

# 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 individuals in positions of authority. However, this is primarily dependent on the words and phrases that make up the constitution. There has been much consideration in determining the correct word that crystallizes the State's authority in order to prevent it from infringing on individual liberty. In such a circumstance, the concept of due process emerged. The phrase 'Due process' embarks the ideology that the authorities while exercising their duties, must not act arbitrarily. It is a principle that states that no one may be denied of their lives, freedom, or possessions without first giving them a fair chance to be heard.

The United States added the 'due process clause' to their written constitution for the first time. They were already aware of it from England. During the course of time, they offered a more comprehensive and evasive interpretation of this phrase than it had imbibed in its genesis in England. Despite the fact that this specific term was not mentioned in the Indian Constitution, the impact of US jurisprudence on Indian judicial decisions is clear. The integration of due process concepts has been critical in shaping a judiciary that prioritizes fairness, justice, and the protection of individual liberty.

The fundamental aim of this article is to explore how the idea of due process has developed over time, within the Indian legal framework, with a specific focus on understanding the reasons for embracing the expression 'procedure established by law' in Art 21 of the Indian Constitution. Additionally, the research also throws light on how the Indian judiciary has accepted due process through its judicial decisions over time.

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## INTRODUCTION

'Due process' is a term with a long history. It is the outcome of the conflict between the individual and government.<sup>1</sup> Its origins can be traced in the Magna carta, 1215 and from then onwards it has secured its place in every significant instrument aiming to curtail the arbitrary authority of the crown. Though the phrase originated in England, the Americans were highly influenced with the phrase. They incorporated the same in the fifth amendment initially and following the civil war, it was incorporated as a 14<sup>th</sup> amendment 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.<sup>2</sup>

Due process thus involves judicial authority to explain and apply laws to solve a legal issue, Judges interpret and apply existing laws to resolve a legal issue or disagreement. By 1868, the term 'due process' had evolved to signify a fundamental set of fair procedures when 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 their case adjudicated by an unbiased panel of judges in accordance with accepted and equitable legal procedures. Thus, due process meant that if the government got involved in decisions that affected a person's life, freedom, or property, they had the right to fair treatment, a fair hearing, and a fair verdict.<sup>3</sup>

The principle of due process holds significant importance within a nation's judicial system. Consequently, numerous countries view due process as a crucial component in their effort to safeguard human rights. The right to due process mandates the government to uphold an individual's legal rights as prescribed by law. This ensured sufficient safeguard to individuals from unjust exploitation by the state. The constitution of the US, has inspired countries across globe in the making of their constitutions. However, the interpretations of due process have not been consistent by the US judiciary and this has created confusion in many countries regarding the adoption of the phrase. It was also evident that a situation very similar to this one existed in India during the time that the constitution of India was being written.

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<sup>1</sup> Charles A Miller, *The Forest of due process of law: The American Constitutional Tradition*, 18 American Society for Political and Legal Philosophy 3 (1977)

<sup>2</sup> Nathan S Chapman and Michael W McConnell, *Due Process as Separation of Powers*, 121 Yale L J 1672 (2012)

<sup>3</sup> Eberle Edward J, *Procedural Due Process: The Original Understanding*, Constitutional Commentary 293 (1987).

India's constitutional system has close connection to British parliamentary sovereignty and legal positivism, it was unlikely that a strong Supreme Court will emerge in this historical setting to challenge parliamentary legislation through due process.<sup>4</sup> This was obviously apparent in the deliberations of the constituent assembly. It is evident that the Constituent Assembly deliberately excluded the due process article when defining the fundamental rights.

This article will examine the progression of due process in the Indian context, by dividing it into four parts, the first part will focus upon the deliberations of the Constituent Assembly and the political disruptions that have hindered the incorporation of the term 'due process' in the Indian constitution, the second part would deal with the rigid interpretation of the phrase 'procedure established by law' in the light of AK Gopalan and the significant impact of the judgement. The third part will explore the rise of 'procedural due process' and the fourth part will address the emergence of 'substantive due process' following the Maneka Gandhi case.

