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An Analysis on the Transformative Impact of Due Process in Indian Judicial Decisions

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ABSTRACT

The objective of the Constitution was to limit the arbitrary power of those holding positions of authority, but that objective depends above all on the words and phrases of which the Constitution is composed. Considerable thought has gone into identifying the formulation that crystallises the State's authority so as to prevent it from encroaching upon individual liberty, and it is in such a setting that the concept of due process emerged. The phrase 'due process' carries the idea that authorities, in discharging their duties, must not act arbitrarily. It is a principle that no one may be deprived of life, freedom or possessions without first being given a fair opportunity to be heard. The United States was the first to add a due process clause to a written constitution, drawing on a concept already familiar from England, and over the course of time American courts gave the phrase a more comprehensive and more open-ended interpretation than it had carried at its English genesis. Although the expression does not appear in the Indian Constitution, the influence of United States jurisprudence on Indian judicial decisions is clear, and the absorption of due process concepts has been critical in shaping a judiciary that prioritises fairness, justice and the protection of individual liberty. This article explores how the idea of due process has developed over time within the Indian legal framework, with a specific focus on the reasons for embracing the expression 'procedure established by law' in Article 21 of the Indian Constitution, and it also considers how the Indian judiciary has come to accept due process through its decisions over time.

Keywords: Due process, Procedure established by law, Article 21, Judicial interpretation, Constituent Assembly, Substantive due process

I. INTRODUCTION

'Due process' is a term with a long history. It is the outcome of the conflict between the individual and the government.¹ Its origins may be traced to the Magna Carta of 1215, and from then onwards it secured a place in every significant instrument aimed at curtailing the arbitrary authority of the Crown. Although the phrase originated in England, it was the Americans who were most influenced by it. They incorporated it first in the Fifth Amendment and, following

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¹ Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in DUE PROCESS: NOMOS XVIII 3 (J. Roland Pennock & John W. Chapman eds., 1977).

the Civil War, again in the Fourteenth Amendment, thereby rendering it applicable to the States as well. Due process has been an essential component in safeguarding personal freedoms since its adoption into the American Bill of Rights.²

Due process thus involves the judicial authority to expound and apply the law in order to resolve a legal issue or disagreement. By 1868 the term had evolved to signify a fundamental set of fair procedures owed whenever the government took action affecting a person's life, freedom or property. It ensured that people were informed, had an opportunity to present their case, and had that case adjudicated by an unbiased bench in accordance with accepted and equitable legal procedures. Due process therefore meant that if the government involved itself in decisions affecting a person's life, freedom or property, that person was entitled to fair treatment, a fair hearing and a fair verdict.³

The principle of due process holds significant importance within a nation's judicial system, and numerous countries accordingly treat it as a crucial component of their effort to safeguard human rights. The right to due process requires the government to uphold an individual's legal rights as prescribed by law, and so affords sufficient protection against unjust exploitation by the State. The Constitution of the United States has inspired countries across the globe in the making of their own constitutions. The interpretation of due process by the United States judiciary has not, however, been consistent, and that inconsistency created confusion in many countries about whether to adopt the phrase at all. A closely similar situation existed in India at the time the Constitution was being written.

India's constitutional system has a close connection to British parliamentary sovereignty and legal positivism, and in that historical setting it was unlikely that a strong Supreme Court would emerge to challenge parliamentary legislation through due process.⁴ This was apparent in the deliberations of the Constituent Assembly, which deliberately excluded a due process article when defining the fundamental rights.

This article traces the progression of due process in the Indian context in five parts. The first examines the deliberations of the Constituent Assembly and the political disruptions that stood in the way of incorporating the term 'due process' in the Indian Constitution. The second deals with the rigid interpretation of the phrase 'procedure established by law' in the light of *A.K. Gopalan* and the significant impact of that judgment. The third explores the rise of procedural due process. The fourth addresses the emergence of substantive due process following *Maneka*

² Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

³ Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339 (1987).

⁴ Akash Tandon, *Judicial Assertion of Due Process of Law in India*, 3 INT'L J.L. MGMT. & HUMAN. 429 (2020).

Gandhi. The fifth examines whether the judgment in *Rajbala* has stagnated substantive due process in India.

II. DELIBERATIONS OF THE CONSTITUENT ASSEMBLY

The task of framing a new constitution for India after independence in 1947 was assigned to the Constituent Assembly, whose Drafting Committee was chaired by Dr B.R. Ambedkar.⁵ The Assembly set up sub-committees in 1947 to begin work on the preparation of the Constitution. Among them was a sub-committee on Fundamental Rights, which included several notable members. It considered which fundamental rights should be included, how those rights ought to be limited, and in what situations they might be restricted. It decided to attach conditions to specific rights and to allow for their suspension in certain circumstances. The Assembly's decisions were also influenced by the political unrest then prevailing in Assam and Bengal, which produced a preference for imposing limitations on rights.⁶

At first the Constituent Assembly chose to include a clause similar to the due process clause of the American Constitution, in the belief that it would offer legal protection against the arbitrary detention of persons by the government. The members agreed, however, to use the words 'personal liberty' rather than 'liberty' alone, so as to ensure deliberately that the guarantee did not extend to rights of property.⁷ This was done because the framers intended to bring about a property regime whose object was to redistribute the lands held by colonial-era landlords, and they believed that the courts would obstruct such reform if the due process provision reached beyond personal liberty.

