

Substantial Due Process and Procedural Due Process in Indian Legal System- Dimension of Judicial Review in India

by

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ABSTRACT

The Supreme Court of India which is the apex court of the land over the time shifts from 'Procedure established by law' concept to the 'Due process' concept. Though, it shaped over a long history of Constitutional interpretation. The two major aspects of 'Due process' concept viz. 'Procedural Due Process' and 'Substantial Due Process' is also relevant in Indian judicial approach and up to a great extent Indian courts travelled and assimilated the 'Substantial Due Process' concept which is closely connected with the judicial approach of USA courts which judicial interpretation opens a huge area of judicial activity where the judiciary tries to consider enactments from a broader concept.

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The Art. 21 of the Indian Constitution on a clear term propound the ‘Procedure established by law’ concept which is practically in the opposite pole of the concept of ‘Due Processes’. Though in the A.K Gopalan¹, the contention was raised in support of ‘Due Process’ Concept but that was rejected by the apex court inter alia on the ground that, though the draft constitution contain the term ‘Due Process’ but in order to avoid legal complexity it was dropped and the present concept adopted².

Due Process of Law- Substantial and Procedural Due Process

As per Editor of Encyclopedia Britannica, the Due Process concept denotes “A course of legal proceeding according to rules and principles that have been established in system of jurisprudence for the enforcement and protection of private rights. If the law seeks to regulate a fundamental right Must meet a stricter judicial scrutiny”³.

The Constitution of U.S.A contain this due process concept which was added via 5th Amendment of the Constitution.⁴

Procedural Due Process and Substantial Due Process

In nutshell, ‘Procedural Due Process’ means that, the judiciary, if the executive or legislative action violate rules of natural justice or tries to implement any legislative or executive scheme without any heed to faire procedure, can struck down that particular action for lack of fair procedure or may try to infuse fair procedure into that particular action of the executive or legislature i.e. in other words judiciary can infuse faire procedure and some rights into the legal system by using the concept of Procedural Due Process.⁵ On the other hand Substantial Due

¹ A.K Gopalan v. State of Madras AIR 1950 SC 27.

² M P JAIN, INDIAN CONSTITUTIONAL LAW 1161(8th ed., Justice Jasti Chelameswar & Justice Dama Seshadri Naidu ed., LEXIS NEXIS 2019).

³ ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com> (last visited March 4, 2022).

⁴ LIBRARY OF CONGRESS, <https://constitution.congress.gov> (last visited March 4, 2022).

⁵ *id.* note 2 at 1684.

Process means that, the Judiciary can struck down the entire legislative or executive action on the ground of Ultra Vires of the Constitution⁶.

Professor Dworkin's Theory on Adjudication by Judiciary

Professor Dworkin chalked out a distinction between 'Argument of Principle' and 'Argument of Policy' and suggest that, judiciary must confined itself within the periphery of 'Principle of Argument' which in turn provide the gravitational force of judicial pronouncements, which is the ultimate touch stone of a validity of a proclaimed policy.⁷

Thus, Professor Dworkin tries to demarcate these two above mentioned factors of judicial verdict and propound that, it is the gravitational force of precedent which lead to 'Enactment Force' of the judicial mind which manifest itself by the way of a judicial verdict even though in many a cases 'Argument of Policy' and 'Argument of Principle' may be intertwined and difficult to segregate if possible at all.

Dimensions of Judicial Review in India- a critical appraisal

The stand of the Supreme Court of India in the case of Maneka Gandhi⁸ clearly contemplates that, it shifts from the A.K Gopalan⁹ stance and moving towards 'Due Process' concept in a considerable term.

As after the Maneka Gandhi¹⁰ judgment, the Indian Judiciary steps to ascertain the 'Just, Fair and Reasonableness' of an enacted statute, hence treat enactment 'in a broader sense of law' which includes the basic principles of law and justice and thus shifts from the approach of treating enactments only as a 'Lex' in a narrow term and this stance of apex court of the land is on the line of and in conformity with the stance and position of US judicial approach in the case of

⁶ See *Miranda v Arizona* 384 US 436(1966), *Gideon v Wainwright* 375 US 335 (1963), *Robinson v California* 370 US 660.

⁷ Prof. Dr. A.LAKSHMINATH, PRECEDENT IN INDIAN LAW 127,128,129(3rd ed. EASTERN BOOK COMPANY 2012).

⁸ *Maneka Gandhi v UOI* AIR 1978 SC 597.

⁹ *Supra* note 1.

¹⁰ *id* note 8.

