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The Road not Taken: The Pervasive Echo of 'Due Process' in Article 21

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One of the most heatedly debated and contentious topics in the creation of the Indian Constitution was the inclusion or exclusion of the "due process" clause in Article 21. Despite the fact that the provision was not employed in the end, "procedure established by law" was afforded leeway. The motives behind such a choice are numerous and immensely complex. This paper attempts to demystify this issue and provide clarification on the current stance of the Indian judiciary on the inclusion of the "due process" provision in Art. 21, starting with the Lochner era to the current liberal interpretations of Art. 21 renderings "procedural due process" to be inclusive in it. The author seeks to demonstrate how, despite the absence of a verbatim "due process", there is still a persistent echo of it in the constitution and the court judgments.

Keywords: *liberal interpretation, due process, article 21, Constitution of India.*

INTRODUCTION

Often called the "**procedural Magna Carta protective of life and liberty**", Article 21[1] is undoubtedly the grandest and most circumscribing of all the fundamental rights enshrined under Part III. It forms the **cornerstone and a yardstick for the sustenance of any ideal**

[1] Constitution of India, 1950, art.21

democracy and provides everyone a sense of security and assurance of peace.[2] Article 21, over the years of constitutional jurisprudence, has taken such an all-encompassing role, that it becomes nearly impossible to define and confine its length and breadth. But before getting into how this cherished article came to provide us rights ranging from a safe environment to privacy, we shall look into the root of the debate that surrounds this Article i.e., the debate on "procedure established by law" versus "due process of law".

"Article 21: Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to **procedure established by law**."

Right after the Indian constitution was put to action, the mystic surrounding the correct interpretation of the words "*procedure established by law*" arose in the famous landmark judgement of ***A.K. Gopalan v State of Madras***[3] (1950), where the constitutional validity of the "**Preventive Detention Act, 1950"**[4] (hereinafter "the PDA") was challenged. The main issue before the court was whether Article 21 envisaged and encompassed *any*"procedure" laid down by a law enacted by the legislature, or **whether the procedure itself needs to be "fair and reasonable"**.[5] Arguments were advanced before the court to persuade that the judiciary was empowered to"adjudicate upon the reasonableness of any law depriving a person of his liberty."[6]

But the court looked to the "Constituent Assembly Debates" on the topic of "due process of law" as opposed to the "procedure established by law".[7] They realised that the constitution makers didn't incorporate "due process of law" as given in the US Constitution because Constitutional Advisor, Dr. B.N. Rao had been advised against it by United States Supreme CourtJudge, Justice Felix Frankfurter, because of what had happened during the infamous **Lochner Era** (after the controversial ruling of *Lochner v New York*[8], 1905) where the United States Supreme Court judges didn't allow even single welfare legislation to pass, declaring

[2] M.P. Jain, *Indian Constitutional Law* (8th edition, Lexis Nexis 2018) 1159
[3] *A.K. Gopalan v State of Madras* (1950), AIR 27
[4] Preventive Detention Act, 1950
[5] A.K. Gopalan (n 3)
[6] *Ibid*
[7] *Ibid*
[8] *Lochner v New York* [1905] 198 U.S. 45

that they were against the due process of law. Thus, the Constituent Assembly members didn't wish to give a set of unelected judges the power to decide the legislations governing the democratic republic of India.

To surmise, we can say that, in *Gopalan*, an initiative had been taken to obtain more robust procedural protections than were previously accessible.[9] But the court rejected the arguments and took a very **literal approach** to the "*procedure established by law*" and pronounced that it meant the **"procedure laid down in the law, as enacted by the Legislature and nothing more"**.[10]This means any individual could be stripped of his right to"life or personal liberty", as long as the deprivation was procedurally in accordance with that which is laid down by the relevant law.[11] **The judiciary was unconcerned with whether the procedure was fair, reasonable, or in accordance with natural justice**.[12]To deprive a person of his life or personal liberty, the rule implied:

1. The presence of a "**law**"
2. Which lays down a "**procedure**"
3. The executive "**must follow this procedure** while depriving a person of his life or personal liberty".