A 'due process' clause would have allowed the judiciary to review legislation passed by the legislature against particular standards, including whether a law is consistent with the basic principles governing individual rights. A law might be entirely correct and legitimate so far as the legislative branch is concerned, and yet be bad in the sense of contradicting some fundamental value; in such a case the judiciary would exercise an additional authority to declare the legislation invalid. The judiciary would thus be endowed with the power of substantive review, and the question before the Assembly was whether it ought to be given that additional authority.⁸

⁵ ABHINAV CHANDRACHUD, *DUE PROCESS OF LAW* 57 (Eastern Book Co. 2011).

⁶ Brijesh Yadav, *Envisaged Relationship between Parliament and Judiciary: An Analysis of Constituent Assembly Debates*, 10 GNLU J.L. DEV. & POLITICS 34 (2020).

⁷ GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 103 (Clarendon Press 1966).

⁸ Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 BERKELEY J. INT'L L. 216 (2010).

One view was that the omission of due process would leave the legislature free to make laws abrogating individual rights. The contrary view was that including the clause would bestow on a few judges of the Supreme Court the authority to determine the validity of laws, and was for that reason anti-democratic.⁹ During these contradictory discussions Justice Frankfurter advised Sir B.N. Rau against incorporating due process,¹⁰ on the ground that it would impose an additional burden upon the judiciary and could weaken the democratic structure by authorising judges to invalidate laws made by elected representatives. His opinion was shaped by the then prevailing consequences of the *Lochner* era.¹¹ In that case the United States Supreme Court declared a social welfare law unconstitutional on the premise that it infringed freedom of contract.¹² After intensive discussion the due process clause was removed, and the new draft Article 15 (the present Article 21) was adopted on 13 December 1948. Political figures, State and central legal bodies, and members of the Assembly itself all expressed strong opposition, causing a national commotion.¹³

A. The removal of due process amid communal unrest

The British partition of India and Pakistan was followed by a rise in religious disorder and instability in north India, which was a major contributing factor in Alladi Krishnaswami Ayyar's shift in thought and in the movement to eliminate due process. Those opposed to due process accordingly believed that preventive detention measures, unencumbered by constitutional due process protections, offered the most effective means of curbing the religious animosity that prevailed at the time.¹⁴

Following the Constituent Assembly's decision to strike due process from draft Article 15, the INDIAN LAW REVIEW and the Calcutta Bar pushed for the restoration of some procedural rights. Ambedkar thereupon introduced draft Article 15A, the present Article 22, which was intended to guarantee that anyone arrested would be produced before a magistrate within twenty-four hours and informed of the grounds of arrest, and could be detained further only with the magistrate's authorisation. Draft Article 15A did not, however, apply to persons held under preventive detention legislation, which allowed up to three months of imprisonment without those procedural protections. After that period particular safeguards had to be put in place, such as a report by an advisory board composed of persons qualified for appointment as High Court

⁹ *Id.*

¹⁰ CHANDRACHUD, *supra* note 5, at 57.

¹¹ *Lochner v. New York*, 198 U.S. 45 (1905).

¹² THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 780 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

¹³ Mate, *supra* note 8.

¹⁴ *Id.*

judges on whether there was sufficient cause for continued detention. Through these efforts the framers ensured that the government could limit judicial interference with executive custody.¹⁵

The founders thus intended to limit judicial review, particularly where it touched the exercise of government power in areas such as preventive detention and property rights, and that intention was apparent in the removal of the due process clause. The Constitution sought in this way to establish an equilibrium between the power of the State and individual freedom, an equilibrium profoundly influenced by the turbulent political and social climate in which it was drafted.

B. Exclusion of ‘due process’ and inclusion of ‘procedure established by law’

Article 21¹⁶ was thus framed so as to eliminate due process and to place constitutional constraints on the judiciary. The step was taken in an effort to stop judges from interpreting a due process clause more broadly, which would encourage judicial interference with legislative policy.¹⁷ Rather than being the arbiter of these rights, the judiciary was envisaged as their guardian.¹⁸

In order to fix the extent of Article 21, the phrase ‘procedure established by law’ was added to the Indian Constitution; the words were adopted from Article 31 of the Japanese Constitution.¹⁹ They refer to the procedure defined by legislation, or to procedures otherwise laid down by the law of the State. A legal framework therefore had to exist before the authorities could interfere with an individual’s life or personal liberty, but there was no requirement that such a law comply with the principles of natural justice.²⁰

III. RIGID INTERPRETATION OF THE PHRASE ‘PROCEDURE ESTABLISHED BY LAW’

The first case to arise under Article 21 after the adoption of the Constitution was that of *A.K. Gopalan*,²¹ in which the detenu challenged the order made against him²² on the basis that it was

¹⁵ AUSTIN, *supra* note 7, at 109.

¹⁶ INDIA CONST. art. 21 (“No person shall be deprived of his life or personal liberty except according to procedure established by law.”).

¹⁷ S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS* 37 (Oxford Univ. Press 2002).

¹⁸ Yadav, *supra* note 6.

¹⁹ K.K. Nigam, *Due Process of Law: A Comparative Study of Procedural Guarantees against Deprivation of Personal Liberty in the United States and India*, 4 J. INDIAN L. INST. 99 (1962). Article 31 of the Japanese Constitution provides that “No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.”

²⁰ Panch Rishi Dev Sharma, *Interpreting ‘Procedure Established by Law’ with ‘Rule of Law’: A Comparative View of Irish, Japanese and Indian Constitutions*, 4 FORENSIC RSCH. & CRIMINOLOGY INT’L J. 79 (2017).