## 1. Deliberations of the Constituent Assembly

The task of formulating the new constitution for India after its independence in 1947 was assigned to the Constituent assembly. Dr. B.R. Ambedkar led the assembly.<sup>5</sup> The assembly set up sub- committees in 1947 to begin work on the constitution's preparation. To aid in this process of preparation of constitution, a subcommittee on Fundamental Rights was established, which included notable members. It focused on the inclusion of Fundamental Rights, discussed how to limit these rights and in what situations they should be restricted. They decided to attach conditions to specific rights and allow for the suspension of rights in certain circumstances. The Assembly's decisions were also influenced by the political unrest in Assam and Bengal at the time, leading to a preference for imposing limitations on rights.<sup>6</sup>

At first, the constituent assembly had chosen to include a clause similar to the American constitution's due process clause as they felt that it would offer legal protections against the government's arbitrary detention of people. However, they had mutually agreed to include the word personal liberty and not liberty alone, so as to purposively ensure that it was not inclusive

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<sup>4</sup> Akash Tandon, *Judicial Assertion of due process of law in India*, 3 IJLMH 429 (2020)

<sup>5</sup> ABHINAV CHANDRACHUD, DUE PROCESS OF LAW, 57 (EBC 2012)

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

of property rights.<sup>7</sup> Also, this was done because the framers were intending to bring about a property regime, where in the motive was to redistribute the lands held by the colonial era landlords, they believed that the courts would obstruct specific reform if the due process provision just addressed liberty.

This implied that the 'due process' clause allowed the judiciary to review laws passed by the legislature based on particular standards. These standards would involve assessing whether the law is consistent with basic principles governing individual rights. The law might be absolutely correct and legitimate insofar as the legislative branch is concerned. However, it might be bad, meaning that it might contradict some fundamental values; in such case, the judiciary should exercise extra authority to declare the legislation illegal. Thus, the judiciary was endowed with the authority to review laws. The question was whether the judiciary should be dawned upon with this additional authority.<sup>8</sup>

One view was that, the inclusion of due process could allow legislature to formulate laws abrogating the individual rights, on the contrary the other view was that the inclusion of the clause would bestow the authority to determine the validity of the laws by a few judges of the SC. Thus, it was viewed to be anti-democratic.<sup>9</sup> During the course of these contradictory discussions, Justice Frankfurter advised Sir Rau to not incorporate due process<sup>10</sup> as it would impose an additional weight upon the judiciary and could weaken democratic structure as it authorized the judges to invalidate laws made by the elected representatives. The reason behind his opinion was the prevailing consequences of 'Lochner era'<sup>11</sup> during that time. In that case, the US SC declared a social welfare law unconstitutional on the premise that it infringed upon the contractual rights.<sup>12</sup> Finally after an intensive discussion the due process clause was removed, the new Art 15 (at present Art 21) was enacted on December 13, 1948. Political personalities, state and central legal organizations, and the Assembly itself all expressed strong opposition, causing a national commotion.<sup>13</sup>

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<sup>7</sup> GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 103 (1966).

<sup>8</sup> 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 Law, 216 (2010)

<sup>9</sup> Id

<sup>10</sup> Supra note 5 at page 57

<sup>11</sup> *Lochner v. New York*, 198 US 45 (1905)

<sup>12</sup> OXFORD HANDBOOK OF INDIAN CONSTITUTION 780 (Oxford 2016)

<sup>13</sup> Supra note 8

### 1.1 The removal of due process due to communal unrest.

As a result of the British division of India and Pakistan, there was a rise in religious disorder and instability in North India, which was a major contributing factor to Ayyar's shift in thought and the movement to eliminate due process. Due to this, those against due process believed that preventative detention measures, which did not possess constitutional protections for due process, offered the most effective means to curb the prevailing religious animosity that existed back then.<sup>14</sup>

However, following the Constituent Assembly's decision to strike due process from Art 15, the Indian Law Review and the Calcutta Bar pushed for the restoration of some procedural rights. Ambedkar there upon introduced Art 15A, which aimed to guarantee that anyone who had been arrested were to be presented in front of the magistrate within a span of 24 hours and had to be notified of the charges against them, and could be detained with the magistrate's permission. However, Art 15A did not apply to those held in accordance with legislative preventive detention law, allowing for up to three months of imprisonment without any procedural protections. After this time, particular safeguards had to be put in place, such as a judge-led advisory board identifying grounds for continuing detention. Through these efforts, they ensured that government could limit judicial intervention with executive custody.<sup>15</sup>

The founders thus had the intention to limit judicial review, particularly when it related to the exercise of government power in areas like preventive detention and property rights, this was apparent through the removal of due process clause. Thus, the constitution ensured to establish an equilibrium between the power of the state and individual freedoms which was profoundly influenced by the turbulent political and social climate at the time of its drafting.

