
‘DUE PROCESS’ V. ‘PROCEDURE ESTABLISHED BY LAW’

FRAMING AND WORKING THE INDIAN CONSTITUTION

- Shivangi Gangwar^{*}

ABSTRACT

The Constitution of India is known for borrowing key concepts and provisions from constitutions all over the world. Being the fundamental law of the land, the judiciary has relied upon its creative and unconventional interpretations to introduce and establish substantive rights jurisprudence, contrary to the known intent of the framers. This article seeks to study whether the emergence of this jurisprudence was inevitable, especially since the framers specifically sought to prevent it by not adopting a ‘due process’ clause. It lays out the reasons and implications of the non-adoption of the ‘due process’ clause and proceeds to see, using a case-study method, whether such choice made a difference to the emergence of substantive ‘due process’ rights in the Indian context.

^{*} Graduate; NALSAR Hyderabad, B.A., LL.B. (Hons.), University of Chicago, LL.M.

INTRODUCTION

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

- Article 21, Constitution of India

“...nor be deprived of life, liberty, or property, without due process of law...”

- Amendment V, Constitution of the United States

Long before India gained its independence in August 1947, work had begun on creating a Constituent Assembly for the future nation. The initial membership of this body was to be 389 but was subsequently reduced to 299 after the partition that led to the birth of two nations instead of one. The first meeting of the Constituent Assembly took place on December 9, 1946 and the last on November 26, 1949 when the Constitution of India was adopted. From August 14, 1947 onwards the same body of people served both as the Constituent Assembly and the Legislative Assembly, charged with the dual task of managing affairs and drafting a new constitution for an independent India.¹

The Drafting Committee was set up on August 29, 1947, with Dr. B.R. Ambedkar as its chairman, and was charged with the task of preparing this constitution for an ‘*independent, sovereign republic*’, keeping in mind Pandit Jawaharlal Nehru’s Objectives Resolution.²The other six members of the Drafting Committee were all renowned lawyers and politicians of the likes of A.K. Ayyar, K.M. Munshi, B.L. Mitter, D.P. Khaitan, N. Gopaldaswami Ayyangar

¹ Some Facts of Constituent Assembly, available at <http://parliamentofindia.nic.in/ls/debates/facts.htm> (Last visited March 23, 2013).

² Resolution Re: Aims and Objects,1, CONSTITUENT ASSEMB. DEB. (Dec 13, 1946), available at <http://parliamentofindia.nic.in/ls/debates/vol1p5.htm> (last visited March 23, 2013).

and the lone Muslim League member Saiyid Mohd. Saadulla.³ A few replacements were made to this committee due to reasons of resignation and death; T.T. Krishnamachari and Madhav Rao later joined as members of the committee.

It is a fact well known in the realm of Indian constitutional history that the members of the Drafting Committee of the Constituent Assembly freely borrowed concepts from the constitutions of various countries, regardless of their dissimilarity with the Indian social milieu. For example, the idea of parliamentary democracy was borrowed from England, the concept of non-justiciable socio-economic rights or ‘Directive Principles of State Policy’ as enshrined in Part IV of the Constitution from Ireland, and the concepts of judicial review, separation of powers, bill of rights, and the establishment of the Supreme Court from the United States of America (hereinafter referred to as “U.S”). What is then surprising is that the Indian framers specifically chose not to adopt the ‘due process clause’, one that was derived from and used in the Anglo-American tradition that the Indian Constitution resembles the most.

Considerable scholarship exists on the reasoning employed by the constitution drafters in deciding to choose one way over the other. The answer generally given is that the Indian framers wanted to avoid the reading in of substantive rights into the Constitution, believing that the judicial branch of the government would use this part of the provision to place obstacles on the path of the legislative branch as it tried to build the nation.⁴ This article seeks to consider both previous scholarship as well as the constitutional history of the Supreme Court of India post 1950 to see whether these fears were well founded and the strategy chosen to deal with them was effective. In essence, the question asked is *whether choosing*

³ 1, CONSTITUENT ASSEMB. DEB. (Aug 29, 1947), available at <http://parliamentofindia.nic.in/ls/debates/vol5p10a.htm> (Last visited March 23, 2013).