²¹ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27, 1950 SCR 88.

²² The order of detention was made under section 3(1) of the Preventive Detention Act, 1950.

unreasonable under Articles 19(1)(d), 21 and 22. He argued that the phrase ‘due process of law’ is wholly interchangeable with the phrase ‘procedure established by law’, and that its meaning remains unchanged even though the word ‘due’ was removed. He further argued that the expression ‘law’ in Article 21 refers to the principles of natural justice, and that any alternative reading would leave no legal protection at all.²³

The Court held that the word ‘law’ as used in Article 31 of the Japanese Constitution did not import any notion of justness as it did in the United States, and that the Court lacked the authority to decide what is due or just.²⁴ The emphasis was instead that the legislature is the ultimate arbiter of what constitutes law. The majority also held that, in assessing the constitutional soundness of a law, only the object of the statute should be considered and its incidental effect on other constitutional provisions should be left out of account. Each right was treated as a self-contained code that did not necessarily overlap with or work alongside the others, and the Court accordingly rejected the argument that Articles 19, 21 and 22 are interdependent.²⁵

Liberty was in this way interpreted in the most restricted sense, to mean only the liberty of the physical body and nothing beyond it.²⁶ Regardless of how irrational the legislation might be, therefore, and even where it deprived a person of life or personal freedom, the deprivation was treated as legitimate.²⁷ One member of the Bench clearly did not share the majority view on this point. Fazl Ali J held that fundamental rights are interconnected and should be interpreted in a cohesive manner, and his reasoning later formed the groundwork for substantive due process in India.

The Court neglected a fundamental canon of statutory reading, namely that a statute must be comprehended in its entirety and within its contextual framework.²⁸ It did not take the whole of Part III of the Constitution into account when interpreting preventive detention. It relied instead on Article 22 alone and concluded that the preventive detention was legally justified because the authorities had complied with the procedure laid down by law. Article 22 was treated as

²³ Pramila Agrawala, *Indian Judiciary and Natural Justice*, 25 INDIAN J. POL. SCI. 282 (1964).

²⁴ K.S. Rathore, *Procedure Established by Law vis-a-vis Due Process: An Overview of Right to Personal Liberty in India*, UTTARAKHAND JUD. & LEGAL REV. 77 (2014).

²⁵ *Gopalan* (n 21). The majority treated Article 22 as a self-contained code for preventive detention. See also Kannan Srinivasan, *The Supreme Court and Its Chief*, 22(1-2) ECON. & POL. WKLY. (1987).

²⁶ Per Kania C.J. in *Gopalan* (n 21).

²⁷ P. Sharan, *Constitution of India and Judicial Review*, 39 INDIAN J. POL. SCI. 526 (1978).

²⁸ G.P. SINGH, *PRINCIPLES OF STATUTORY INTERPRETATION* 35 (14th ed., LexisNexis 2019).

independent of Articles 21 and 19(1)(d). The Court thus rejected the concept of due process outright, with strong backing from the textualist²⁹ and originalist modes of interpretation.³⁰

Following that case the Supreme Court, through a series of further rulings, established a guide to judicial review. It emphasised the presumption of constitutionality of a statute;³¹ it gave prominence to the textual mode of interpretation;³² it declined to sit in judgment upon questions of political wisdom or executive policy;³³ and it refused to assume that a law would be misused, holding that the potential for misuse alone would not be enough to invalidate it and that any alleged discrimination must be inherent in the statute itself.³⁴

Following *Gopalan*, the Supreme Court consistently upheld the principles associated with ‘procedure established by law’, as its rulings in subsequent cases show. In *Makhan Singh Tarsikka* it held that the order of preventive custody made by the Governor of Punjab was invalid for want of adherence to the requirements of the preventive detention legislation, under which an advisory board had to report that detention was justified before the government could confirm it and fix its period.³⁵ The case emphasised the importance of adhering to formal procedures before depriving an individual of liberty, without regard to the justness of the statute.

In *Kharak Singh* the Supreme Court examined the constitutionality of a police regulation that allowed the police to make domiciliary visits to people’s homes at night. The Court reaffirmed that Articles 19(1)(d) and 21 represent distinct fundamental rights, rejecting the idea that one is carved out of the other.³⁶ Both the majority and the dissenting judges referenced American substantive due process opinions, particularly *Munn*,³⁷ which emphasised a careful scrutiny of laws affecting fundamental rights.³⁸ The majority used that reference to broaden the

²⁹ Arvind P. Datar & Rahul Unnikrishnan, *Interpretation of Constitutions: A Doctrinal Study*, 29 NAT’L L. SCH. INDIA REV. 136 (2017).

³⁰ Brandon J. Murrill, CONG. RSCH. SERV., R45129, *Modes of Constitutional Interpretation* (2018).

³¹ *Ram Krishna Dalmia v. Justice S.R. Tendolkar*, AIR 1958 SC 538, 1959 SCR 279.

³² *State of Bombay v. F.N. Balsara*, AIR 1951 SC 318, [1951] SCR 682. See also 1 H.M. SEERVAL, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY 262 (4th ed., Universal Law Publishing 2006).

³³ *State of Rajasthan v. Union of India*, AIR 1977 SC 1361, (1977) 3 SCC 592 (holding that questions of political wisdom or executive policy alone could not be subjected to judicial control).