### 1.2 Exclusion of 'due process' and inclusion of 'procedure established by law'

Art 21<sup>16</sup> was thus altered to eliminate due process in order to place constitutional constraints on the judiciary. This action was taken in an effort to stop judges from interpreting the due process clause more broadly, which would encourage judicial intervention with legislative

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<sup>14</sup> Id

<sup>15</sup> Supra note 7 at 109

<sup>16</sup> Article 21 states that 'No person shall be deprived of his life or personal liberty except according to a procedure established by law.'

policies.<sup>17</sup> Rather than being the arbiter of these rights, the judiciary was envisioned as the guardian of these rights.<sup>18</sup>

In order to determine the extent of Art 21, 'procedure established by law' was therefore added to the Indian Constitution; these terms were adopted from Art 31 of the Japanese Constitution.<sup>19</sup> It refers to the procedure defined by legislation or those outlined by the state's laws. Thus, there was a need to have a legal framework before the authorities could interfere with an individual's life or personal liberty, a legal framework must exist. But there was no requirement that the law had to be in compliance with principles of natural justice.<sup>20</sup>

## 2. Rigid interpretation of the phrase 'Procedure established by law'

The first case under Art 21, following the adoption of the constitution was that of A. K. Gopalan,<sup>21</sup> in which he challenged the decision<sup>22</sup> on the basis that it was unreasonable under Art 19(1)(d), 21 and 22. He argued that the phrase 'due process of law' is completely interchangeable with the phrase 'procedure established by law' and its meaning remains unchanged even if the term 'due' was removed. It was further added that the expression 'law' in Art 21 refers to the natural justice principles and any alternative reading, would offer absolutely no legislative protection.<sup>23</sup>

The Court determined that the term 'law' as used in Art 31 of the Japanese constitution did not refer to *justness*, like the US and the court lacked the authority to decide what is *due* or *just*.<sup>24</sup> Rather the emphasis was that the legislature is the ultimate arbiter of what constitutes law. The majority judges in this decision also argued that while assessing the constitutional soundness of a law, only the object of the statute should be considered and that its incidental effect on the other constitutional provisions should be excluded. Each right is like its own rulebook, and

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<sup>17</sup> S.P. SATHE, JUDICIAL ACTIVISM IN INDIA 37( New Delhi: OUP, 2002)

<sup>18</sup> Supra note 6

<sup>19</sup> 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 Journal of the Indian Law Institute 99–135 (1962)

<sup>20</sup> Sharma PRD, *Interpreting 'procedure established by law' with 'rule of law': A comparative view of Irish, Japanese and Indian Constitution*, 4 Forensic Res Criminal Int J 79 (2017)

<sup>21</sup> A. K. Gopalan v. State of Madras, AIR 1950 SC 27

<sup>22</sup> It was passed under S. 3(1) of the Preventive Detention Act, 1950

<sup>23</sup> Pramila Agrawala and Pramila Agrawal, *Indian Judiciary and Natural Justice*, 25 The Indian Journal of Political Science 282 (1964)

<sup>24</sup> Rathore, *Procedure established by law vis-a- vis Due Process: An overview of Right to Personal liberty in India*, Uttarakhand Judicial and Legal Rev 77 (2014)

they don't necessarily overlap or work together in every situation. Thus, they rejected the contentions of dependency between Art 19, 21, 22.<sup>25</sup>

Thus, it can be viewed in this case that liberty was interpreted in the most restricted way only to mean liberty of the physical body and nothing beyond it.<sup>26</sup> Therefore, regardless of the irrationality of the legislation, even if it deprives someone of their life or personal freedom, it is considered legitimate for the government to do so.<sup>27</sup> However, there was one Judge who clearly did not agree with the majority view. Justice Fazal Ali stated that fundamental rights are interconnected and should be interpreted in a cohesive manner. His views later formed the groundwork for substantive due process in India.