⁴ See generally 7, CONSTITUENT ASSEMB. DEB. (Dec. 6 and 13, 1948).

the 'procedure established by law' clause over the 'due process' clause had a negative impact on the development of substantive fundamental rights in the Indian context? Given the highly activist nature of the Supreme Court since the 1980s, it is worthwhile to see whether this choice was successful in preventing a substantial rights regime. Part II of the article juxtaposes the two clauses and examines the reasons why the framers chose one over the other. Part III plays out the practical application of the 'procedure established by law' clause in the Indian context by examining landmark decisions of the Indian Supreme Court. Part IV of the article concludes with a possible reason as to why things played out the way they did despite the best laid plans and intentions.

DELIBERATIVE HISTORY OF 'PROCEDURE ESTABLISHED BY LAW'

The Advisory Committee on Minorities and Fundamental Rights presented its interim report on fundamental rights to the Constituent Assembly on April 23, 1947. In that report, Clause 9, which was later to become Article 21 of the Constitution read as follows-

“No person shall be deprived of his life, or liberty, without due process of law, nor shall any person be denied the equal treatment of the laws within the territories of the Union:

Provided that nothing herein contained shall detract from the powers of the Union Legislature in respect of foreigners.”⁵

On April 30, 1947 the Constituent Assembly amended and adopted Clause 9 to read as follows-

⁵ 3, CONSTITUENT ASSEMB. DEB. (Apr. 29, 1947) (Justiciable Fundamental Rights, Annexure) available at <http://parliamentofindia.nic.in/ls/debates/vol3p2.htm> (Last visited March. 23, 2013).

*“No person shall be deprived of his life, or liberty, without due process of law, nor shall any person be denied equality before the law within the territories of the Union.”*⁶

When the Drafting Committee finally completed and submitted the draft constitution in February 1948, Clause 9 or draft Article 15 read the way the present Article 21 reads today except that the word ‘*personal*’ had been included before ‘*liberty*’ and ‘*without due process of law*’ had been substituted with ‘except according to procedure established by law’.

A. Reasons put forth for this change

There were mainly two reasons given for this change. *First*, for the former, absence of the word ‘*personal*’ before ‘*liberty*’ would mean that rights protected by Article 19,⁷ granted only to citizens at that time, would be extended to non-citizens as well. The constitutional framers wanted these two sets of rights to be treated separately. *Secondly*, the ‘*due process of law*’ clause was not as definite and specific as the one borrowed from Article 31⁸ of the Japanese Constitution of 1946.⁹ There was considerable opposition to and debate about this amendment but it was passed nevertheless. Dr. Ambedkar, in his reply, compared the

⁶3, CONSTITUENT ASSEMB. DEB. (Apr. 30, 1947), *available at* <http://parliamentofindia.nic.in/ls/debates/vol3p3.htm> (Last visited March. 23, 2013).

⁷INDIA CONST. art. 19, cl.1.(Protection of certain rights regarding freedom of speech, etc.-

(1)All citizens shall have the right-

(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
(f) omitted

(g) to practise any profession, or to carry on any occupation, trade or business.)

⁸NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 31, (Japan). (No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.)

⁹7, CONSTITUENT ASSEMB. DEB. (Dec. 6, 1948) *available at* <http://parliamentofindia.nic.in/ls/debates/vol7p20b.htm> (Last visited March. 23, 2013).

situation to “sail[ing] between Charybdis and Scylla” and declined to take a stand, though hinting that the question revolved around whether the legislature could be trusted enough not to make bad laws.¹⁰

The real reason behind the change, however, seems to be the nature of the relationship between the legislature and the judiciary. Abuse of substantive due process by the U.S. Supreme Court¹¹ led B.N. Rau¹² to point out, long before any draft was presented to the Constituent Assembly, that a due process clause would get in the way of beneficial social legislation.¹³ The famous interaction that took place between B.N. Rau and Justice Felix Frankfurter was the last nail in the coffin.¹⁴ Justice Frankfurter persuaded Rau to believe that the power of judicial review implicit in the due process clause was undemocratic and burdensome on the judiciary.¹⁵ Rau was finally able to convince the Drafting Committee and the due process clause was omitted, though not without considerable opposition.

Another factor put forth for this change was the very real problem of communal violence facing the country in the aftermath of partition. It was believed that preventive detention policies used during the British colonial rule without constitutional guarantees of due process would be the most effective in checking communal violence.¹⁶ Govind Ballabh Pant opined, in this regard, that there would be no end to communal disorders if mischief makers couldn't

¹⁰7, CONSTITUENT ASSEMBLY DEB. (Dec. 13, 1948), *available at* <http://parliamentofindia.nic.in/ls/debates/vol7p25a.htm> (Last visited March. 23, 2013).