³⁴ *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75, 1952 SCR 284.

³⁵ *Makhan Singh Tarsikka v. State of Punjab*, AIR 1952 SC 27, [1952] SCR 368. This decision is distinct from *Makhan Singh v. State of Punjab*, AIR 1964 SC 381, which concerned Article 359 during the Emergency. See also *Ram Narayan Singh v. State of Delhi*, AIR 1953 SC 277, [1953] SCR 652.

³⁶ *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295, [1964] 1 SCR 332. The majority struck down Regulation 236(b) of the U.P. Police Regulations, which authorised domiciliary visits at night.

³⁷ *Munn v. Illinois*, 94 U.S. 113 (1877) (Field, J., dissenting, joined by Strong, J.).

³⁸ Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 653 (1909); Howard Jay Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851 (1943).

understanding of ‘personal liberty’, but maintained an interpretation of Article 21 close to *Gopalan*, which did not explicitly recognise due process or the elements of natural justice.³⁹

It is evident from these cases that the Court did not accurately comprehend the fundamental principles of fairness within the framework of Article 21, which was where due process would have operated; it required no more than a procedure prescribed by legislation. The notion of substantiveness was not, however, new to the courts. They had already applied it under Articles 14 and 19 in determining the arbitrariness or reasonableness of statutes. Substantive review therefore existed before *Maneka Gandhi*, but it was not given the title of ‘substantive due process’ because it did not encompass life and liberty under Article 21.

A. ‘Reasonableness’ under Article 19

Under the Indian Constitution the courts have the authority to scrutinise the fairness of legislation, precisely under Articles 14 and 19. That scrutiny involves assessing whether laws are reasonable and whether they classify persons or things in a justifiable manner. The exercise is often associated with substantive due process, but it is a narrower form of scrutiny because it is not tied to life and liberty. It focused initially on Article 14 and over time expanded to include Article 19 as well. That evolution led to the development of the ‘arbitrariness’ test within the framework of reasonableness, and the test eventually paved the way for procedural due process in Indian law. Before turning to due process in India, therefore, it is necessary to consider how the courts have explored the concept of reasonableness.⁴⁰

Although the Constituent Assembly barred judicial review, through due process, of laws pertaining to the rights to life and personal liberty under Article 21, it did permit the courts to conduct substantive review in other areas of constitutional law. That was particularly evident under Articles 19(2) to 19(6), which deal with ‘reasonable restrictions’ and under which the courts were allowed to assess whether laws limiting the enumerated freedoms were reasonable.

In *Chintaman Rao*⁴¹ a Constitution Bench of the Supreme Court scrutinised the legitimacy of a law that prohibited the manufacture of bidis. The Court unanimously declared the statute invalid, considering it an unreasonable limitation on the right to carry on an occupation.⁴²

³⁹ SHAILJA CHANDER, JUSTICE V.R. KRISHNA IYER ON FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES (Deep & Deep 1992). The decision was also influenced by *Wolf v. Colorado*, 338 U.S. 25 (1949), overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961), which emphasised the protection of the home from unlawful intrusion as a fundamental aspect of liberty.

⁴⁰ CHANDRACHUD, *supra* note 5, at 78.

⁴¹ *Chintaman Rao v. State of Madhya Pradesh*, [1950] SCR 759, AIR 1951 SC 118. See also *State of Madras v. V.G. Row*, AIR 1952 SC 196, [1952] SCR 597.

⁴² INDIA CONST. art. 19(1)(g).

Mahajan J, speaking for the Court, emphasised the need for a balance, with arbitrariness as a crucial factor.

In these early cases concerning ‘reasonable restrictions’ under Article 19 the Supreme Court began to explore what would later be recognised as procedural due process, a concept that became more prominent in later years. The cases highlighted the importance of preventing unchecked government discretion, and reasonableness review led to requirements of notice and hearing that resemble procedural due process,⁴³ although the label did not strictly apply because the review was not associated with Article 21.

IV. THE RISE OF PROCEDURAL DUE PROCESS

The emergence of the procedural aspect of due process in India, particularly in the 1970s, may be attributed to three key factors.

The first was Subba Rao J’s⁴⁴ concern about the rigid interpretation of fundamental rights in *Gopalan*, after which the Supreme Court began breaking down the barriers between those rights. The shift was evident in cases such as *Cooper* and *Kesavananda*. In *Cooper*⁴⁵ the ‘object’ test⁴⁶ was replaced by the ‘effects’ test, under which a law would be assessed by reference to its direct operation upon the individual’s rights and not merely by its intended purpose. The focus thus shifted from what a law aimed to achieve to what its actual consequences were. In *Kesavananda*⁴⁷ the Court set about deriving the essence of the Constitution, in a manner similar to approaches seen in the state due process cases in the United States. The basic structure case emphasised the Court’s role in safeguarding procedural due process interests and in securing its own jurisdiction.

The second factor was the Emergency, during which the Supreme Court faced difficulty in upholding its authority under the restrictions then imposed. That period of limited judicial access prompted the Court to take on a more activist role.

⁴³ In *Ebrahim Vazir Mavat v. State of Bombay*, AIR 1954 SC 229, [1954] SCR 933, the Supreme Court considered the constitutionality of section 7 of the Influx from Pakistan (Control) Act, 1949, which authorised the Central Government to order the removal of a person from India where a reasonable suspicion of an offence existed. The Court criticised the absence of clear criteria for determining reasonableness and emphasised the importance of notice and hearing, holding the provision void so far as it conflicted with Article 19(1)(e). See also *R.M. Seshadri v. District Magistrate, Tanjore*, AIR 1954 SC 747, [1955] 1 SCR 686.

