency Period

Undoubtedly the most important (and infamous) decision pronounced during the Emergency period was A.D.M Jabalpur v. Shivkant Shukla[19]. Seervai considered it as the "most glaring instance in which the Supreme Court… suffered most severely from a self-inflicted wound" borrowing the language of Chief Justice Charles Evans Hughes while most people, including former Supreme Court justice V. R. Krishna Iyer, refer to this judgment as the darkest hour in the history of the Supreme Court.[20]

This decision disposed of a bunch of habeas corpus petitions filed by numerous people, including well known political opponents of Indira Gandhi, challenging their preventive detention. The majority decisions held that in light of the Presidential order dated June 27, 1975, no person had any locus standi to file a writ petition, for habeas corpus or otherwise, challenging the legality of the order of preventive detention on the ground that it was not in accordance with the Maintenance of Internal Security Act, was illegal or vitiated by malafides or extraneous considerations. Article 21 was the "sole repository" of the right to life and personal liberty against state action and since Part III of the Constitution was suspended during the Emergency, any claim for the enforcement of this right was barred by the Presidential order. An exchange between Justice Khanna and the government counsel reveals that even the right to life didn't exist while the Emergency was in operation and the courts were helpless even when life was taken away illegally.[21] No rule of law existed outside the Constitution

[13] 338 U.S. 25 (1949).

[14] 1967 (3) S.C.R. 525

[15] 357 U.S. 116 (1958).

[16] 378 U.S. 500 (1964).

[17] . C. Cooper v. Union of India, 1970 S.C.R. (3) 530

[18] *See generally* Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461; Maneka Gandhi v. Union of India, 1978 S.C.R. (2) 621; Unni Krishnan v. State of Andhra Pradesh, A.I.R. 1993 S.C. 2178.

[19] 1976) Supp. S.C.R. 172 (hereinafter "A.D.M. Jabalpur Case").

[20] V.R. Krishna Iyer, *Emergency—Darkest hour in India's judicial history*, Indian Express June 27, 2000, available at http://expressindia.indianexpress.com/news/ie/daily/20000627/ina27053.html (last visited March. 30, 2013).

[21] GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 339 (1999).

and when the Constitution, or the law passed under it, itself extinguished the right, no remedy existed.

Justice Khanna delivered the sole dissent wherein he held that Article 21 cannot possibly be the sole repository of any right as "the principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution" but existed well before it came into force. Even in the absence of Article 21 no person could be deprived of his life or liberty without the authority of law as no court in any country of this world, in its pre- or post- Constitution days, would accept such a claim.

While the majority opinion reversed the fledgling trend towards reading substantive due process rights in Article 21, albeit still holding that it contained both procedural and substantive aspects, Justice Khanna's dissent marched along this path of Universalist construction of the right to life and personal liberty that went beyond the mere text of the Constitution.

From 'Procedure Established By Law' To 'Due Process Of Law' Post Maneka Gandhi Case

The turning point of substantive due process rights jurisprudence came in the form of Maneka Gandhi v. Union of India[22], the first case that dealt with personal liberty in the post-Emergency period. It was the beginning of an era of judicial populism which can be explained by a variety of factors ranging from attempts to mend the reputation of the Court, atone for the Jabalpur decision, and to legitimize judicial power.

The petitioner in the Maneka case happened to be the younger daughter-in-law of Indira Gandhi, who challenged the order of the Janata government impounding her passport as violative of Arts. 14 and 21 because she wasn't provided with a notice or prior hearing. The six judge majority opinion expanded the scope of Article 21 by reading the right to travel abroad as flowing from the right of personal liberty. Another break from the Gopalan approach occurred when the bench held that the procedure envisioned by Article 21 must be just and fair, and not arbitrary, fanciful or oppressive, thus reading in the principles of natural justice. The golden triangle of Articles 14, 19 and 21 rights was created by holding that procedures depriving a person of life or personal liberty must be non-arbitrary, reasonable and in accordance with law.

This reasoning was a far cry from the formal, black letter of the law approach taken by the Court in its early years, and in the Jabalpur decision, wherein it stressed on the mutual exclusivity of the various Articles and law of the Parliament rather than the rule of law. Both Justices Bhagwati and Krishna Iyer, who formed the majority in the Maneka decision, went on to spearhead the Public Interest Litigation movement in India that was the true product of the substantive due process jurisprudence.