¹¹DURGA DAS BASU, *SHORTER CONSTITUTION OF INDIA*, 693 (13th ed.2001).

¹² B. N. Rau was not a member of the Constituent Assembly, but served in the capacity of a ‘Constitutional Advisor’.

¹³GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION*, 102 (1966).

¹⁴K. M. MUNSHI, *PILGRIMAGE TO FREEDOM (1902-1950)* 298 (1967) (K. M. Munshi opined, in this context, that had Justice Black been consulted in place of Justice Frankfurter, Rau could have possibly received advice to the contrary).

¹⁵AUSTIN, *supra* note 13, at 103.

¹⁶Manoj 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, 223 (2010).

be put into jails and that anarchy would be the sure result of restraining the legislature's discretion.¹⁷

The opposition to deletion of the '*due process*' clause was primarily in relation to preventive detention and the necessity of protecting individual liberty from the excesses and arbitrariness of executive actions.¹⁸ This problem was partly solved by the introduction of draft Article 15A which later became Article 22¹⁹ of the Indian Constitution.

B. Implications of this change

The ultimate goal to be served by the Constitution was to bring a "*social revolution, of national renaissance*"²⁰ and the agencies chosen to fulfill this noble goal were the legislature and the executive, not the judiciary. The judiciary was expected to defer to the other branches of the government, to such an extent that even the principle of judicial independence was not to elevate its status to a body that acted as a "*super-legislature or super-executive*".²¹ Thus, it can be seen that the political system envisioned by the framers was one based on the traditions of British legal positivism and parliamentary supremacy. The Indian judiciary was not designed to be a strong institution that would challenge legislations on the basis of substantive due process, had such a clause even existed.²²

By replacing the 'due process' clause with the 'procedure established by law' clause, the constitutional framers wanted to foreclose the possibility of the judiciary giving more significance to individual rights over beneficial social legislations. Great pains seem to have

¹⁷AUSTIN, *supra* note 13, at 85.

¹⁸*Supra* note. 9.

¹⁹INDIA CONST. art. 22. (Protection against arrest and detention in certain cases- (1) No person who is arrested shall be detained without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice).

²⁰AUSTIN, *supra* note 13, at 27.

²¹A.S. Anand, *The Indian Judiciary in the 21st Century*, 26 INDIA INT'L CENTRE.Q. 61, 63 (1999).

²²MATE, *supra* note 16, at 217-20.

been taken to strictly separate the rights granted by Articles 14, 19 and 21. Since the word ‘reasonable restrictions’ has been used only in the text of Article 19 and no link was envisioned between the separate rights granted by the Constitution in Articles 14, 19 and 21, it was not possible for the judges to extend the concept of judicial review from Article 19 to Article 21.²³ It was not open for judges to look into the reasonableness of the provisions that deprived a person of her/ his life and liberty unlike the situation where s/he was being deprived of the right of expression or movement. Transporting the language from one clause to another and reading in an equal standard of reasonableness in the three Articles would result in the introduction of the ‘due process’ clause into the Indian system; a clause which, the Supreme Court repeatedly ruled in its early years, found no place in constitutional interpretation.²⁴

In all probability, this fear was inspired by events that had taken place across the globe in the U.S. The U.S. Supreme Court began reading in substantive due process rights in the realm of liberty to contract and economic regulation. *Lochner v. New York*²⁵ marks the conceivable beginning of the doctrine of economic substantive due process when it was held that the ‘due process’ clause protected private property and liberty to contract from unwarranted and excessive governmental interference. During the *Lochner* era (1905 to 1934), the Supreme Court struck down around 200 economic regulations, dealing with the subjects of labor, price regulation, minimum wages and business entry, among others.²⁶ Though the emphasis was on the field of economic regulations, the seeds of modern substantive due process rights were also sown during this period. Both *Meyer v. Nebraska*²⁷ and *Pierce v. Society of Sisters*²⁸

²³Charles Henry Alexandrowicz-Alexander, *American Influence on Constitutional Interpretation in India*, 5 AM. J. COMP. L. 98, 100 (1956).

²⁴H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 485 (3d ed., 1983).

²⁵198 U.S. 45 (1905).

²⁶STONE (ET. AL.), CONSTITUTIONAL LAW 724 (4th ed. 2001).