⁴⁴ See *Kharak Singh* (n 36) (Subba Rao, J., dissenting). Subba Rao J emphasised that a law affecting both the freedom guaranteed by Article 19 and personal liberty under Article 21 must satisfy the requirements of both, so that it must meet the criterion of ‘procedure established by law’ and also be reasonable under Article 19. See also *State of Maharashtra v. Prabhakar Pandurang Sanzgiri*, AIR 1966 SC 424, [1966] 1 SCR 702.

⁴⁵ *R.C. Cooper v. Union of India*, AIR 1970 SC 564, (1970) 1 SCC 248.

⁴⁶ As upheld in *Gopalan* (n 21).

⁴⁷ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, (1973) 4 SCC 225.

The third was Khanna J's dissent in the *Habeas Corpus* case and the Court's experience of illegitimacy during the Emergency, in consequence of which the Supreme Court adopted a novel approach to equal protection analysis. It identified arbitrariness as the antithesis of equality, in a manner akin to the approach of American judges such as Frankfurter and Cardozo.

As a result of these factors the Court introduced, in the late 1970s, a new 'arbitrariness' test which reached not only Articles 14 and 19 but extended to Article 21 as well, and which served to safeguard procedural due process rights against government authorities on a broad standard.⁴⁸ Through its procedural due process opinions the Court aimed to uphold the principles of judicial access and natural justice, which require notice and an opportunity to be heard. In incorporating procedural due process within the Indian Constitution and defining procedural fairness, the courts essentially created a new constitutional right or value that the framers had not expressly intended.

Procedural due process thus began to gain momentum through the recognition of judicial access, but the concept reached its zenith in *Maneka Gandhi*. That case came before the Court after a series of political upheavals, and the judiciary's firm stand prevailed over the legislative and political hurdles of the period. The concepts of natural justice were in this way stabilised, and their stabilisation facilitated the later emergence of substantive due process.

A. The impact of the post-Emergency period in shaping judicial power

In 1975 Prime Minister Indira Gandhi proclaimed a state of Emergency, shortly after the Allahabad High Court set aside her election on findings of corrupt electoral practice. Throughout that period she used the Maintenance of Internal Security Act to curb political adversaries, and also enforced limitations on civil freedoms and on the autonomy of the press. She brought in a series of amendments so as to reverse the Court's decision in *Kesavananda*, amendments aimed at limiting the judiciary's authority to exercise judicial review.⁴⁹ During the Emergency the Supreme Court to some extent supported the suspension of democratic rights and of habeas corpus.⁵⁰

In the years following the Emergency, however, the Janata government repealed the majority of the measures implemented during it⁵¹ and sought to restore judicial power.⁵² During that transition the Supreme Court played a pivotal role in determining matters pertaining to the

⁴⁸ CHANDRACHUD, *supra* note 5, at 108.

⁴⁹ Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476 (2003).

⁵⁰ *Additional District Magistrate, Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207, (1976) 2 SCC 521.

⁵¹ In the 1977 general election the Congress Party faced its first defeat in post-independence India, losing to the Janata Party coalition.

⁵² UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* 122-23, 209 (Eastern Book Co. 1980).

restoration of constitutional rights and the investigation of violations committed under the emergency regime.

It was in this period that a case which laid the groundwork for the modern Article 21 came before the Supreme Court.⁵³ Maneka Gandhi challenged the impounding of her passport⁵⁴ without notice or a hearing, contending that the action violated Articles 14, 19 and 21.⁵⁵ The Court emphasised the need to broaden rather than restrict the interpretation of fundamental rights. It interpreted 'personal liberty' in Article 21 broadly, holding that it encompasses various rights essential to personal freedom, some of which are separately recognised as fundamental rights under Article 19. The majority further introduced the substance of due process into Article 21, requiring that any procedure affecting life and liberty be fair, just and reasonable rather than arbitrary. The Court determined, moreover, that a law restricting personal liberty must not only satisfy procedural fairness under Article 21 but also pass the test of reasonableness under Article 19 and the requirement of non-arbitrariness under Article 14. The decision represented a notable deviation from prior doctrine and underscored the significance of safeguarding individual rights against arbitrary state action.

B. The impact of *Maneka Gandhi*

Maneka Gandhi brought about three important changes in the way the Indian courts reviewed laws relating to equality and personal liberty.⁵⁶

First, it shifted the Court's focus from a strict 'classification' review to a more nuanced examination of the 'reasonableness' of legislation.⁵⁷ Laws would be scrutinised on whether they were fair and just, rather than solely on how they classified persons or things.

Secondly, the case introduced the concept of procedural due process into Indian constitutional analysis, so that a law affecting personal liberty must not only be validly enacted but must also follow a fair and reasonable procedure.

⁵³ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, (1978) 1 SCC 248.

⁵⁴ The passport was impounded under section 10(3)(c) of the Passports Act, 1967.

⁵⁵ INDIA CONST. arts. 14, 19, 21.

⁵⁶ CHANDRACHUD, *supra* note 5, at 151.