The court neglected to take into account a fundamental concept of statutory readings, which states that a statute must be comprehended in its entirety and within its contextual framework.<sup>28</sup> In this instance, the court did not take into account the entirety of Part III of the Constitution when interpreting preventive detention. Instead, the court solely relied on Art 22 and concluded that the preventive detention was legally justified, as the authorities had complied by the procedure laid down in the law. It considered Art 22 to be independent of Art 21, 19(1)(d). The court in this case outrightly rejected the concept of due process with a strong backing through the textualist<sup>29</sup> and originalist mode of interpretation.<sup>30</sup>

Following the conclusion of this case, the Supreme Court, via a series of other rulings, established a guide to judicial review. It emphasized on the presumption of constitutionality of a statute,<sup>31</sup> gave prominence to the textual mode of interpretation,<sup>32</sup> the court would refrain from evaluating the wisdom, justness, or policy aspects of a statute,<sup>33</sup> finally the court wouldn't assume that a law would be misused, and the potential for misuse alone wouldn't be enough for

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<sup>25</sup> Kannan Srinivasan, *The Supreme Court and Its Chief*, 22 Economic and Political Weekly 23 (1987),

<sup>26</sup> As interpreted by Chief Justice Kaniya in AK Gopalan case

<sup>27</sup> P Sharan, *Constitution of India and Judicial review*, 39 The Indian Journal of Political Science 526 (1978)

<sup>28</sup> G P SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 35 (Lexis Nexis 2019)

<sup>29</sup> Arvind P Datar and Rahul Unnikrishnan, *Interpretation of Constitutions*, 29 NLSIR 136 (2017)

<sup>30</sup> Brandon J Murrill, *Modes of Constitutional Interpretation*, Congressional Research Service 1 (2018)

<sup>31</sup> Ram Krishna Dalmia v. Justice S R Tendolkar, AIR 1958 SC 538

<sup>32</sup> F.N Balsara v. State of Bombay, AIR 1951 SC 318, see also H M Seervai, *Constitutional Law of India*, Vol 1 262 (Law & Justice 2006)

<sup>33</sup> State of Rajasthan v. UOI, AIR 1977 SC 1361, Ajit Kumar Nag v. Indian oil corp ltd, (2005) 7 SCC 264

it to be invalidated. Instead, any alleged discriminatory aspects must be inherent in the statute itself.<sup>34</sup>

Following the Gopalan case, the Supreme Court consistently upheld the principles associated with 'procedure established by law,' as evidenced by its rulings in subsequent cases such as the Makhan Singh case, in this case it was held that the Governor of Punjab's order for preventive custody was unconstitutional due to its lack of adherence to the Preventive custody Act's guidelines. According to the act, an Advisory Board had to assess each detention case before the government could verify it.<sup>35</sup> Therefore, the case emphasized the importance of adhering to formal procedures prior to depriving an individual of their liberty, without considering the justiciability of the statute.

Further in Kharak Singh, the SC examined the constitutionality of a regulation that allowed police to make night visits to people's homes. The court reaffirmed that Art 19(1)(d) and 21 represent distinct fundamental rights, rejecting the idea that one is carved out of the other.<sup>36</sup> The judges who formed the majority and the dissenting judges in the case referenced American substantive due process opinions, particularly Munn case,<sup>37</sup> which emphasized a careful scrutiny of laws affecting fundamental rights.<sup>38</sup> While the majority in this case used this reference to broaden the understanding of 'personal liberty,' they maintained an interpretation of Article 21 similar to the Gopalan decision, which did not explicitly recognize 'due process' or elements of natural justice.<sup>39</sup>

From the aforementioned cases, it is evident that the court did not accurately comprehend the fundamental principles of fairness within the framework of Art 21, which was similar to due process, the court just required a procedure prescribed by the legislation. But it is to be noted that the concept of 'substantiveness' was not new to the courts, the same was being interpreted

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<sup>34</sup> State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75

<sup>35</sup> Makhan Singh v. State of Punjab, [1951] S.C.J 835, Also see Ram Narayan Singh v. State of Delhi, (1953) SCJ 326

<sup>36</sup> Kharak Singh v. State of U.P, AIR 1963 SC 1295

<sup>37</sup> Munn v. Illinois, 94 U.S. 113 (1876), see Justice Stephen Field's dissent.

<sup>38</sup> 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, 843 (1941).

<sup>39</sup> SHAILJA CHANDER, JUSTICE V.R. KRISHNA IYER ON FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES (Deep and Deep 1992), Also this decision was influenced by the U.S. case Wolf v. Colorado [338 U.S. 25 (1949)] emphasizing the importance of safeguarding residences from unlawful intrusion as a fundamental aspect of liberty.



by them under art 14, 19 in the context of determining the arbitrariness or reasonableness of the statutes. Thus, the concept of substantive review did exist prior to Maneka Gandhi, but it was not given the title of 'substantive due process' as it was not encompassing life and liberty under art 21.