One of the first PIL cases was that of Hussainara Khatoon v. Home Secretary, State of Bihar[23] which dealt with numerous under trial prisoners languishing in the jails of Bihar, some having been imprisoned for periods longer than the maximum sentence their charge carried. Apart from considerably relaxing the standing requirements by letting Kapila Hingorani, a journalist appearing as counsel for the petitioners, file habeas corpus petitions on behalf of the undertrial prisoners, the Court formulated and used a 'continuing mandamus' which allowed it to issue relief through orders and directives, and not dispositive judgments, so that it could continue to retain jurisdiction. Justice Bhagwati authored the Court's opinion and held that fairness under Article 21 is infringed upon when the state does not provide for speedy trial of the accused, his pre-trial release on bail and free legal aid if he is indigent. It was not open to the state to deny the constitutional right to speedy trial of the accused on the ground of scarcity of resources. The bench headed by Justice Bhagwati also introduced the concept of epistolary jurisdiction (term coined by Upendra Baxi) by instituting a PIL in response to a letter sent to the Court by a social reform group leader. In Bandhua Mukti Morcha v. Union of India[24], the Court held that the right to life under Article 21 included the right of a person to not be subject to 'bonded labor' and the right of bonded laborers to rehabilitation after release. It is noteworthy that the Court read this right under Article 21 in spite of Article 23[25] and the Bonded Labour System (Abolition) Act, 1976, probably due to the failure of the latter to provide any respite and the increasing power and importance of substantive due process rights.

The petitioner in Parmanand Katara v. Union of India[26] was a human rights activist who submitted

[22] 1978 S.C.R. (2) 621.

[23] 1979 S.C.R. (3) 532.

[24] (1984) 3 S.C.C. 161.

[25] INDIA CONST. art. 23. (Prohibition of traffic in human beings and forced labour—

(1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or classor any of them.).

[26] 1989 S.C.R. (3) 997.

newspaper reports dealing with a specific hit-and-run case to the Court and asked that the state be directed to give medical aid to all injured citizens brought to government hospitals. Justice Ranganath held that Article 21 casts a "total, absolute and paramount" obligation on the state to preserve life and rules of procedure must give way to it. It is not open to the state to insist on the police being contacted and the proper procedure related to negligent deaths being followed when a person's life was at stake. The Court had come far beyond the question it asked in its early years- whether the procedure causing the loss of life/ liberty was by law- to hold that Article 21 contained both negative and positive rights; individual entitlements and state obligations. A host of PIL petitions instituted by M.C. Mehta, a man sometimes described as a "One Person Enviro-Legal Brigade"[27], successfully led to the reading in of environmental rights in Article 21. Various benches of the Supreme Court have held private corporations, having the potential to affect the life and health of people, liable for violations of Article 21 by polluting the environment[28], that positive obligations exist on the state to eliminate water and air pollution[29] and also that the people of India have a right to breathe air unpolluted by the carcinogens present in diesel exhaust. Vishakha v. State of Rajasthan[30] was a PIL filed to enforce the fundamental rights of working women under Articles 14, 19 and 21. The bench lamented the absence of a law dealing with and prohibiting the sexual harassment of women at the workplace, holding that each such incident violated the rights of life, liberty and gender equality guaranteed under Arts. 14, 15 and 21 of the Constitution and went ahead to lay down guidelines to be followed by each and every office throughout the country. These guidelines still remain the governing law on this subject as the Parliament is yet to legislate on this topic.

The list of the decisions expanding the substantive scope of the right to life and personal liberty is indeed ongoing and endless. On the basis of the decisions mentioned above and the numerous ones not studied in this article, it can now be evaluated whether absence of the 'due process' clause in the text of the Indian Constitution had an effect on the development of human rights.

JUDICIAL ANALYSIS – USA

The Slaughter-House Cases (14 Apr 1873)

In the Slaughter-House Cases, waste products from slaughterhouses located upstream of New Orleans had caused health problems for years by the time Louisiana decided to consolidate the industries into one slaughterhouse located south of the city. Slaughterhouse owners were incensed; they sued Louisiana and argued that the state-sanctioned monopoly infringed on their newly ratified 13th and 14th Amendment rights. Justice Samuel Miller dismissed the butchers' claims regarding due process and involuntary servitude. He then looked to Article IV, which entitled "the Citizens of each State" to "all Privileges and Immunities of Citizens in the several States" and to the 14th Amendment, which guaranteed the protection of the "Privileges or Immunities of citizens of the United States." Miller reasoned that the two clauses protected different bundles of rights, with Article IV protecting the rights of state citizenship and the 14th Amendment protecting rights of national citizenship. The privileges and immunities of U.S. citizenship were narrow and only those specified in the Constitution, which included the right to freely travel throughout the states. Not included, Miller said, was the right to one's livelihood or be protected against a monopoly.