THE AMERICAN CONSTITUTION & "DUE PROCESS"

The **5th US Constitutional Amendment** provides, among other things, that "*no person shall be deprived of his life, liberty or property, without due process of law*". The above"due process" clause has been the **single most powerful source behind judicial review** in the USA.[13] According to the judicial interpretation, the term "due" in this clause implies "just", "proper", or "reasonable". As a result, the courts can decide whether or not legislation impacting a person's life, liberty, or property is reasonable.[14] If the legislation does not conform to the court's views

[9] M.P. Jain (n 2) 1160
[10] A.K. Gopalan (n 3)
[11] M.P. Jain (n 2) 1161
[12] M.P. Jain (n 2) 1163
[13] M.P. Jain (n 2) 1162
[14] *Ibid*

of what is reasonable and fair under the circumstances, it may be declared invalid. The courts are thus empowered to check even the substance of the law and not just the procedure that it may prescribe. Any given law, in the US, can be struck on the anvil of unconstitutionality, if the judicial review finds that the law itself fails to be fair or reasonable.

- This "due process" has two prongs of important classification:
  a) **"Substantive due process" –** It intends that the substantive provisions of law be fair and non-arbitrary.
  b) **"Procedural due process" –** It proposes a "reasonable procedure". Specifically, the individual impacted should have a fair right of hearing, which comprises the four criteria listed below as well as the principles of natural justice.:
     i) Proper notice of the offence
     ii) Fair opportunity to be heard before the court of law (*audi alteram partum*)
     iii) An impartial tribunal free from bias and preconceived prejudice (*nemo judex in causa sua*).
     iv) Fair and orderly procedure

With this concept of "due process", the American courts thus **became the "arbiter of reasonableness"** of both the **substantive** and the **procedural provisions** provided in law.

A DEEPER DIVE INTO THE "LOCHNER ERA"

The infamous "Lochner era" depicts a timeline in the history of the US legal jurisprudence which was characterised by the striking down of "economic regulations" by the Apex Court of the US on the grounds of "the court's own notions of the most appropriate means for the State to implement its considered policies." The Supreme Court was able to achieve this with the help of the interpretation of "substantive due process" to suit its own.

The namesake comes from the case of ***Lochner v New York***, 1905.[15]The case under question started in 1899 when the plaintiff, Joseph Lochner, a bakery owner in New York, was charged

[15] Lochner (n 8)

for an alleged violation of the New York's Bakershop Act of 1895[16], which made employing bakers for "more than 10 hours per day or 60 hours per week" a crime. Upon conviction, he appealed to the US Supreme Court, which held that the concerned law formed an "*unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract*." In the history of the US Supreme Court, *Lochner* remains one of the most controversial judgements. In the meantime, the SC had also adjudged several decisions invalidating many federal and state statutes regulating the work conditions during the "Progressive Era" and also the "Great Depression". The *Lochner* era came to an end with the judgement of ***West Coast Hotel Co. v Parrish*** (1937)[17], where the court upheld the constitutional validity of the "minimum wage legislation" of the Washington State and overturned the *Lochner* judgement.

As scholar Ronald Dworkin succinctly puts it, Lochner is the 'whipping boy' of American constitutional law.[18]Scholars have argued that much of the edifice of the past half a century of the American constitutional jurisprudence is a reaction to, rejection of, and an attempt to avoid repetition of", the infamous Lochner Era.[19]It has also been said that, even now, Lochner lurks as a shadow over liberal democratic constitutionalism, 'aversive' constitutionalism that is framed, in part, by what it is not.[20] Seeing as how this era marked a period of darkness in the otherwise celebrated American jurisprudence, it is understandable that the drafters of the Indian constitution were wary of carving the root cause of the turmoil, i.e., the "due process" clause, in the constitutional touchstone of the nation. To further understand and comprehend the debate between the road that was not taken and that which was, let us have a look at a judgement by the Supreme Court of India and how it may have been influenced by the controversial *Lochner* judgement.

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[16] The New York Bakershop Act, (1895)

[17] *West Coast Hotel Co. v Parrish* [1937] 300 U.S. 379

[18] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 82

[19] Sujit Chaudhary, 'The Lochner Era and Comparative *Constitutionalism*' (2004) 2 (1), I. CON, 1-55

[20] Kim Lane Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models' (2003) 1 (2) I. CON, 20