⁵⁷ The Court thereby reaffirmed the opinion it had expressed in *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555, (1974) 4 SCC 3, where the petitioner, the Chief Secretary to the Government of Tamil Nadu, was moved to the temporary posts of Deputy Chairman of the State Planning Commission and Officer on Special Duty, allegedly because of the Chief Minister's displeasure. He argued that the transfer violated his right to equality. Bhagwati J, speaking also for Chandrachud and Krishna Iyer JJ, emphasised the expansive nature of the right to equality and rejected narrow interpretations of it. In rejecting traditional limits and introducing the concept of arbitrariness, the Court moved away from the strict classification doctrine and allowed a more flexible approach to assessing the reasonableness of laws, although the petition itself was dismissed.

Thirdly, courts began to declare laws ‘arbitrary’ where the authorities exercised power to make decisions without following fair and reasonable procedures. In many cases after *Maneka Gandhi* the courts emphasised the importance of natural justice, which includes principles such as a fair hearing and impartial decision-making. Most of those cases, interestingly, concerned statutes which did not themselves expressly mention any need for natural justice.

It thus appeared that the scope of fairness in procedure, and of procedural due process, was expanding substantially.⁵⁸ The idea that a statute concerning life and liberty must meet standards of reasonableness and fairness contributed in turn to the development of a substantive dimension within the ambit of due process.

V. THE RISE OF SUBSTANTIVE DUE PROCESS

The doctrine of substantive due process in India has three main origins, each attributable to the judiciary: the cases concerning the Court’s ‘basic structure’ test, which extended beyond issues of judicial access; the cases linked to the Court’s ‘arbitrariness’ doctrine, which appeared to stem from the fundamental principles of fairness and equality outlined in Article 14; and the cases associated with the Court’s interpretation of the ‘right to life’ provision in the Constitution.⁵⁹

A. Basic structure test

The Court’s ‘basic structure’ test had both substantive and procedural aspects. It identified fundamental values within the Constitution of India, in a manner similar to the working of substantive due process in American law, and it established principles that restricted Parliament’s authority to amend the Constitution. It also had procedural implications, because it ensured that the Court could handle cases of constitutional importance. The test was initially concerned mainly with ensuring access to the courts, but over time it expanded to address broader issues beyond judicial access. It thus combined substantive and procedural elements to safeguard constitutional principles and ensure effective judicial review.⁶⁰

Likewise, in the case involving Indira Gandhi, the Supreme Court struck down clause (4) of Article 329A because it validated her election without applying any law and removed the dispute from every adjudicatory forum, thereby depriving candidates of the ability to challenge an election. The decision affirmed access to the courts by acknowledging the essential values of democracy and the rule of law as intrinsic components of the Constitution’s basic structure.

⁵⁸ CHANDRACHUD, *supra* note 5, at 158.

⁵⁹ CHANDRACHUD, *supra* note 5, at 164.

⁶⁰ *Kesavananda Bharati* (n 47).

Cases of this kind pose a challenge in effectively distinguishing between procedural and substantive due process: the Court upheld both the fundamental principles of democratic governance and the procedural right to seek legal recourse, thereby blurring the boundary between the two.⁶¹

In the basic structure case and related cases the Supreme Court initially identified certain values essential to the Constitution's 'basic structure' mainly in order to protect judicial access. In subsequent cases, however, the Court extended its scope beyond that purpose.

B. Arbitrariness test

In the period following *Maneka Gandhi* the Supreme Court expanded the scope of the 'arbitrariness' doctrine. Arbitrariness had previously been closely linked with 'reasonableness' under Article 19 and 'classification' under Article 14. The new approach recognised the interconnectedness of Articles 14, 21 and 19, which came to be known as the 'golden triangle'. The Court used the 'arbitrariness' test to evaluate the fairness of substantive law, indicating that it was willing to conduct a substantive assessment of the fairness of legislation. The test was, however, criticised for its lack of clarity and precision.⁶²

In *Malpe Vishwanath Acharya*⁶³ the Supreme Court faced a challenge to certain provisions of the Bombay rent control legislation. Landlords argued that the law, which regulated the rent recoverable, had become unfair and unreasonable over time. Kirpal J, in his decision, emphasised that laws can become unfair with changing circumstances and that social legislation must balance the interests of all parties. He stressed the importance of approaching such laws thoroughly, so as not to favour one group over another. Having found the frozen standard rent arbitrary, the Court nevertheless chose not to strike the provisions down immediately, because the statute was set to expire shortly. It warned that if the law were extended without its concerns being addressed, it would be held unconstitutional. The decision highlighted the Court's stance on fairness in legislation and the need for lawmakers to consider all perspectives when enacting laws.

⁶¹ *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299, (1975) Supp SCC 1. See also *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789, (1980) 3 SCC 625, where it was held that fundamental rights and the directive principles should be interpreted harmoniously so as to create a balance between them, and that the balance so struck is itself part of the basic structure.

⁶² CHANDRACHUD, *supra* note 5, at 177.

⁶³ *Malpe Vishwanath Acharya v. State of Maharashtra*, AIR 1998 SC 602, (1998) 2 SCC 1. The provisions challenged were the standard rent provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947.

In *Mardia Chemicals*⁶⁴ the Court did not explicitly employ the analytical framework established in *Maneka Gandhi* under Article 21, which pertains to the fundamental freedoms of life and liberty, even though it struck down as arbitrary a statutory condition that obstructed a borrower's access to the tribunal.

The 'arbitrariness' test thus provided a way for the courts to invalidate laws that were unjust or unreasonable even where life or personal liberty was not directly concerned. A clear example is *Naz Foundation*,⁶⁵ where the 'procedure established by law', contained in the Code of Criminal Procedure, was deemed fair, while the substance of the law, section 377 of the Indian Penal Code, was considered unfair.