²⁷262 U.S. 390 (1923).

dealt with the liberty rights of parents to educate and bring up their children as they saw fit. With the progression of time however, the ‘*due process*’ clause was “*emptied of its controversial economic content*” and became the “*center of a civil liberty storm*”.²⁹

The framers were apprehensive that American history would repeat in the Indian context. Alladi Krishnaswamy Iyer stated that the Indian Supreme Court would create uncertainty by fluctuating between liberal and conservative interpretations, and obstruct social control.³⁰

It was pointed out by K.M. Munshi during the deliberations that a substantive ‘*due process*’ clause in the Indian context would not apply to liberty of contract but only to liberty of person due to the addition of ‘*personal*’ before ‘*liberty*’ in clause 9/draft Article 15.³¹ It is also apposite to note that the new nation of India, under the leadership of socialist Nehru, was never meant to be built using the tools of capitalism. There was no possibility of *laissez-faire* economics, with *due process* as its constitutional handmaiden, overwhelming the bar and the bench.³² It thus seems perplexing why the framers chose to consider and then reject the ‘*due process*’ clause because of its operation in the field of economic regulation rather than in the sphere of individual civil-political or socio-economic rights. What is also interesting to see is whether this fear was justified and whether it could possibly be eradicated by a little wordplay given that the ‘*due process*’ clause was initially envisioned as a procedural clause in the U.S., same as the one finally adopted by the Indian framers.

²⁸268 U.S. 510 (1925).

²⁹Wallace Mendelson, *Foreign Reactions to American Experience with “Due Process of Law”*, 41 VA. L. REV. 493, 503 (1955).

³⁰MUNSHI, *supra* note 14, at 299.

³¹AUSTIN, *supra* note 13, at 105.

³²Mendelson, *supra* note 29, at 502.

EVOLUTION OF SUBSTANTIVE RIGHTS JURISPRUDENCE

The Constituent Assembly Debates make it clear, as do some of the first judgments delivered by the Indian Supreme Court (discussed in the next sub-section), that the framers had absolutely no intention of introducing the American doctrine in the Indian context. Yet we see the emergence of an activist Supreme Court in the 1970s and continuation of this trend till date. Manoj Mate³³ addresses this conundrum of how the Supreme Court was able to found substantive due process jurisprudence within the realm of a Constitution that specifically excluded it, doing so in the face of long held traditions of parliamentary sovereignty and legal positivism. He concludes the cause to be a gradual shift towards a Universalist approach of interpretation, brought about by an increased borrowing of U.S. and other foreign precedents, institutional changes in the Court and the effects of the Emergency.³⁴ The present article addresses the simple question of how this shift occurred and traces the evolution of due process jurisprudence in India, treating the Emergency³⁵ period as the watershed. Supreme Court decisions under this study are categorized under the three heads of-

a) Early years

b) Emergency period

c) PIL jurisprudence

³³MATE, *supra* note 16.

³⁴MATE, *supra* note 16, at 217-218.

³⁵INDIA CONST. art. 300 (A national emergency, under Article 352 of the Constitution, was declared on June 26, 1975, barely a fortnight after the decision of the Allahabad High Court holding Indira Gandhi, then Prime Minister of India, guilty on two counts of election malpractice and thereby rescinding her election to the Central legislature. Countless members of the Opposition party were detained and imprisoned during this period and the 39th amendment to the Constitution (wresting jurisdiction from the Supreme Court to hear this particular appeal) was passed on August 10, 1975, just one day before the Supreme Court was to start hearing the appeals in this case, forcing it to adjourn the hearings till the end of the month. The Emergency period was generally marked by large scale human rights violations and was finally lifted in March 1977, after being in operation for nearly two years.).

A. Early Years

*A. K. Gopalan v. State of Madras*³⁶ was one of the first cases to be decided under the newly minted Article 21. Gopalan challenged his detention under the Preventive Detention Act, 1950 as being violative of Arts. 13, 19, 21 and 22, claiming that ‘personal liberty’ included the freedoms guaranteed under Article 19 as well. The majority decision, authored by Chief Justice Kania, did not accept the argument that Articles 19 and 21 should be read together as the former dealt with substantive rights and the latter with procedural rights. It was emphatic in ruling that ‘procedure established by law’ did not mean ‘due process of law’. Article 19 did not apply to laws dealing with preventive detention even though the rights guaranteed by the provision would be in a way abridged by such detention.