A TALE OF DIVERGENCE

In the recent judgement of ***Rajbala v Haryana*** (2015), the division bench of the Supreme Court stringently dismissed the idea of "substantive due process" in India.[21] The main issue of the case was the constitutional validity of the Haryana Panchayati Raj (Amendment) Act, 2015, under which 5 categories of people were barred from contesting elections in the Haryana panchayats for certain offices.[22] The Act was challenged for being wholly unreasonable and arbitrary and therefore violative of Article 14 of the Constitution.[23] The Supreme Court not only held that a law cannot be declared *ultra vires* merely because it is "arbitrary", but it also observed that the courts in India do not examine the wisdom of legislative choices unless the legislation is otherwise violative of some specific provision of the constitution, as to undertake such an examination would amount to virtually importing the doctrine of 'substantive due process' employed by the American Supreme Court, and as per the Indian constitutional scheme "*the test of due process of law cannot be applied to statutes enacted by the Parliament or the State Legislatures*."[24] The given judgement is of particular intrigue since previous benches of the same SC, in cases like *RamlilaMaidan Incident* (2012)[25] and ***Selvi v State of Karnataka*** (2010)[26], had reiterated that substantive due process and due process can be extrapolated from a liberal interpretation of Art. 21.[27]

INTER-RELATION BETWEEN ARTICLES 20, 21 & 22: "PROCEDURAL DUE PROCESS"

While "substantive due process" has been summarily rejected by the Indian courts, we still find glimpses of its other half, i.e., "procedural due process" is not only in many judgements but also in the new interpretative language of the constitution. In the simplest and most apparent of instances, we see that Art. 20[28] and 21[29] of the Indian constitution are truly **reflective of the procedural due process** since they provide us with the procedure that has to

[21] *Rajbala & Ors. v State of Haryana* (2015) Writ Petition (Civil) No. 671/2015
[22] The Haryana Panchayati Raj (Amendment) Act, 2015
[23] *Ibid*
[24] *Ibid*
[25] *Ramlila Maidan Incident v Home Secretary* (2011) Suo Motu Writ Petition (Crl.) No. 122/2011
[26] *Selvi v State of Karnataka* (2010) Criminal Appeal No. 1267/2004
[27] Abhinav Chandrachud, *A Tale of two Judgements*' (*The Hindu,* 22 June 2022) <https://www.thehindu.com/opinion/lead/a-tale-of-two-judgments/article8586369.ece> accessed 25 June 2022
[28] Constitution of India, 1950, art.20
[29] Constitution of India, 1950, art.21

be followed when someone's life and liberty are to be curtailed.[30] The procedure which is thus established by the law then shall have to conform to certain established principles as enumerated under Art. 20 and 22. The **substantive rights are also to be implemented in a fair and just manner** not only in the law but also in its application.[31]

Article 20: Protection in respect of conviction for offences

1. No person shall be convicted of any offence except for violation of the **law in force** at the **time of the commission of the act** charged as an offence, **nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time** of the commission of the offence.
2. **No person shall be prosecuted and punished for the same offence more than once**.
3. **No person** accused of any offence shall be **compelled to be a witness against himself."**

Similarly, **Art. 22[32] provides protection against "arbitrary arrest and detention"**. In addition to this, **Art. 142[33]** of the constitution is also reflective of the idea of due process as it allows the judiciary to pass "any decree or order" so as to do "**complete justice**". Thus, despite no explicit mention of the words "due process" in the Indian Constitution, its echo can still be found in multiple Articles. But after the famous case of "***Maneka Gandhi v Union of India***", it has become clear that the spirit of the "due process" clause finds homage in the Indian jurisprudence.[34]

MANEKA GANDHI V UNION OF INDIA, 1978

This landmark judgement illustrates the influence that"**liberal tendencies**" have had on the SC when it comes to the interpretation of Fundamental Rights, specifically Art. 21. A tremendous change has come about in the attitude of the judiciary towards the safeguarding of human life and personal liberty after the traumatic and unforgettable experiences of the **national emergency** (1975-77) when deprivation of **liberty had reached its peak**. *Maneka Gandhi's* case

[30] M.P. Jain (n 2) 1164
[31] M.P. Jain (n 2) 1165
[32] Constitution of India, 1950, art.22
[33] Constitution of India, 1950, art.142
[34] *Maneka Gandhi v Union of India* (1978), AIR 597

also throws light on the fact that Art. 21 as had been interpreted in *Gopalan*, failed to play any substantive role in protecting against arbitrary and unreasonable laws. This case has been called the "catalyst for the transformation of judicial view on Art. 21." The bench practically overruled *Gopalan*, with the new interpretation of Art. 21 in *Maneka Gandhi*, giving it a broader and all-encompassing meaning covering a multitude of other fundamental rights. The following propositions were laid down[35]:

1. "Just as no man is dissectible into separate limbs, cardinal rights in an organic constitution have a synthesis. There is a **nexus between Art. 14, 19, and 21**. Not only the procedure has to be fair, but also the law itself has to be reasonable so as to conform to Art. 14 and 19."
2. "Personal liberty was expansively interpreted to give it the widest amplitude covering a variety of rights."
3. "Art. 21 would no longer mean that law could prescribe some semblance of procedure, however arbitrary or fanciful, to deprive a person of his personal liberty. It means now that the **procedure must satisfy certain requisites in the sense of being fair and reasonable**."

POST MANEKA GANDHI

Scholars have gone so far as to suggest that before *Maneka Gandhi* judgement, Art. 21 had been a dormant fundamental right, unutilised to its fullest potential. Post the landmark judgement, Art. 21 has now assumed a "**highly activist magnitude**." Ever since Art. 21 has evolved into the Indian equivalent of the American principle of due process. The terms "life", "personal liberty" and "procedure" have been given wider amplitude so as to make Art. 21 the point of inception of multitudinous substantive rights and procedural protections for the people.

Bhagwati J. in ***Francis Corallie v Delhi*** observed that "***right to life doesn't connote mere animal existence*** *but also includes the right to live with human dignity and all the bare necessities of life such as nutrition, clothing, shelter, etc*." and upholding the right of the detenu to have personal calls with her friends and family, the learned judge held that personal liberty includes right to socialise with others.[36]

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[35] *Ibid*

[36] *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1980) 2 SCR 557

In ***P. Rathinam v Union of India***, the Supreme Court defined 'life' to mean "the right to live with dignity which doesn't connote continued drudgery. It takes within its fold some of the **fine graces of civilization that make life worth living**.[37] In ***Olga Tellis v Bombay Municipal Corp***., the Supreme Court emphasized the "*inhibition against deprivation of life extends to all those limits and faculties by which life is enjoyed*."[38] The Supreme Court has held in ***RM Malkani v State of Maharashtra***, with regards to Art. 21, that the "*telephonic conversation of an innocent citizen would be protected against wrongful interference by tapping…*"[39]

In ***Suchita Srivastava v Chandigarh Administration***, the right of a woman to make reproductive choices has been held to be a dimension of "personal liberty", whose boundaries cannot be strictly identified but at the same time mandates that such liberty must also accommodate public interest.[40] In ***Satwant Singh v APO***, even the right to travel has been held to be an aspect of "personal liberty".[41] The Supreme Court observed in ***Kartar Singh v State of Punjab***, that the procedure envisaged by Art. 21 is that it must be right, just, and fair, and not arbitrary, fanciful, or oppressive. The procedure must also be in consonance with the principles of natural justice.[42]

CONCLUSION

All of the above cases decided post-*Maneka Gandhi*, illustrate that the interpretation of Art. 21 has come a long way since *Gopalan*. Even after the explicit deletion of the "due process" clause, its spirit has been carried forward to make our society more liberal and progressive. Right to privacy, right to education, and right against sexual harassment at the workplace, all have been considered a part of the right to life under Art. 21. The notion of what defines a "life" has undoubtedly changed dramatically throughout the years. In its current form, Article 21 includes rights that the framers of the constitution could not have foreseen. The gloomy days of the 1975 emergency emphasise the significance of this article even further. Ever since, we have worked to guarantee that everyone has the right to a healthy, peaceful, and, most

[37] *P. Rathinam v Union of India* (1994), AIR 1844.
[38] *Olga Tellis & Ors. v Bombay Municipal Corporation* (1986), AIR 180
[39] *R. M. Malkani v State ofMaharashtra* (1973), AIR 157
[40] *SuchitaSrivastava v Chandigarh Administration* (2009) Civil Appeal No. 5845/2009
[41] *Satwant Singh Sawney v D. Ramarathnam, Asst. Passport Officer* (1967), AIR 1836
[42] *Kartar Singh v State of Punjab* (1961), AIR 1787

importantly, safe life. The "due process" debate has modified the initial literal reading of the article, and while we do not follow the footsteps of American constitutional jurisprudence, we have forged a unique path for ourselves, tailored to India's individuality and diversity. The road that was formerly abandoned finds its echo in the current course of Indian constitutional governance.