PROCEDURE ESTABLISHED BY LAW VERSUS DUE PROCESS OF LAW

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ABSTRACT

"The Indian Constitution is renowned for incorporating significant ideas and provisions from other international constitutions."[1] *The judiciary has constructed substantive rights jurisprudence against the acknowledged intentions of the Constitution's founders. This is because it has creatively and unconventionally interpreted the Constitution, which is the country's foundational legislation. It was inevitable that this set of laws would evolve, especially because the framers made a point of avoiding it by omitting a "due process" provision.*

In "A.K. Gopalan v. State of Madras,"[2] *the Supreme Court determined that the phrase "procedure established by law" in Article 21 referred to the approach defined in the statute as adopted by the Legislature. As a result, a person may be deprived of their life or personal liberty by completing the procedures outlined in the applicable legislation. A legislation is only legitimate, in accordance with the Procedure Established by Law, if the correct actions have been taken and if the legislature or other appropriate body has legitimately accepted it.*

Clause 39 of the Magna Carta was the foundation for the concept of "due process of law" in England. In addition to determining whether a law is meant to take away someone's life and personal freedom, this concept also ensures that the law is fair and non-arbitrary nature of it.

The phrase "process established by law" is used explicitly in the Indian constitution instead of the considerably more general phrase "due process of law," which is not particularly mentioned there. The Indian Constitution's authors deliberately omitted the due process clause since it is adhered to the Amendment V, constitution of the United States.

Were the substantive fundamental rights that were developed in the Indian context negatively impacted by the decision to favour the procedure provided by law provision above the due process clause?

[1] Shivangi Gangwar, *'due process' v. 'procedure established by law': Framing and working the Indian Constitution*, SSRN Electronic Journal (2013).
[2] A.K. Gopalan v. State of Madras 1950 AIR 27, 1950 SCR 88

KEYWORDS- *Due process, article 21 of Indian constitution, procedure established by law, Amendment V, Constitution of the United States*

HISTORICAL BACKGROUND & INTRODUCTION

Due Process of Law versus Procedure Established by Law*[3]

On April 23, 1947, the Constituent Assembly received the interim report on basic rights from the Advisory Committee on Minorities and Fundamental Rights. In that report, the phrase that would subsequently become Article 21 of the Constitution read as follows:

> *"No person shall be deprived of his life, or liberty, without due process of law, nor shall any person be denied the equal treatment of the laws within the territories of the Union: Provided that nothing herein contained shall detract from the powers of the Union Legislature in respect of foreigners."*[4]

Clause 9 was modified and accepted by the Constituent Assembly on April 30, 1947, and now reads as follows:

> *"No person shall be deprived of his life, or liberty, without due process of law, nor shall any person be denied equality before the law within the territories of the Union."*[5]

The due process phrase was changed to "procedure established by law" in the draught Article 15 following a conversation between Sir B.N. Rau, the advisor to the Constitutional Assembly, and "Frankfurter J., a justice on the Supreme Court of the United States of America. Frankfurter J. said that the due process provision is undemocratic and oppressive to the court since it allows judges to overturn passed laws."[6]

The vagueness of the phrase "due," which may have resulted in anomalies, non-uniformity, and strengthened the judiciary's standing in regard to the legislature in the United States, was something the constituent assembly wished to avoid.

Preventive detention policies were seen to be the most effective in reducing community violence during British colonial rule, which was only somewhat alleviated when Article 22 was

*[3] ARTICLE REVIEW- *Of constitutional 'due process': The Hindu – Are we shifting from original constitutional norms?*
[4] Durga das basu, *Section 21*, 2 *in* Indian constitution 1727–1738 (26th ed. 2017).
[5] Durga das basu, *Section 21*, 2 *in* Indian constitution 1727–1738 (26th ed. 2017).
[6] Frankfurter J., *Due process of law*, Springer Reference.

incorporated into the constitution. The phrase was condemned during the founding assembly for its potential to be exploited for partisan motives, party biases, and worries, endangering the individual's right to life and liberty.

