

Due Process of Law and Natural Justice

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"The principles of natural justice are easy to proclaim but their precise extent is far less easy to define"

Evershed M R

Introduction to Natural School :

Natural School of Law deals with norms which are higher and which is involved in search of absolute justice. It is the touchstone of all activities and the ruled as well as the ruler is bound by it. It can be divided into two parts :

- Natural law is higher law, which renders inconsistent laws invalid. If the law is contrary to natural law, it becomes ultra vires. Law in ancient and medieval period was prevalent in this sense.
- Natural law is an ideal and without affecting the constitutionality the law has to conform to its principles.

In absence of such principles peace and happiness cannot be established in the society. Natural law is the dictate of the reason. It contains transcendental and immutable principles to which the system has to conform. Cicero pointed this out that law is just and reasonable. It contains in itself 3 things

- The human inclination towards goal and every element, which protects itself and therefore it, includes all elements necessary for protection of human life and it discards all rules, which are against the same.
- Like other animals, men have certain desires and object in life. Natural law includes rules pertaining to instincts.
- Due to its rationale nature it has inclination towards what is good and bad.

According to Diaz, Natural law has been used in 5 ways :

- as an ideal which directs the development of law
- It contains rules of morality, which does not allow permanent separation between law as it and law as it ought to be.

- It's an away to search absolute law.
- Natural law is content of law derived from reason
- It is necessary for the legitimacy and existence of any law.

Hence, natural school basically deals with the dictates of the reason and rationality.

DUE PROCESS OF LAW :

The concept of due process originated in English Common Law.¹ The rule that individuals shall not be deprived of life, liberty, or property without notice and an opportunity to defend themselves predates written constitutions and was widely accepted in England.² The MAGNA CARTA, an agreement signed in 1215 that defined the rights of English subjects against the king, is an early example of a constitutional guarantee of due process.³ That document includes a clause that declares, "No free man shall be seized, or imprisoned ... except by the lawful judgment of his peers, or by the law of the land". This concept of the law of the land was later transformed into the phrase "due process of law."

The application of constitutional due process is traditionally divided into the two categories of

- * Substantive Due Process and
- * Procedural due process

These categories are derived from a distinction that is made between two types of law. Substantive Law creates, defines, and regulates rights, whereas procedural law enforces those rights or seeks redress for their violation.

A fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property. It is also, a constitutional guarantee that law shall not be unreasonable, arbitrary, or capricious. Due process is the principle that the government must respect all of the legal rights that are owed to a person according to the law. Due process holds the government subservient to the law of the land, protecting individual persons from the state. Due process has also been frequently interpreted as placing limitations on laws and legal proceedings, in order for judges instead of legislators to define and guarantee fundamental fairness, justice, and liberty. This interpretation has often proven controversial, and is analogous to the concepts of natural justice.

PARADOX OF SUBSTANTIVE DUE PROCESS: The doctrine of Substantive Due Process holds that

the Due Process Clause not only requires "due process," that is, basic procedural rights, but that it also protects basic substantive rights.⁴ "Substantive" rights are those general rights that reserve to the individual the power to possess or to do certain things, despite the government's desire to the contrary.⁵ These are rights like freedom of speech and religion. "Procedural" rights are special rights that, instead, dictate how the government can lawfully go about taking away a person's freedom or property or life, when the law otherwise gives them the power to do so.⁶ It is not only that appropriate and just procedures (or "processes") be used whenever the government is punishing a person or otherwise taking away a person's life, freedom or property, but that these clauses also guarantee that a person's life, freedom and property cannot be taken without appropriate governmental justification, regardless of the procedures used to do the taking. In a sense, it makes the "Due Process" clause a "Due Substance" clause as well. Substantive Due Process provides comprehensive nation-wide protection for all our most cherished rights. Supporters of this concept argue that the doctrine is a simple recognition that no procedure can be just if it is being used to unjustly deprive a person of his basic human liberties and that the Due Process Clause was intentionally written in broad terms to give the Court flexibility in interpreting it. Critics claim that "Substantive Due Process" is an oxymoron and that there is no way a reasonable person with a sixth grade grasp of grammar could read the "Due Process" Clause to assure anything but procedural rights.⁷ Critics in America say that when the Court uses judicial review to enforce these pseudo-Constitutional rights they are stealing the legitimate law-making power from the state legislatures.

STATUS IN AMERICA :

The due process clause of the Fifth Amendment, ratified in 1791, asserts that no person shall "be deprived of life, liberty, or property, without due process of law." The Due Process Clause of the Fourteenth Amendment, ratified in 1868, declares, "Nor shall any State deprive any person of life, liberty, or property, without due process of law". In *Den v. Hoboken Land and Improvement Company*⁸, the first Supreme Court case to attempt to define the Fifth Amendment's "due process of law" provision, Justice Benjamin R. Curtis, for a unanimous court, stated that the "words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land,' in Magna Carta. Lord Coke, in his commentary on those words ... says, they mean due process of law."⁹ Justice Curtis continued and noted that although the Constitution did not define "due process of law," provided no description of those processes which were intended or forbidden and did not declare the principles to be applied: It is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process" by its mere will ... We must first examine the Constitution ... to see whether this process be in conflict with

any of its provisions.¹⁰ The case of *Stuart v Palmer*¹¹ has to be considered in which it was declared that "due process of law" is based upon the first principles of natural law, which is older than written constitutions, that a citizen should not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these without due process of law.¹² This concept of "due process" is almost analogous to principles of natural justice. Basically due process has not been attempted to define as it is based on the concept of free government and wide gamut of rights. The word "due" in American sense is interpreted as "reasonable", "just" and "proper".¹³ The power to decide as to the reasonability of the same is vested in the courts.