Wong Yang Sung¹¹. It is clearly evident from several judgments of the apex court of the land touching various different issues¹², where the apex court purposefully gave wider meaning of several enactments and all these judicial pronouncements came in the light of the Part- III of The Constitution of India which clearly denotes that the judicial stance tries to uphold the Part-III of The Constitution of India by giving a wider meaning of the enactments which clearly suggests an active judicial review in the Indian legal system and hence the judiciary refuse to convert into legislature with limited power and also not allowed the judiciary to assume the judicial role.¹³

Though, the apex court by the virtue of Art. 13¹⁴ is empowered to struck down any enactment if that particular enactment violate any provision of Part-III of the Indian Constitution, but the apex court extend the periphery of judicial review to the other parts of the Indian Constitution specifically after the advent of the ‘Basic Structure’ doctrine in the landmark case of Kesavananda Bharati¹⁵. Hence, judicial review along with the ‘Due Process’ concept is now extended to the Indian Constitution at large¹⁶.

Hence, the conjoint reading the of the ‘Due Process’ concept and that of ‘Judicial Review’ leads towards the wider interpretation of the Indian Constitutional norms which laid the foundation of the basis of the approach of judicial review in India and on this very basis apex court struck down several enactments along with or without any relevant amendment of Indian Constitution viz. The National Judicial Appointment Commission Act, 2014 along with the 99th Constitutional Amendment was struck down by the apex court in the Supreme Court Advocate-on Record Association¹⁷, case. Another glaring example of this is the case of Shreya Singhal¹⁸ where the Supreme Court struck down Sec. 66A of the Information Technology Act, 2000¹⁹ on the ground of violation of the Part-III of the Indian Constitution. Hence from these factual

¹¹ Wong Yang Sung v McGrath 339 US 33 (1950).

¹² See M.C Meheta v UOI (1988) 1 SCC 471, People’s Union for Civil Liberties v UOI AIR 1997 SC 568, Re Noise Pollution(V) AIR 2005 SC 3136, Olga Tellis v Bombay Municipal Corporation AIR 1986 SC 180, Indian Express Newspapers(Bombay) Private Limited v UOI AIR 1986 SC 515 etc.

¹³ GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION 60(15th impression, OXFORD UNIVERSITY PRESS 2019).

¹⁴ INDIA CONST. art. 13 cl. 1 & 2.

¹⁵ Kesavananda Bharati v State of Kerala AIR 1973 SC 1461.

¹⁶ See Supreme Court Advocate-on Record Association v UOI (2016) 5 SCC 1, Indira Nehru Gandhi v Raj Narain AIR 1975 SC 2299.

¹⁷ Supreme Court Advocate-on Record Association v UOI (2016) 5 SCC 1.

¹⁸ Shreya Singhal v UOI AIR 2015 SC 1523.

¹⁹ THE INFORMATION TECHNOLOGY ACT, 2000 § 66A, NO.21, Act of Parliament, 2000 (India).

situations it can be safely deduced that, Indian Judiciary is entered if not entirely but at least substantially into the era of ‘Substantial Due Process’ and upheld the relevance of the maxim ‘lex iniusta non est lex’ which means unjust law is not law.²⁰

Though this argument has another side which must be taken into cognizance in order to understand and ascertain the true nature of ‘Judicial Review’ concept in India along with the concept of ‘Substantial Due Process’ in the Indian legal system. On the line of the US Judiciary²¹ Indian Judiciary also tries not to interfere the arena of the ‘Wisdom of Legislature’²².

Thus, though Indian Judiciary uses ‘Substantial Due Process’ in many instances²³ but tries to avoid Brandies Brief Practice (as it prevalent in USA)²⁴. The Indian Judiciary strikes a magnificent balance between ‘Argument of Principle’ and ‘Argument of Policy’ (as propounded by Dworkin) and successfully upheld the relevance of the legal maxim called ‘BONI JUDICIS EST AMPLIARE JURISDICTIONEM’ which is interpreted by Lord Chancellor Bacon as “Take care to contain the jurisdiction of the court within the ancient mere-stones without removing the mark”.²⁵ On this line of argument, the apex court held separation of power as an important element of Indian Constitution²⁶.

Conclusion can be drawn with the observation of Dr. Finer that, “Supremacy still belongs to the Constitution”²⁷ and it is very true in Indian Context as all of the organs of the government strive to achieve the constitutional goal through different path and technicalities.

²⁰ OXFORD REFERENCE, <https://www.oxfordreference.com> (last visited March 4, 2022).

²¹ See Mr Justice Stone in US v Butler 297 US 1, Railway Employees’ Department v Hansen 351 US 225(1956).

²² See State of Andhra Pradesh v McDowell and Company AIR 1996 SC 1627, State of Himachal Pradesh v Student’s Parent, Medical College, Shimla AIR 1985 SC 910.

²³ See Sabu Mathew George v UOI (2017) 2 SCC 514.

²⁴ *Supra* note 2 at 1705.

²⁵ HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 44(10th ed., R.H. KERSLEY ed., Universal Law Publishing Co. Pvt. Ltd 2010).

²⁶ See Re, Delhi Laws Act, 1912, AIR 1951 SC 332.

²⁷ VISHNOO BHAGWAN & VIDYA BHUSHAN & VANDANA MOHLA, WORLD CONSTITUTIONS A COMPERATIVE STUDY 218(11th ed., STERLING 2020).

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