"With proper constitutional and judicial safeguards for personal liberty against judicial supremacy"[7], the preference for "process defined by law" was to provide legislative authority in the making of legislation in the founding text. The legislative branch's supremacy was maintained by the constitutive assembly.

Procedure Established by Law

"No person shall be deprived of his life or personal liberty except according to procedure established by law."[8]

- Article 21, Constitution of India

"The English Constitution gave birth to the concept of Procedure Established by Law."[9] The Judiciary receives some restricted power as a result. Before a court of law, it is contested for denying people their right to life or liberty.

To determine whether the state's conduct in this respect is lawful or not, it will use the three tests listed below.

- the existence of a legal provision allowing the administration to revoke someone's right to life and liberty.
- the question of whether the legislature had the authority to pass the relevant statute.
- how closely the legislature adhered to the rules when passing the bill.

In order to give the person more protection from the executive's arbitrary acts, the court will order his case discharge if any of the aforementioned tests are unsuccessful. To determine whether the relevant statute is fair, just, and reasonable, the court will not, however, use any additional criteria. Even if a court considers the legislation to be harsh or arbitrary, it won't nullify it and declare it unconstitutional, protecting people from the legislature's arbitrary actions. More than any other philosophy, this one is based on the strength of the nation's public opinion and the sensible decisions made by the legislature. A

[7] Bidyut Chakrabarty, 2 *in* Indian constitution: Text, context and interpretation (6th ed. 2017).
[8] Pramod Pawar, *Section 21*, 2 *in* Indian constitution (6th ed. 2017).
[9] Panch Rishi Sharma, *Rule of law and procedure established by law: A comparative analysis.*, SSRN Electronic Journal (2017).

person's life and freedom are also covered by the protection **only against the arbitrary conduct of the executive,** but not against that of "the legislative has been referred to in **Article 21** of the Indian Constitution. Life and personal liberty are protected under Article 21 of the Indian Constitution, which states that no one may be deprived of either without following the legal process."[10]

Due Process of Law*[11]

"…nor be deprived of life, liberty, or property, without due process of law…"[12]

- Amendment V, Constitution of the United States

The US Constitution served as the foundation for the concept of due process of law. Clause 39 of the Magna Carta served as the foundation for the development of due process in England. In the hands of the judiciary, it bestows greater power. In a circumstance like the one just described, the court will apply the three examples mentioned above, as well as the Principle of Natural Justice to assess the law from a wider perspective of the law's transmission of goodness.

Rules of Principles of Natural Justice

- No one may be sentenced to punishment without first being given a chance to explain themselves.
- A representative of authority must behave impartially and in good faith.
- It hasn't been specifically addressed in the Indian Constitution, but
- If the court considers it to be arbitrary or oppressive, it will declare the legislation illegal and grant individuals' protection not just from the president's arbitrary actions but also from those of the legislative and executive branches.

Judicial Pronouncements Related to Procedure Established by Law & Due Process of Law

"In Ramesh Bhai Chandu Bhai Rathod v. State of Gujarat, it was decided that fairness, justice, and reasonableness, which contain the essence of guarantee of life, and liberty displayed in Article 21 of the Constitution, also pervades the sentencing policy in Sections 235(2) and 354(3) of the Code. These two sentences

[10] Panch Rishi Sharma, Rule of law and procedure established by law: A comparative analysis., SSRN Electronic Journal (2017).

*[11] ARTICLE REVIEW- *Due Process of law: Manupatra*

[12] U.S. Constitution - Fifth Amendment | Resources - Congress, , https://constitution.congress.gov/constitution/amendment-5/ (last visited Sep 1, 2022).

effectively integrate the idea of process established by law as it applies to Article 21 of the Constitution."[13]

"In the Gopalan v. State of Madras case, the majority bench of the Supreme Court maintained the view that Article 21 of our Constitution had contained the English idea of personal liberty in preference to that of American due process of law. even if, in the minority judgement of the bench, the result of such interpretation was to throw the most fundamental basic right to life and personal liberty."[14]

It was found illegal to administer the "narco-analysis test, the detector test, polygraph, and brain mapping without the subject's forced participation and consent in Selvi v. State of Karnataka. He made the connection between the ban on self-incrimination and the assurance of a fair trial by mentioning the concept of due process of law."[15]

WHAT DOES INDIA FOLLOW? *[16]

After 1978, the Indian judiciary adopted a liberal perspective and attempted to link "due process" with "procedure established by law" in order to safeguard individual rights.