It can be seen that the Supreme Court held the rights guaranteed under Arts. 14, 19 and 21 (which later came to be referred as the ‘*golden triangle*’) as mutually exclusive and used a formalist approach of construction to interpret the right guaranteed by Article 21.³⁷ Justice Mukherjea referred to the Constituent Assembly Debates in his opinion to hold that the obvious intention behind qualifying liberty with ‘personal’ was to exclude the contents of Article 19 from that of Article 21.³⁸ Chief Justice Kania also referred to the Debates to show how the idea of legislative prescription was brought out by the omission of the word ‘due’ and qualification of ‘procedure’ by the word ‘established’.³⁹ The Constitution clearly gave the legislature the power of final determination of law as a result of which Chief Justice

³⁶ 1950 S.C.R. 88 (India) [Hereinafter “Gopalan v. Madras”].

³⁷ SEERVAI, *supra* note 24, at 701-2 (Seervai differs on this point. According to him, the majority did not hold these rights to be mutually exclusive and in fact rejected the contention that Article 21 guaranteed only procedural rights. Article 21 guaranteed both substantive and procedural rights because this was the only understanding that demonstrated that Arts. 19(1) and 21 could not be read together).

³⁸ Gopalan v. Madras, *supra* note 36, at 262-63.

³⁹ *Id.* at 108.

Kania arrived at this narrow interpretation of Article 19 and limited the scope of judicial function, apparently using both tools of original intent and textual analysis.⁴⁰

The sole dissent in this case was issued by Justice Fazl Ali who opined that preventive detention directly infringed the right guaranteed by Article 19(1)(d) and even by a narrow construction of this provision, preventive detention laws would be subject to the limited judicial review provided therein.

*Kharak Singh v. State of Uttar Pradesh*⁴¹ is widely construed to mark the beginnings of the right to privacy in India.⁴² Since a right embodying privacy is not expressly mentioned in either Article 19 or Article 21, its only possible genesis lies in a substantive due process reading of Article 21. Uttar Pradesh Police Regulation 236, which allowed for night domiciliary visits and police surveillance of a suspect's home, was challenged as being violative of Articles 19(1)(d) and 21. The majority decision of the Court readily held that the impugned regulation was not passed under the authority of any law and thus open to challenge. However, it struck down as unconstitutional only that provision of Regulation 236 which dealt with the domiciliary visits as being violative of Article 21. It went on to hold that the right to privacy was not one guaranteed under the Constitution and that an infringement of the rights under Part III must be both direct and tangible. While the majority opinion deemed it unnecessary to determine the precise relationship between Articles 19 and 21, it did hold that Article 21 comprised the residue of the rights not specifically covered under Article 19, thus taking a view different than the one taken by the *Gopalan* bench.⁴³

⁴⁰MATE, *supra* note 16, at 232.

⁴¹ 1964 S.C.R. (1) 332 (India) [Hereinafter *Kharak Singh v. U.P.*].

⁴²REPORT OF THE GROUP OF EXPERTS ON PRIVACY, *available*

at http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf (Last visited October. 29, 2013).

⁴³SEERVAI, *supra* note 24, at 705.

The dissenting opinions of Justices Subba Rao and Shah did find a constitutional right to privacy in Article 21, stating that such a right was an essential ingredient of personal liberty.⁴⁴ They also held that though Articles 19 and 21 dealt with two distinct and independent fundamental rights, there was considerable overlap between the two. Thus, the impugned law or regulation had to satisfy that both of these rights were not infringed.

It is interesting to note that both the majority and the minority opinions cited the American cases of *Munn v. Illinois*⁴⁵ and *Wolf v. Colorado*⁴⁶ to determine the nature of the right to liberty. While the majority opinion extended this analysis to only hold that domiciliary visits impinged upon the said right, the minority opinion went steps further to read a substantive due process right into Article 21. This dissenting opinion of then Justice Subba Rao went on to become the majority opinion in *Satwant Singh Sawhney v. Assistant Passport Officer*⁴⁷, a case that dealt with the infringement of the right to travel by virtue of impounding of passports. Chief Justice Subba Rao again relied on the American decisions in *Kent v. Dulles*⁴⁸ and *Aptheker v. Secretary of State*⁴⁹ to hold that ‘liberty’ in the Indian Constitution bore the same comprehensive meaning as given to it in the 5th and 14th amendments of the U.S. Constitution.⁵⁰

Though the *Bank Nationalisation case*⁵¹ dealt with the right to property, it is apposite in this context as it considered and held as incorrect the reasoning in *Gopalan*⁵² about the mutual exclusivity of rights. Petitioner in the present case was a shareholder of one of the 14

⁴⁴Kharak Singh v. U.P. *supra* note 41, at 359.

⁴⁵94 U.S. 113 (1877).