## 2.1 'Reasonableness' under Article 19

In accordance with the Indian Constitution, courts have the authority to scrutinize the fairness of law, precisely under Art 14 and 19. This scrutiny involves assessing whether laws are reasonable and whether they classify people or things in a justifiable manner. While this process is often associated with substantive due process, but it's a narrower form of scrutiny as it is not associated with life and liberty. Initially, this examination focused on Art 14, but over time, it expanded to include Art 19 as well. This evolution led to the development of the 'arbitrariness' test within the framework of reasonableness. This test eventually paved the way for procedural due process in Indian law. So, before exploring about due process in India, we need to look at how the courts have explored the concept of 'reasonableness.'<sup>40</sup>

The Constituent Assembly of India prohibited judicial review of laws pertaining to the 'rights to life and personal liberty' as outlined in Art 21 through due process, it did permit courts to conduct substantive reviews in other areas of constitutional law. This was particularly evident under Art 19(2)-(6), which deals with 'reasonable restrictions', under these articles' courts were allowed to assess whether laws that limited these fundamental freedoms were reasonable or not.

In a significant case called Chintaman Rao,<sup>41</sup> the Supreme Court's Constitution Bench scrutinized the legitimacy of a law that prohibited the production of bidis. The court unanimously declared the statute invalid, considering it an unreasonable limitation on the right to occupation.<sup>42</sup> Mahajan J, speaking for the court, emphasized the need for a balance, with 'arbitrariness' being a crucial factor.

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<sup>40</sup> Supra note 5 at 78

<sup>41</sup> Chintaman Rao v. State of Madhya Pradesh, 1950 SCR 759, Also see State of Madras v. V.G. Row, AIR 1952 SC 196

<sup>42</sup> Under Article 19(1) of the Constitution Of India, 1950

In these early cases concerning 'reasonable restrictions' under Art 19, the SC started to explore the concept of procedural due process, which became more prominent in later years. These cases highlighted the importance of preventing unchecked government discretion. 'Reasonableness' review led to requirements for notice and hearing, resembling procedural due process,<sup>43</sup> while not strictly 'procedural due process' because it was not associated with Art 21.

### 3. The rise of 'procedural due process.'

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

Firstly, it was influenced by Subba Rao J's<sup>44</sup> concerns regarding the rigid interpretation of fundamental rights in the Gopalan case, the SC began breaking down barriers between these rights. This shift was evident in cases like Cooper and Keshavananda, In the Cooper's case,<sup>45</sup> the 'object' test<sup>46</sup> was replaced by the 'effects' test. According to the 'effects' test, a law would be assessed based on the constitutional provisions it naturally triggered, not just its intended purpose. Thus, the focus shifted from what the law aimed to achieve to what its actual consequences were. In Keshavananda,<sup>47</sup> the court focused on deriving the essence of the Constitution, similar to approaches seen in federal state due process cases in the US. The case of Basic structure emphasized the court's role in safeguarding procedural due process interests and securing its jurisdiction.

Secondly, during the Emergency, the SC faced challenges in upholding its authority due to the restrictions imposed. This period of limited judicial access prompted the court to take on a more activist role.

Thirdly, it was influenced by Justice Khanna's dissent in the Habeas Corpus case and the court's experience of illegitimacy during the Emergency, as a result of this Supreme Court adopted a

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<sup>43</sup> In Ebrahim Vazir Mavat v. State of Bombay,[AIR 1954 SC 229] the Supreme Court considered the constitutionality of a law authorizing the Central Government to order the removal of a person from India based on a 'reasonable suspicion.' The court criticized the lack of clear criteria for determining what constitutes 'reasonableness' and emphasized the importance of providing notice and hearing rights, known as 'natural justice'. Also see R.M. Seshadri v. District Magistrate, Tanjore [AIR 1954 SC 747]

<sup>44</sup> Justice Subba Rao's views can be observed in the case of Kharak Singh v. State of UP, AIR 1963 SC 1295; Subba Rao J, in particular, emphasized that if a law affects both the right to freedom under Article 19 and personal liberty under Article 21, it must meet the requirements of both articles. This means that the law must not only satisfy the "procedure established by law" criterion but also be deemed reasonable under Article 19(2) of the Constitution. Also see, State of Maharashtra v. Prabhakar Pandurang Sanzgiri, AIR 1996 SC 424

<sup>45</sup> R C Cooper v. UOI, AIR 1970 SC 564

<sup>46</sup> As upheld in the AK Gopalan case

<sup>47</sup> Keshavananda Bharati v. State of Kerala, AIR 1973 SC 1461

novel approach to equal protection analysis. It identified 'arbitrariness' as the essence of equality, akin to the approach of US justices like Frankfurter and Cardozo.