Plessy v. Ferguson (18 May 1896)

The Louisiana legislature had passed a law requiring black and white residents to ride separate, but equal, train cars. In 1892, Louisiana police arrested Homer Adolph Plessy—who was seven-eighths Caucasian—for taking his seat on a train car reserved for "whites only" because he refused to move to a separate train car reserved for blacks. Plessy argued that the Louisiana statute violated the 13th and 14th Amendments by treating black Americans inferior to whites. Plessy lost in every court in Louisiana before appealing to the Supreme Court in 1896. In a 7-1 decision, the Court held that as long as the facilities were equal, their separation satisfied the 14th Amendment. Justice John Marshall Harlan authored the lone dissent. Passionately he clarified that the Constitution was color-blind, railing the majority for an opinion which he believed would match Dred Scott in infamy.

Lochner v. New York (17 Apr 1905)

Lochner, a baker from New York, was convicted of violating the New York Bakeshop Act, which prohibited bakers from working more than 10 hours a day and 60 hours a week. The Supreme Court struck

[27] Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN Diego Int'l L.J. 175, 202 (2010).

[28] M. C. Mehta v. Union of India, 1987 S.C.R. (1) 819.

[29] M. C. Mehta v. Union of India, (1987) 4 S.C.C. 463.

[30] A.I.R. 1997 SC 3011.

down the Bakeshop Act, however, ruling that it infringed on Lochner's "right to contract." The Court extracted this "right" from the Due Process Clause of the 14th Amendment, a move that many believe exceeded judicial authority.

Gitlow v. New York (08 June 1925)

Before 1925, provisions in the Bill of Rights were not always guaranteed on the local level and usually applied only to the federal government. Gitlow illustrated one of the Court's earliest attempts at incorporation, that is, the process by which provisions in the Bill of Rights has been applied to the states. A socialist named Benjamin Gitlow printed an article advocating the forceful overthrow of the government and was arrested under New York state law. Gitlow argued that the First Amendment guaranteed freedom of speech and the press. On appeal, the Supreme Court expressed that the First Amendment applied to New York through the Due Process Clause of the 14th Amendment. However, the Court ultimately ruled that Gitlow's speech was not protected under the First Amendment by applying the "clear and present danger" test. The Court's ruling was the first of many instances of incorporating the Bill of Rights.

Brown v. Board of Education (17 May 1954)

It is impossible to mention the victories of the Civil Rights Movement without pointing to Brown v. Board of Education. Following the Court's ruling in 1896 of Plessy v. Ferguson, segregation of public schools based solely on race was allowed by states if the facilities were "equal." Brown overturned that decision. Regardless of the "equality" of facilities, the Court ruled that separate is inherently unequal. Thus public school segregation based on race was found in violation of the 14th Amendment's Equal Protection Clause.

Mapp v. Ohio (19 Jun 1961)

What happens when the police obtain evidence from an illegal search or seizure? Before the Court's decision in Mapp, the evidence could still be collected, but the police would be censured. Police had received a tip that a bombing suspect might be located at Dollree Mapp's home in suburban Cleveland, Ohio. When police asked to search her home, Mapp refused unless the police produced a warrant. The police used a piece of paper as a fake warrant and gained access to her home illegally. After searching the house without finding the bombing suspect, police discovered sexually explicit materials and arrested Mapp under state law that prohibited the possession of obscene materials. Mapp was convicted of possessing obscene materials and faced up to seven years in prison before she appealed her case on the argument that she had a First Amendment right to possess the material. The Court held that evidence collected from an unlawful search should be excluded from her trial. Justice Tom Clark's majority opinion incorporated the Fourth Amendment's protection of privacy using the Due Process Clause of the 14th Amendment, a very controversial move.

Gideon v. Wainwright (18 Mar 1963)

Before 1962, indigent Americans were not always guaranteed access to legal counsel despite the Sixth Amendment. Gideon, a Florida resident, was charged in Florida state court for breaking and entering into a poolroom with the intent to commit a crime. Due to his poverty, Gideon asked the Florida court to appoint an attorney for him. The court declined to do this and pointed to state law which said that the only time indigent defendants could be appointed an attorney was when charged with a capital offense. Left with no other choice, Gideon represented himself in trial and lost. He filed a petition of habeas corpus to the Florida Supreme Court, arguing that he had a constitutional right to be represented with an attorney, but the Florida Supreme Court did not grant him any relief. A unanimous United States Supreme Court said that state courts are required under the 14th Amendment to provide counsel in criminal cases to represent defendants who are unable to afford to pay their attorneys, guaranteeing the Sixth Amendment's similar federal guarantees.