⁴⁶338 U.S. 25 (1949).

⁴⁷ 1967 (3) S.C.R. 525 [Hereinafter Sawhney v. Passport Officer].

⁴⁸357 U.S. 116 (1958).

⁴⁹378 U.S. 500 (1964).

⁵⁰ Sawhney v. Passport officer, *supra* note 47, at 526.

⁵¹ R. C. Cooper v. Union of India, 1970 S.C.R. (3) 530, [Hereinafter Cooper Case]

⁵²Gopalan v. Madras, *supra* Note. 36.

commercial banks that were acquired and nationalized by the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969. The main issue, as was the case in all right to property cases, was one of compensation and petitioner contended that his fundamental rights under Arts. 19(1)(f) and 31(2) were infringed. The majority opinion considered the correlation between the two articles as well as the dicta in *Gopalan*⁵³, which was the source of the understanding that the extent of protection against infringement of fundamental rights was determined by the object of the state action and not by its operation on the individual's rights. This reasoning was transferred from the realm of preventive detention and personal liberty into that of property rights to result in a long line of cases that divorced the rights guaranteed by separate Articles, leading the Court to consider it. The majority opinion went on to hold this understanding as inconsistent with the scheme of the Constitution, in effect laying the groundwork for linking up and mutual inclusivity of rights and also overruling the ratio in *Gopalan*.⁵⁴

Seervai has severely criticized this decision as an unjustified display of judicial power, stating that there was absolutely no need for the *Cooper*⁵⁵ bench to consider these questions as they were well settled in law and also because *Gopalan*⁵⁶ dealt with a completely different sphere of preventive detention and not property rights.⁵⁷ Nevertheless, this decision was cited by subsequent benches in their judgments⁵⁸ and proved instrumental in turning the initial understanding of the internal relationship of the fundamental rights on its head. Slowly but

⁵³*Ibid.*

⁵⁴*Ibid.*

⁵⁵Cooper Case, *supra* note 51.

⁵⁶Gopalan v. Madras, *supra* note 36.

⁵⁷SEERVAI, *supra* note 24, at 717-19.

⁵⁸See generally Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461; Maneka Gandhi v. Union of India, 1978 S.C.R. (2) 621; Unni Krishnan v. State of Andhra Pradesh, A.I.R. 1993 S.C. 2178.

surely the Supreme Court was moving away from a Positivist interpretation and towards a Universalist interpretation of fundamental rights.

B. Emergency Period

Undoubtedly the most important (and infamous) decision pronounced during the Emergency period was *A.D.M Jabalpur v. Shivkant Shukla*⁵⁹. Seervai considered it as the “most glaring instance in which the Supreme Court... suffered most severely from a self-inflicted wound” borrowing the language of Chief Justice Charles Evans Hughes⁶⁰ while most people, including former Supreme Court justice V. R. Krishna Iyer, refer to this judgment as the darkest hour in the history of the Supreme Court.⁶¹

This decision disposed of a bunch of habeas corpus petitions filed by numerous people, including well known political opponents of Indira Gandhi, challenging their preventive detention. The majority decisions held that in light of the Presidential order dated June 27, 1975, no person had any locus standi to file a writ petition, for habeas corpus or otherwise, challenging the legality of the order of preventive detention on the ground that it was not in accordance with the Maintenance of Internal Security Act, was illegal or vitiated by malafides or extraneous considerations. Article 21 was the “*sole repository*” of the right to life and personal liberty against state action and since Part III of the Constitution was suspended during the Emergency, any claim for the enforcement of this right was barred by the Presidential order. An exchange between Justice Khanna and the government counsel reveals that even the right to life didn’t exist while the Emergency was in operation and the

⁵⁹ (1976) Supp. S.C.R. 172 (hereinafter “A.D.M. Jabalpur Case”).

⁶⁰SEERVAI, *supra* note 24, at 1048.

⁶¹ V.R. Krishna Iyer, *Emergency—Darkest hour in India’s judicial history*, Indian Express June 27, 2000, available at <http://expressindia.indianexpress.com/news/ie/daily/20000627/ina27053.html> (last visited March 30, 2013).

courts were helpless even when life was taken away illegally.⁶² No rule of law existed outside the Constitution and when the Constitution, or the law passed under it, itself extinguished the right, no remedy existed.

Justice Khanna delivered the sole dissent wherein he held that Article 21 cannot possibly be the sole repository of any right as “*the principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution*” but existed well before it came into force.⁶³ Even in the absence of Article 21 no person could be deprived of his life or liberty without the authority of law as no court in any country of this world, in its pre- or post- Constitution days, would accept such a claim.