As a result of these factors in the late 1970s, the court introduced a new 'arbitrariness' test, which included not only Art 14, 19 but extended to Art 21 and also to safeguard procedural due process rights against government authorities, establishing a broad 'arbitrariness' standard.<sup>48</sup> Through its procedural due process opinions, the court aimed to uphold principles of judicial access and natural justice, which involves receiving notice and having a chance to be heard. By incorporating procedural due process within the Indian Constitution and defining procedural fairness, the courts essentially created a new constitutional right or value that wasn't explicitly intended by the Constitution's framers.

Thus, the procedural due process started gaining slight momentum through the recognition of judicial access, but the concept reached its zenith in the case of Maneka Gandhi. This case came before the court after a series of political upheavals (emergency). However, the judiciary's firm stand fought against all the legislative and political hurdles. Finally, concepts of natural justice were stabilized and it further facilitated the emergence of substantive due process.

### 3.1 The impact of post emergency in shaping Judicial power

In 1975, Prime Minister Indira Gandhi announced a state of Emergency in response to her conviction by a court for election fraud. Throughout this period, Gandhi utilized the Maintenance of Internal Security Act to curb political adversaries and also enforced limitations on civil freedoms and the autonomy of the press. She brought in a series of amendments so as to reverse the Court's decision in Keshavananda. These amendments aimed at limiting the judiciary's authority in exercising judicial review.<sup>49</sup> During the phase of emergency, the SC to some extent, supported the suspension of democratic rights and habeas corpus.<sup>50</sup>

Nevertheless, during the years following the Emergency, the Janata government repealed the majority of the rules that were implemented during the emergency<sup>51</sup> and tried to restore

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<sup>48</sup> Supra note 5 at 108

<sup>49</sup> Burt Neubome, *The Supreme Court of India*, I INT J CONSTITUTIONAL LAW 494 (2003).

<sup>50</sup> A.D.M. Jabalpur v. Shivkant Shukla, A.I.R. 1976 S.C. 1207

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

judicial power.<sup>52</sup> During this transition period, the SC played a pivotal role in determining matters pertaining to the restoration of constitutional rights and the investigation of violations committed under the emergency regime.

During this period, an important case that laid the groundwork for Art 21 was brought before the SC.<sup>53</sup> Maneka Gandhi challenged the government's seizure of her passport<sup>54</sup> without providing her a notice or hearing. She contended this act to be violative of Art 14, 19, and 21.<sup>55</sup> The court in this case emphasized the need to broaden the interpretation of fundamental rights rather than restricting them. It interpreted 'personal liberty' in Art 21 broadly, stating that it encompasses various rights essential to personal freedom, some of which are recognized as distinct fundamental rights under Art 19. Further, the majority introduced the concept of due process into Art 21, requiring that any procedures affecting life and liberty be equitable, impartial, and devoid of arbitrariness. Furthermore, the Court determined that laws restricting personal liberty must not only adhere to procedural due process under Art 21 but also pass the test of reasonableness under Art 19 and ensure non-arbitrariness under Art 14. This case represented a notable deviation from prior doctrine and underscored the significance of safeguarding individual rights against arbitrary state action.

### 3.2 Impact of Maneka Gandhi:<sup>56</sup>

The Maneka Gandhi case brought about three important changes in how the Indian courts reviewed laws related to equality and personal liberty.

Firstly, it shifted the court's focus from strict 'classification' review to a more nuanced examination of the 'reasonableness' of legislation.<sup>57</sup> This meant that laws would be scrutinized based on whether they were fair and just, rather than solely based on how they classified people or things.

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<sup>52</sup> UPENDRA BAXI, THE INDIAN SUPREME COURT AND POLITICS 122-23, 209 (1980);

<sup>53</sup> Maneka Gandhi v. Union of India, AIR 1978 SC 597

<sup>54</sup> Under section 10 (3)(c) of the Passport Act, 1967

<sup>55</sup> INDIAN CONST

<sup>56</sup> ABHINAV CHANDRACHUD, DUE PROCESS OF LAW, 151 (EBC 2012)

<sup>57</sup> Thus, it reaffirmed its opinion as stated in the Royappa Case[AIR 1974 SC 555], the petitioner, a high-ranking officer in the Indian Administrative Service, was transferred to a lower-ranking temporary position, allegedly due to displeasure from the Chief Minister. The petitioner argued that this transfer violated his right to equality, claiming that the new position was inferior to his previous one.