C. Rights creation

The third aspect of substantive due process involves the establishment of new rights. Cases relating to privacy and dignity prove the Court's enthusiasm to broaden constitutional interpretation. This segment also includes cases in which rights were indirectly established. The basic structure case, the Indira Gandhi case and *Mardia Chemicals* all protected judicial access, and in addressing procedural due process concerns they essentially created a right of access to the courts, which makes them substantive in nature.

From the 1960s onwards the Indian Supreme Court identified various unlisted rights under its interpretation of the 'right to life' principle. These encompass privacy;⁶⁶ protection against solitary confinement;⁶⁷ the prohibition of bar fetters;⁶⁸ access to free legal assistance;⁶⁹ safeguards against handcuffing;⁷⁰ safeguards against violence while in custody;⁷¹ the right to humane conditions of work;⁷² the entitlement to livelihood;⁷³ and the guarantee of a clean environment.⁷⁴

⁶⁴ *Mardia Chemicals Ltd. v. Union of India*, AIR 2004 SC 2371, (2004) 4 SCC 311. The Court upheld the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in substance, but struck down section 17(2), which required a borrower to deposit seventy-five per cent of the amount claimed before an appeal to the Debts Recovery Tribunal would be entertained, as unreasonable and arbitrary.

⁶⁵ *Naz Foundation v. Government of NCT of Delhi*, (2009) 111 DRJ 1, 160 (2009) DLT 277 (Del.). The High Court read down section 377, rather than striking it down. The decision was set aside in *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, and section 377 was subsequently read down in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

⁶⁶ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

⁶⁷ *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675, (1978) 4 SCC 494.

⁶⁸ *Charles Sobraj v. Superintendent, Central Jail, Tihar, New Delhi*, AIR 1978 SC 1514, (1978) 4 SCC 104.

⁶⁹ *M.H. Hoskot v. State of Maharashtra*, AIR 1978 SC 1548, (1978) 3 SCC 544.

⁷⁰ *Prem Shankar Shukla v. Delhi Administration*, AIR 1980 SC 1535, (1980) 3 SCC 526.

⁷¹ *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378, (1983) 2 SCC 96.

⁷² *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802, (1984) 3 SCC 161.

⁷³ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180, (1985) 3 SCC 545.

⁷⁴ *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420, (1991) 1 SCC 598 (holding that the right to life includes the right to the enjoyment of pollution-free water and air).

VI. *RAJBALA* AND THE ALLEGED STAGNATION OF SUBSTANTIVE DUE PROCESS

A. Does *Rajbala* negate substantive due process?

A *prima facie* reading of *Rajbala*⁷⁵ leaves the impression that the Court rejected substantive due process outright. The judgment is better understood, however, along two dimensions: the nature of the rights that were in issue, and the sense in which the Court used the words it did. The rights considered in *Rajbala* were not fundamental rights at all. They were purely statutory, since what was in question was the right to contest an election, and in such a situation, on the Court's own reasoning, the judiciary must exercise restraint and refrain from reframing or reviewing the qualifications the legislature has prescribed. Where, by contrast, personal liberty appears to be compromised by state action, the Supreme Court has repeatedly reinforced its reasoning by adopting a substantive due process framework in protection of fundamental rights. In *Sunil Batra*⁷⁶ the Court upheld the liberty of prisoners, holding that inhumane treatment is inconsistent with fair procedure, and what it applied there was in substance substantive due process. In the narco-analysis case⁷⁷ it held in terms that the standard of substantive due process governs state action restraining personal liberty. The nature of the right therefore plays a decisive part: where a fundamental right is engaged, substantive review becomes unavoidable, whereas where the right is statutory, judicial review is curtailed in deference to legislative wisdom.

The words used in *Rajbala* repay equally close attention.⁷⁸ The passage on which the criticism rests is directed at the American doctrine as the American courts have applied it, and the Court itself observed that even in the United States the doctrine is of doubtful legitimacy. In the United States substantive due process has operated largely as judge-made law resting on the discretion

⁷⁵ *Rajbala v. State of Haryana*, (2016) 2 SCC 445, AIR 2016 SC 33. Chelameswar and Abhay Manohar Sapre JJ upheld clauses (t), (u), (v) and (w) of section 175(1) of the Haryana Panchayati Raj Act, 1994, as inserted by the Haryana Panchayati Raj (Amendment) Act, 2015, which disqualified candidates for panchayat office on the grounds of unpaid cooperative society dues, electricity arrears, want of the prescribed educational qualification and the absence of a functional toilet.

⁷⁶ *Sunil Batra* (n 67).

⁷⁷ *Selvi v. State of Karnataka*, (2010) 7 SCC 263 (holding that the involuntary administration of narco-analysis, polygraph and brain electrical activation profile tests offends the standard of substantive due process required for a restraint upon personal liberty).