According to article 21, only theories that had been developed and legal procedures in place were permitted. In contrast, "the Supreme Court of India decided in Maneka Gandhi v. Union of India (1978) that a process established by law as described in Article 21 must be right, just, and fair and not arbitrary, whimsical, or oppressive otherwise it won't be a procedure at all and the requirement of Article 21 won't be met."[17]

Because of this, "the phrase procedure established by law now has the same meaning in India as the phrase due process of law has in the US."[18]

CONCLUSION

None of these nations ratified the "due process" clause, despite the fact that the U.S. Constitution was a major source of

[13] Ramesh Bhai Chandu Bhai Rathod vs state of Gujarat on 27 April, 2009, https://indiankanoon.org/doc/1338996/ (last visited Sep 1, 2022).
[14] A.K. Gopalan vs the state of Madras. Union of ... on 19 May, 1950, https://indiankanoon.org/doc/1857950/ (last visited Sep 1, 2022).
[15] Selvi & Ors vs State of Karnataka & ANR on 5 May, 2010 - Indian kanoon., https://indiankanoon.org/doc/338008/ (last visited Sep 1, 2022).
*[16] ARTICLE REVIEW- *On MCOCA: Tehelka – A Law Inconsistent with The Idea of India.*
[17] Maneka Gandhi vs Union of India on 25 January, 1978 - Indian kanoon, https://indiankanoon.org/doc/1766147/ (last visited Sep 7, 2022).
[18] Panch Rishi Sharma, *Rule of law and procedure established by law: A comparative analysis.*, SSRN Electronic Journal (2017).

inspiration for many other nations while they were writing their own constitutions. It would be interesting to see how, in many of these nations, taking such a move would have precluded the development of a meaningful human rights framework.

In this instance, the drafters of the Indian Constitution felt confidence in their choice to follow the Japanese Constitution rather than the US Constitution. They planned to capitalise on the law's ambiguity "They attempted to implement a socialist and distributive land policy in India in order to bring about a social revolution, but they were thwarted by the due process provision and a strong judiciary. Both were consequently taken out as a safety measure "the exclusion of due process and property from the purview of Article 21. In hindsight, their worries might seem justified given the lengthy right to property dispute between the legislature and the court, in which every court decision was met with a constitutional amendment, until the issue was declared unimportant by stripping the right to property of its legal protections.

A variety of events seem to have contributed to the development of an active judiciary, including the excesses of the executive and legislative branches during the Emergency period, the growing borrowing and application of foreign precedents, notably those from the United States, or simply the court's yearning for a new endeavour since its previous one was taken away from it. However, the Supreme Court consistently expanded the substantive rights guaranteed by Article 21, its own authority, and its role as the advocate for the weak and disadvantaged. Additionally, the legislation let it to get stronger rather than resisting and restraining it as it had in the past.

The issue presented at the beginning of this article-

Were the substantive fundamental rights that were developed in the Indian context negatively impacted by the decision to favour the procedure provided by law provision above the due process clause? It must be answered negatively if the decision to prioritise the due process clause above the procedure provided by law provision has a negative impact on the evolution of substantive basic nights in the Indian context. Because of the Constitution's indistinct language, the judges were free to interpret it however they thought proper. "The court gradually changed the system from one of legislative dominance to one of constitutional supremacy, moving away from a Formalist and substantive

understanding of law."[19] The court saw itself as the driver of India's future.

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5. *Maneka Gandhi v. Union of India*

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