While the majority opinion reversed the fledgling trend towards reading substantive due process rights in Article 21, albeit still holding that it contained both procedural and substantive aspects, Justice Khanna’s dissent marched along this path of Universalist construction of the right to life and personal liberty that went beyond the mere text of the Constitution.

C. PIL JURISPRUDENCE

The turning point of substantive due process rights jurisprudence came in the form of *Maneka Gandhi v. Union of India*⁶⁴, the first case that dealt with personal liberty in the post-Emergency period. It was the beginning of an era of judicial populism which can be explained by a variety of factors ranging from attempts to mend the reputation of the Court, atone for the *Jabalpur*⁶⁵ decision, and to legitimize judicial power.⁶⁶

⁶²GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 339 (1999).

⁶³ A.D.M. Jabalpur Case, *supra* note 59, at 268.

⁶⁴ 1978 S.C.R. (2) 621, [Hereinafter Maneka Gandhi Case].

⁶⁵ A.D.M. Jabalpur Case, *supra* note 59.

⁶⁶ Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107, 113 (1985).

The petitioner in the *Maneka*⁶⁷ case happened to be the younger daughter-in-law of Indira Gandhi, who challenged the order of the Janata government impounding her passport as violative of Arts. 14 and 21 because she wasn't provided with a notice or prior hearing. The six judge majority opinion expanded the scope of Article 21 by reading the right to travel abroad as flowing from the right of personal liberty. Another break from the *Gopalan*⁶⁸ approach occurred when the bench held that the procedure envisioned by Article 21 must be just and fair, and not arbitrary, fanciful or oppressive, thus reading in the principles of natural justice. The golden triangle of Articles 14, 19 and 21 rights was created by holding that procedures depriving a person of life or personal liberty must be non-arbitrary, reasonable and in accordance with law.

This reasoning was a far cry from the formal, black letter of the law approach taken by the Court in its early years, and in the *Jabalpur*⁶⁹ decision, wherein it stressed on the mutual exclusivity of the various Articles and law of the Parliament rather than the rule of law. Both Justices Bhagwati and Krishna Iyer, who formed the majority in the *Maneka*⁷⁰ decision, went on to spearhead the Public Interest Litigation (hereinafter referred to as "PIL") movement in India that was the true product of the substantive due process jurisprudence.

One of the first PIL cases was that of *Hussainara Khatoon v. Home Secretary, State of Bihar*⁷¹ which dealt with numerous under trial prisoners languishing in the jails of Bihar, some having been imprisoned for periods longer than the maximum sentence their charge carried. Apart from considerably relaxing the standing requirements by letting Kapila Hingorani, a journalist appearing as counsel for the petitioners, file habeas corpus petitions

⁶⁷Maneka Gandhi Case, *supra* note 64.

⁶⁸Gopalan v, Madras, *supra* note 36.

⁶⁹A.D.M. Jabalpur Case, *Supra* note 59.

⁷⁰Maneka Gandhi Case, *Supra* note 64.

⁷¹ 1979 S.C.R. (3) 532.

on behalf of the undertrial prisoners, the Court formulated and used a ‘continuing mandamus’ which allowed it to issue relief through orders and directives, and not dispositive judgments, so that it could continue to retain jurisdiction. Justice Bhagwati authored the Court’s opinion and held that fairness under Article 21 is infringed upon when the state does not provide for speedy trial of the accused, his pre-trial release on bail and free legal aid if he is indigent. It was not open to the state to deny the constitutional right to speedy trial of the accused on the ground of scarcity of resources.

The bench headed by Justice Bhagwati also introduced the concept of epistolary jurisdiction (a term coined by Upendra Baxi)⁷² by instituting a PIL in response to a letter sent to the Court by a social reform group leader. In *Bandhua Mukti Morcha v. Union of India*⁷³, the Court held that the right to life under Article 21 included the right of a person to not be subject to ‘bonded labor’ and the right of bonded laborers to rehabilitation after release. It is noteworthy that the Court read this right under Article 21 in spite of Article 23⁷⁴ and the Bonded Labour System (Abolition) Act, 1976, probably due to the failure of the latter to provide any respite and the increasing power and importance of substantive due process rights.

The petitioner in *Parmanand Katara v. Union of India*⁷⁵ was a human rights activist who submitted newspaper reports dealing with a specific hit-and-run case to the Court and asked that the state be directed to give medical aid to all injured citizens brought to government

⁷²Maneka Gandhi Case, *Supra* note 61, at 118.