Griswold v. Connecticut (07 Jun 1965)

You know when you're walking down the street at night with lights in front of you and behind you, and you get that really dark shadow? In the scientific community, that shadow is known as an "umbra." Flanking that dark shadow on the ground are two or more, half-shadows, not quite as dark, but darker than the well-lit sidewalk around you. Those shadows are known as "penumbras" and were used to explain the most controversial issue of arguably the most controversial Supreme Court case in the 20th century. Estelle Griswold was the director of a Planned Parenthood clinic in Connecticut when she was arrested for violating a state statute that prohibited counseling and prescription of birth control to married couples. The question before the Supreme Court was whether the Constitution protected the right of married couples to privately engage in counseling regarding contraceptive use and procurement. Justice Douglas articulated that although not explicit, the penumbras of the Bill of Rights contained a fundamental "right to privacy" that was protected by the 14th Amendment's Due Process Clause. Griswold's "right to privacy" has been applied to many other controversial

decisions such as Roe v. Wade. It remains at the core of substantive due process debate today.

Loving v. Virginia (12 Jun 1967)

By 1967, 16 states had still not repealed their anti-miscegenation laws that forbid interracial marriages. Mildred and Richard Loving were residents of one such state, Virginia, who had fallen in love and wanted to get married. Under Virginia's laws, however, Richard, a white man, could not marry Mildred, a woman of African-American and Native American descent. The two traveled to Washington D.C. where they could be married, but they were arrested in Virginia under a state law that prohibited inter-racial marriage. Because their offense was a criminal conviction, after being found guilty, they were given a prison sentence of one year. The trial judge suspended the sentence for 25 years on the condition that the couple left Virginia. On Appeal, the Supreme Court of Appeals of Virginia ruled that the state had an interest in preserving the "racial integrity" of its constituents and that because the punishment applied equally to both races, the statute did not violate the Equal Protection Clause of the 14th Amendment. The United States Supreme Court in a unanimous decision reversed the Virginia Court's ruling and held that the Equal Protection Clause required strict scrutiny to apply to all race-based classifications. Furthermore, the Court concluded that the law was rooted in invidious racial discrimination, making it impossible to satisfy a compelling government interest. The Loving decision still stands as a milestone in the Civil Rights Movement.

Regents of the University of California v. Bakke (26 Jun 1978)

Allan Bakke, a white man, had been denied access to the University of California Medical School at Davis on two separate occasions. The medical school set aside 16 spots for minority candidates in an attempt to address unfair minority exclusion from medical school. Bakke contested that his exclusion from the Medical School was entirely the result of his race. The Supreme Court ruled in a severely fractured plurality that the university's use of strict racial quotas was unconstitutional and ordered that the medical school admit Bakke, but it also said that race could be used as one of several factors in the admissions process. Justice Lewis F. Powell, Jr. cast the deciding vote ordering the medical school to admit Bakke. However, in his opinion, Powell said that the rigid use of racial quotas violated the equal protection clause of the 14th Amendment.

II. CONCLUSION

The U.S. Constitution has inspired many nations during their constitution framing exercises yet not one of these countries adopted the 'due process' clause, despite its English origins. It would be interesting to see in how many of these nations such a move prevented the development of a substantive human rights regime. Framers of the Indian Constitution were very secure in their understanding of why they chose to follow the Japanese Constitution rather than the U.S. Constitution in this regard. They wanted to avoid the vagueness of the 'due process' clause as well as a strong judiciary that thwarted their efforts in bringing about a social revolution in India by way of their socialist and distributive land policies. Hence, the double precaution of removing both 'due process' and 'property' from the ambit of Article 21. In hindsight their apprehensions do seem justified given the prolonged right to property debate between the legislature and the judiciary, with each judicial decision being countered by a constitutional amendment, until the issue was deemed moot by divesting the right to property of its fundamental status. It seems to be a combination of various factors that led to the rise of an activist judiciary including legislative and executive excesses during the Emergency period; increased borrowing and use of foreign, especially U.S. precedents; or merely the judiciary's search for a new project after its previous one was wrested away. Nevertheless, in decision after another, the Supreme Court expanded the substantive rights under Article 21 and its own jurisdiction and role as the protector of the poor and underprivileged. And the legislature let it gain its strength instead of attacking and curtailing it as it had done previously. Mere language of the constitutional text did not restrain the judges from interpreting it the way they thought it should be interpreted. The judiciary gradually worked its way from a Formalist understanding of law to a Universalist and substantive understanding and transformed the system from one of parliamentary supremacy to constitutional supremacy, with itself at the helm of India's future.

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