Chief Justice Bhagwati, emphasized the expansive nature of the right to equality, rejecting narrow interpretations. By rejecting traditional limits and introducing the concept of "arbitrariness," the court moved away from the strict classification doctrine, allowing for a more flexible approach to assessing the reasonableness of laws. This new standard marked a departure from previous means-end scrutiny and expanded the scope of judicial review in cases involving equality.

Secondly, this case introduced the concept of procedural due process into Indian constitutional analysis. This meant that laws affecting personal liberty must not only be validly enacted but must also follow fair and reasonable procedures.

Thirdly, courts started declaring a laws as ‘arbitrary’, when the authorities exercised power to make decisions without following fair and reasonable procedures. In many cases following the Maneka Gandhi era, the courts emphasized the importance of ‘natural justice’, which includes principles like fair hearing and impartial decision-making. Interestingly, most of these cases dealt with situations where statutes didn't explicitly mention the need for natural justice.

Thus, it appeared that the scope of fairness in procedure and procedural due process was expanding substantially.<sup>58</sup> The idea that a statute concerning life and liberty must meet standards of reasonableness and fairness further contributed to the development of substantiveness within the ambit of due process.

#### 4. The rise of substantive due process:

The three main origins of substantive due process doctrine in India can be attributed to the judiciary, in its decisions in i) the cases related to the court's ‘basic structure’ test, which extended beyond issues of judicial access, ii) Cases linked to the court's ‘arbitrariness’ doctrine, which appeared to stem from the fundamental principles of fairness and equality outlined in Art 14, iii) Cases associated with the court's interpretation of the ‘right to life’ provision in the constitution.<sup>59</sup>

##### 4.1 Basic Structure Test

The court's ‘basic structure’ test had both substantive and procedural aspects. Firstly, it identified fundamental values within the constitution of India, similar to how substantive due process worked in American law. Secondly, it established principles that restricted Parliament's authority to amend the Constitution. However, it also had procedural implications because it ensured that the court could handle cases of constitutional importance. Initially, this test was mainly about ensuring access to the courts, but over time, it expanded to address broader issues beyond just judicial access. Essentially, it combined both substantive and procedural elements to safeguard constitutional principles and ensure effective judicial review.<sup>60</sup>

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<sup>58</sup>Supra note 5 at 158

<sup>59</sup> Id at 164

<sup>60</sup> Keshavananda Bharati v. State of Kerala, AIR 1973 SC 1461

Likewise, in the case involving Indira Gandhi, the SC struck down Art 329-A to the Constitution because it deprived candidates of the ability to challenge elections. This decision affirmed the access to courts by acknowledging the essential values of 'democracy' and the 'rule of law' as intrinsic components of the Constitution's 'basic structure'. This poses a challenge in effectively distinguishing between procedural and substantive due process in such instances. In essence, the court upheld both the fundamental principles of democratic governance and the procedural rights to seek legal recourse, thereby blurring the boundary between the two.<sup>61</sup>

In the Basic Structure case and related cases, the Supreme Court initially identified certain values essential to the Constitution's 'basic structure,' mainly to protect judicial access. However, in subsequent cases, the court extended its scope beyond just safeguarding judicial access.

#### 4.2 Arbitrariness test

In the period following the Maneka Gandhi case, the SC expanded the scope of the 'arbitrariness' doctrine. Previously, 'arbitrariness' was closely linked with 'reasonableness' under Art 19 and 'classification' under Art 14. However, the new approach recognized the interconnectedness of Art 14, 21, and 19 which formed 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 laws. The 'arbitrariness' test was however criticized for its lack of clarity and precision.<sup>62</sup>

In the Malpe case,<sup>63</sup> the Supreme Court faced a challenge regarding certain provisions of the Bombay Rent Control Act. Landlords argued that the law, which regulated rent amounts, had become unfair and unreasonable over time. Justice Kirpal, in his decision, emphasized 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 to not favour one group over another. Despite finding the law arbitrary, the court chose not to strike it down immediately because it was set to expire soon. However, it warned that if the law were extended without addressing its concerns, it would be deemed unconstitutional. This

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<sup>61</sup>Indira Gandhi v. Raj Narain, AIR 1975 SC 2299, Also in the case of Minerva mills,[AIR 1980 SC 1789] it was held that the fundamental rights and the directives should be interpreted harmoniously so as to create a balance between them, in this case this was considered to be a part of the basic structure.