⁷⁸ *Rajbala* (n 75), paras 64-65 (paras 68-69 of the certified copy). The Court held that "courts in this country do not undertake the task of declaring a piece of legislation unconstitutional on the ground that the legislation is 'arbitrary'", since to do so "would amount to virtually importing the doctrine of 'substantive due process' employed by the American Supreme Court at an earlier point of time", and observed that "even in United States the doctrine is currently of doubtful legitimacy". That reasoning rested upon *State of Andhra Pradesh v. McDowell & Co.*, (1996) 3 SCC 709. In *Shayara Bano v. Union of India*, (2017) 9 SCC 1, para 53 (per Nariman J, for himself and Lalit J), *McDowell* was held to be *per incuriam* and the decisions following it, *Rajbala* among them at paras 53 to 65, were held to be no longer good law.

of the individual judge upon the issue before the Court, as *Dobbs*,⁷⁹ in which the long-settled precedent of *Roe*⁸⁰ was overturned, illustrates. In India the application of due process is not boundless in that way. It operates within constitutional limits, is tied to an element of proportionality, and draws its strength from Article 21 and from the doctrine of arbitrariness under Article 14. So anchored, it yields stability in operation rather than the unpredictable outcomes of judicial discretion.

B. Current judicial trends surrounding due process

Numerous decisions of the Supreme Court have since made due process indispensable in determining violations of fundamental rights. The expression is not used in them as explicitly as it was in *Rajbala*,⁸¹ *Sunil Batra*⁸² and *Selvi*,⁸³ but its essence is visible in the outcomes.

First, in *Shayara Bano*⁸⁴ the Court set aside the practice of *talaq-e-biddat*, the plurality holding it to be manifestly arbitrary and therefore violative of Article 14. The Court has likewise struck down the provision that made adultery an offence,⁸⁵ and has read down the provision that criminalised consensual sexual acts between adults of the same sex.⁸⁶ A reading of these cases shows that the Court attended to the substantive injustice worked by the law itself. It did not merely verify the procedure by which the law had been passed but examined its substantive content, and through the intersection of Articles 14 and 21 it strengthened fundamental rights through the lens of substantiveness.

Secondly, in the cases concerning the protection of privacy⁸⁷ the Court has held privacy to be an integral facet of Article 21 and has required that any infringement satisfy the test of proportionality. A law is not declared valid merely because parliamentary procedure was followed; what the Court examines is whether the substance of a law that curtails a fundamental right is legitimate. Articles 14 and 21 are strengthened in this way, and substantive due process is applied in all but name.

⁷⁹ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

⁸⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

⁸¹ *Rajbala* (n 75).

⁸² *Sunil Batra* (n 67).

⁸³ *Selvi* (n 77).

⁸⁴ *Shayara Bano v. Union of India*, (2017) 9 SCC 1. The practice of *talaq-e-biddat* was set aside by a majority of three to two: Nariman and Lalit JJ held it to be manifestly arbitrary and so violative of Article 14, and Kurian Joseph J held that what is bad in theology cannot be good in law.

⁸⁵ *Joseph Shine v. Union of India*, (2019) 3 SCC 39, AIR 2018 SC 4898 (striking down section 497 of the Indian Penal Code and section 198(2) of the Code of Criminal Procedure as violative of Articles 14, 15 and 21).

⁸⁶ *Navtej Singh Johar* (n 65) (reading down section 377 of the Indian Penal Code so far as it criminalised consensual sexual acts between adults in private).

⁸⁷ *Puttaswamy* (n 66). The nine-judge Bench held the right to privacy to be intrinsic to Article 21 and required any invasion of it to satisfy the tests of legality, legitimate aim and proportionality.

Thirdly, in the 2026 decision in *National Legal Services Authority v. Union of India*⁸⁸ the Supreme Court affirmed that detention must go hand in hand with dignity, thereby extending the principle established in *Sunil Batra*. The Court held that elderly and terminally ill prisoners must receive prompt and appropriate medical care that preserves their dignity, and that their release may be considered on compassionate grounds. The Court has thus reinforced, again and again, that a conviction does not by itself extinguish the rights conferred by Article 21, and that dignity in detention must be secured. It is evident from this discussion that the judgment in *Rajbala* has not stagnated substantive due process. The courts have on the contrary continued to insist upon its application in protecting the basic fundamental rights of the people.

VII. CONCLUSION

The concept of due process, though initially rejected by the drafters of the Constitution, has found its place and has penetrated the constitutional order through judicial interpretation.⁸⁹ It was at first perceived as a hindrance to the activities of the government, and its inclusion was on that account discarded. Later circumstances warranted its need, as it came to be felt that in the absence of fair procedures the right of liberty had no true purpose. Throughout history the safeguarding of liberty has depended on having proper procedural protections. Article 21 was therefore read by the judiciary in a way that ensures fair and just processes, and not merely whatever procedure the law happened to prescribe, on the footing that fair procedures are crucial to upholding the law in India and securing justice for all. Over time that interpretation enlarged to include substantive elements as well, and the test of due process came to be applied to see whether laws conformed to larger notions of justice and equity.⁹⁰ On the basis of these extended interpretations it may rightly be pointed out that these constitutional clauses will have a substantial impact on political and legal choices in the future.

⁸⁸ *National Legal Services Authority v. Union of India*, 2026 SCC OnLine SC 1341 (decided 16 July 2026, per Vikram Nath and Sandeep Mehta JJ), directing the States and Union Territories to frame policies for the early release of elderly and terminally ill prisoners and holding that continued incarceration without adequate provision for medical care and release offends Articles 14 and 21.

⁸⁹ Pran Chopra, *The Constitution and Supreme Court*, 39(30) ECON. & POL. WKLY. (2004).

⁹⁰ David G. Barnum, *Article 21 and Policy Making Role of Courts in India: An American Perspective*, 30 J. INDIAN L. INST. 19 (1988).