This concept augmented and broadened the scope of rights in America leading to a bunch of uncertainty.¹⁴ The decisions on the question of reasonability are not uniform in USA. Moreover, doctrine of police power is established in USA to restrict the ambit of "due process" i.e. doctrine of governmental power to regulate private rights in public interest.¹⁵

STATUS IN INDIA :

In order to surmount the uncertainty, which would arise because of broadening of scope of rights like in America, Indian constitution makers restricted it to procedure established by law.¹⁶ The phrase "procedure established by law" seems to be borrowed from article 31 of the Japanese Constitution, which gives the legislature the final word.¹⁷ *Gopalan*¹⁸ held the field for almost three decades. It gave legislature a carte blanche to enact a law to provide for arrest of a person without much procedural safeguards.¹⁹ It gave the ultimate power to the legislature to decide what was going to be the procedure to curb the liberty of a person under article 21. This was an absolute right given to the legislature. It held that the term "law" in article 21 could not be understood as principles of natural justice. In its normal connotation it should mean procedure established by law means law enacted or State made law and not the American concept of due process which simply means vague and uncertain principles of natural justice.²⁰ It was held by the majority that procedure established is in the nature of "Lex" and not "Jus". Jurisprudentially speaking *Gopalan* reflected the sway of positivism the superior authority of law - the thoughts of Austin. An extreme view was taken during the emergency of 1975-1977 when Supreme Court, in one of the most unfortunate decisions, held that once article ²¹ was suspended by a presidential order the court could not enquire whether the deprivation of life or liberty of an individual was authorized by law.²¹

Prof Hart and Prof Fuller attacked this analytical separation of law. According to them the law should discharge the prerequisite of justice and rationale. In *Maneka Gandhi v UOI*²² it was held that a procedure lacking rationale and fairness is void. Procedure as established by law should not

be bizarre, oppressive or arbitrary otherwise it would not be a procedure in law. A procedure to fulfill this basis should fulfill the needs of natural law. This case generated an aura of peaceful transition from archaic legal positivism to the dictates of natural law and reached social justice jurisprudence solely on account of judicial interpretation, something which was not seen by the founding fathers of the constitution. Justice Bhagwati in Maneka Gandhi pointed out that the

"procedure established by law under article 14 should fulfill the test of reasonableness under article 14. Law should be reasonable law, and not enacted piece of law "

This shows that even in India the concept of "reasonable" and "Fair", and not only "Lex" but "Jus" prevails. It's only after the eye-opening decision of Maneka Gandhi that the status has changed so drastically. Now, in India also "procedure" has to pass the test of reasonability and the Government has not given unfettered and unregulated power to curtail the liberty and freedom of any person. Moreover, it overruled the explanation in the Gopalan which delinked article 14, 19 and 21. This case laid down that these articles are not mutually exclusive. A nexus has been established between these three articles. To deprive a person of his "personal liberty" the procedure should fulfill all the requirements of article 14 and 19.

The power to decide as to the reasonability of the same is vested in the courts. "Fair Procedure" includes 4 elements:

- (1) Notice
- (2) Opportunity to be heard
- (3) Impartial tribunal
- (4) Orderly procedure

CONCLUSION :

While J. Bhagwati in Maneka Gandhi established the requirement of reasonableness of procedure in article 21 through article 14 some judges in the case have read "procedure established by law" as "due process of law" which was intentionally avoided by constitution makers. Indian constitution, even though has adopted and borrowed many things from the United States' constitution has not adopted the American doctrine of the "Due process of Law" in its formal and comprehensive form but the discretion has been left to the judiciary to decide the rationality of a procedure. Nevertheless, this principle has been incorporated in the Indian Constitution in especially article 21 as discussed. When we compare the narrow view of article 21 in Gopalan Case we can realize that judiciary was living in an ivory tower unconnected and unconcerned with the social reality - far away from where the law originates - the nature. The judiciary was undermining the values of natural justice. Only

after the astounding decision of Maneka Gandhi case the state of affairs in India has radically revolutionized.

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1. Refer, http://en.wikipedia.org/wiki/Due_process as on 25.2.2010.

2. Robert E. Riggs, 'SUBSTANTIVE DUE PROCESS', 1990 Wis. L. Rev. 941.

3. supra note 1.

4. Refer, http://en.wikipedia.org/wiki/Substantive_due_process as on 23.2.2010

5. Refer, <http://www.stanford.edu/group/psylawseminar/Substantive%20Due%20Process.htm> as on 20.2.2010

6. Id.

7. Id.

8. 59 U.S. (18 How.) 272, 15 L.Ed. 372 (1855).

9. Id. at 276, 15 L.Ed. at 374.

10. Hon. Maurice Portley, 'THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT', 28-DEC Ariz. Att'y 13

11. 74 NY 183 at p.190 (1878).

12. Misra A S, "Law of Bias and Mala Fides", p 18 (4th Edn., 2007).

13. M.P. Jain, 'Indian Constitutional law', p 1080 (5th Edn, 2005).

14. Supra note 11, at 1081

15. Id.

16. Supra note 11, at 1081

17. DATAR, ARVIND, 'Datar on Constitution', p.57, (1st Ed., 2001)

18. Gopalan v State of Madras, AIR1950 SC 27

19. Supra note 11, at 1082

20. Dhyani S N, "Jurisprudence and Indian Legal Theory", p 65 (4th Edn. 2002).

21. ADM Jabalpur v Shivakant Shukla AIR 1976 SC 1207.

22. AIR 1978 SC 597.