⁷³(1984) 3 S.C.C. 161.

⁷⁴INDIA CONST. art. 23. (Prohibition of traffic in human beings and forced labour—

(1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.).

⁷⁵ 1989 S.C.R. (3) 997.

hospitals. Justice Ranganath held that Article 21 casts a “*total, absolute and paramount*” obligation on the state to preserve life and rules of procedure must give way to it. It is not open to the state to insist on the police being contacted and the proper procedure related to negligent deaths being followed when a person’s life was at stake. The Court had come far beyond the question it asked in its early years- whether the procedure causing the loss of life/ liberty was by law- to hold that Article 21 contained both negative and positive rights; individual entitlements and state obligations.

A host of PIL petitions instituted by M.C. Mehta, a man sometimes described as a “*One Person Enviro-Legal Brigade*”⁷⁶, successfully led to the reading in of environmental rights in Article 21. Various benches of the Supreme Court have held private corporations, having the potential to affect the life and health of people, liable for violations of Article 21 by polluting the environment⁷⁷, that positive obligations exist on the state to eliminate water and air pollution⁷⁸ and also that the people of India have a right to breathe air unpolluted by the carcinogens present in diesel exhaust.⁷⁹

*Vishakha v. State of Rajasthan*⁸⁰ was a PIL filed to enforce the fundamental rights of working women under Articles 14, 19 and 21. The bench lamented the absence of a law dealing with and prohibiting the sexual harassment of women at the workplace, holding that each such incident violated the rights of life, liberty and gender equality guaranteed under Arts. 14, 15 and 21 of the Constitution and went ahead to lay down guidelines to be followed by each and every office throughout the country. These guidelines still remain the governing law on this subject as the Parliament is yet to legislate on this topic.

⁷⁶Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT’L L.J. 175, 202 (2010).

⁷⁷ M. C. Mehta v. Union of India, 1987 S.C.R. (1) 819.

⁷⁸ M. C. Mehta v. Union of India, (1987) 4 S.C.C. 463.

⁷⁹M.C. Mehta v. Union of India, (1998) 2 Supp. S.C.R. 24.

⁸⁰ A.I.R. 1997 S.C. 3011.

The list of the decisions expanding the substantive scope of the right to life and personal liberty is indeed ongoing and endless. On the basis of the decisions mentioned above and the numerous ones not studied in this article, it can now be evaluated whether absence of the ‘due process’ clause in the text of the Indian Constitution had an effect on the development of human rights.

CONCLUSION

The U.S. Constitution having inspired many nations during their constitution framing exercises, yet not one of these countries adopted the ‘due process’ clause, despite its English origins.⁸¹ It would be interesting to see in how in many of these nations such a move prevented the development of a substantive human rights regime.

Framers of the Indian Constitution were very secure in their understanding of why they chose to follow the Japanese Constitution rather than the U.S. Constitution in this regard. They wanted to avoid the vagueness of the ‘due process’ clause as well as a strong judiciary that thwarted their efforts in bringing about a social revolution in India by way of their socialist and distributive land policies. Hence, the double precaution of removing both ‘due process’ and ‘property’ from the ambit of Article 21. In hindsight their apprehensions do seem justified given the prolonged right to property debate between the legislature and the judiciary, with each judicial decision being countered by a constitutional amendment, until the issue was deemed moot by divesting the right to property of its fundamental status.

It seems to be a combination of various factors that led to the rise of an activist judiciary including legislative and executive excesses during the Emergency period; increased borrowing and use of foreign, especially U.S. precedents; or merely the judiciary’s search for a new project after its previous one was wrested away. Nevertheless, in one decision after

⁸¹Mendelson,*supra* note 29, at 493.

another, the Supreme Court expanded the substantive rights under Article 21 and its own jurisdiction and role as the protector of the poor and underprivileged. And the legislature let it gain its strength instead of attacking and curtailing it as it had done previously.

The question asked at the beginning of this article—*whether choosing the ‘procedure established by law’ clause over the ‘due process clause’ had a negative impact on the development of substantive fundamental rights in the Indian context*, must be answered in the negative. Mere language of the constitutional text did not restrain the judges from interpreting it the way they thought it should be interpreted. The judiciary gradually worked its way from a Formalist understanding of law to a Universalist and substantive understanding and transformed the system from one of parliamentary supremacy to constitutional supremacy, with itself at the helm of India’s future.