<sup>62</sup>Supra note 5 at 177

<sup>63</sup> Malpe Vishwanath Acharya v. State of Maharashtra case, AIR 1998 SC 602

decision highlighted the court's stance on fairness in legislation and the need for lawmakers to consider all perspectives when enacting laws.

In the case of *Mardia Chemicals*,<sup>64</sup> the court did not explicitly employ the analytical framework established in the *Maneka Gandhi* case under Art 21, which pertains to the fundamental freedoms of life and liberties.

The 'arbitrariness' test thus provided a way for courts to invalidate laws that was unjust, or unreasonable even when it did not concern the life or personal liberty. A clear example of this was seen in the *Naz Foundation* case,<sup>65</sup> where the 'procedure established by law' (the Criminal Procedure Code) was deemed fair, but the substance of the law (S. 377 IPC) was considered unfair.

### 4.3 Rights Creation

The third aspect of substantive due process involves establishing new rights. Cases related to 'privacy' and 'dignity' prove the court's enthusiasm to broaden constitutional interpretation. However, this segment also includes cases where rights were indirectly established. For instance, the *Basic Structure* case, the *Indira Gandhi* case, and the *Mardia Chemicals* case all protected judicial access. While addressing procedural due process concerns, these cases essentially created a 'right to judicial access,' making them substantive in nature.

From 1960 to 2006, the Indian Supreme Court identified various unlisted rights under its interpretation of the "right to life" principle. These encompassed: Privacy rights,<sup>66</sup> Protections against solitary confinement,<sup>67</sup> Prohibitions against the use of bar fetters,<sup>68</sup> Access to free legal assistance,<sup>69</sup> Safeguards against handcuffing,<sup>70</sup> Safeguards against violence while in custody,<sup>71</sup>

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<sup>64</sup> *Mardia Chemicals Ltd. v. Union of India*, AIR 2004 SC 2371

<sup>65</sup> *Naz Foundation v. State (Govt of NCT Delhi)*, (2009) 111 DRJ 1

<sup>66</sup> *K.S Puttuswamy v. UOI*, 2017 10 SCC (1)

<sup>67</sup> *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675

<sup>68</sup> *Charles Sobraj v. Central Jail*, AIR 1978 SC 1514

<sup>69</sup> *M H Hoskot v. State of Maharashtra*, AIR 1978 SC 1548

<sup>70</sup> *Prem Shankar Shukla v. Delhi Administration*, AIR 1980 SC 1535

<sup>71</sup> *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378

Rights to improved working conditions,<sup>72</sup> Entitlement to livelihood,<sup>73</sup> Guarantees for a clean environment.<sup>74</sup>

## CONCLUSION

Thus, the concept of due process though was initially rejected by the drafters of the constitution has found its place and has penetrated through the judicial interpretations.<sup>75</sup> Initially it was perceived to be a hindrance on the activities of the government, and thereby they discarded its inclusion. Later circumstances warranted its need, as it was felt that in the absence of fair procedures, the right of liberty had no true purpose. Throughout history, safeguarding liberty was dependent on having proper procedural protections. Thus, Art 21 was read by the judiciary in a way to ensure fair and just processes, by not merely following whatever procedures were prescribed by law. Thus, highlighting the need that fair procedures are crucial for upholding the laws in India and ensuring justice for everyone.<sup>76</sup> However, over time its interpretations enlarged to include the substantive elements as well. Thus, the test of due process was further applied to see if the laws conformed to larger notions of justice and equity.<sup>77</sup> On the basis of these extended interpretations it can be rightly pointed out that these constitutional clauses will have a substantial impact on political and legal choices in the future.

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<sup>72</sup> Bandhua Mukthi Morcha v. UOI, AIR 1984 SC 802

<sup>73</sup> Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180

<sup>74</sup> M C Mehta v. UOI, AIR 1987 SC 965

<sup>75</sup> Pran Chopra, *The Constitution and Supreme Court*, 39 Economic and Political Weekly 3355 (2004)

<sup>76</sup> Mohammad Ghose, *Indian Supreme Court and Politics by Upendra Baxi*, 23 Journal of the Indian Law Institute 288 (1981)

<sup>77</sup> David G. Barnum, *Article 21 and policy making role of courts in India: An American perspective*, 30 Journal of the Indian Law Institute 19 (1988)