

**STATE, POLITICS AND DEBATES ON DUE PROCESS OF  
LAW IN POSTCOLONIAL INDIA**

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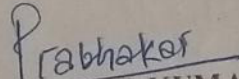
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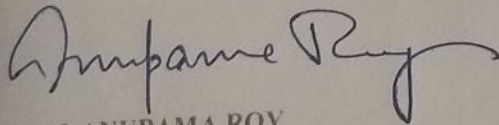
### DECLARATION

I declare that the dissertation entitled "STATE, POLITICS AND DEBATES ON DUE PROCESS OF LAW IN POSTCOLONIAL IN INDIA" submitted by me in partial fulfillment of the requirements for the award of Master of Philosophy has not been previously submitted for any other degree of this University or any other university.

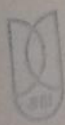
  
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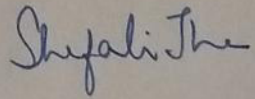
### CERTIFICATE

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## INTRODUCTION

The important goal ahead of the architect of the constitution was to ensure that the idea of freedom and justice, which is certainly endless and complex in reality, to be an enduring cornerstone of the newly independent Indian state. The realisation of Individual liberty and freedom along with democratic culture in politics and other sphere of life was the ultimate goal of Indian nation-state. The realisation of individual freedom and liberty in any democratic society is also contingent upon the fairness of rule of law. Indian State carrying the legacy of freedom struggle was committed to adherence to rule of law. The due process of law is an important component of rule of law principle. Due process principle as it was first codified in American legal-political jurisprudence did not become part of Indian constitution in the same content and intent at the beginning of our constitutional democracy. Unlike US where the 'substantive due process' is part of constitutional provision to safeguard the individual rights of life, liberty and property as results of US fifth and fourteenth Constitutional Amendment Act that says that "No person shall be denied of life, liberty or property without due process of law."

Indian conception of due process principle is procedural in nature as enshrined in our constitution under the Article 21 which says that 'No person shall be deprived of his life and personal liberty without the procedure established by law.' There are three marked differences over here. First the term property was removed from the group of justiciable rights; Secondly the term liberty was qualified with the word 'personal;' and finally the word 'due' was substituted with the phrase 'procedure established by law.' This change moved closer to the Japanese conception of 'procedural due process' under Article 31, although the Japanese constitution provides other remedial measures to safeguard Individual life and liberty.<sup>1</sup> This points towards an important nature of due process principle that its adoption and application has been contextual and differential in different political and legal systems, which means it is not technically possible to define the conception of due process

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<sup>1</sup> Austin, *The Indian Constitution: Cornerstone of a Nation*, 105-144.

of law. This could well be understood from the fact that historically its genealogy could be traced from the Section 39 of *Magna Carta* of England in 1215<sup>2</sup> in English Common law tradition. But now it has place in many of the democratic constitution of the world be it in Presidential or parliamentary form of the government.

## LOCATING THE STATE

By adopting the democratic form of State as well as the government, India also committed itself to the rule of law principle. The due process of law principle as it emerged from the debates in constituent assembly has primarily been about the protection of Individual life and liberty, and expropriation of property by the State.<sup>3</sup> In fairness, the right to individual freedom and liberty, as espoused by the spirit of our constitution and informed by the prevailing political culture of Indian society has had two important component; first at the level of abstraction and idea of justice individual have natural right to life and liberty which is essential for leading a dignified life. And due process of law is a guarantee of protection of individual life and liberty against the State. As Dworkin has Stated in his master work *"Taking Rights Seriously"* (1977) that:

*"Individual rights are political trumps held by individual. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."*<sup>4</sup>

He was of the firm opinion that it should always make a sense that an individual has fundamental rights against the coercive action of the State in enjoying the dignity of life. This is where he also comments that the due process of law as a protection for Individual rights of life and liberty "must be understood as appealing to the moral concept." And in deciding the case of due process even the Court should look into it with the lease of political "morality."<sup>5</sup>

And secondly the very nature of state and its capacity was conceived by the constitution to protect Individual rights and freedom. Here very idea of abstract justice and freedom was

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<sup>2</sup> "Due process of law."

<sup>3</sup> Austin, *The Indian Constitution: Cornerstone of a Nation*, 105-144.

<sup>4</sup> Dworkin, *Taking Rights Seriously*, XI.

<sup>5</sup> *Ibid.*, 147.



premised on the conditions of political stability, survival of democracy and social revolution in economic and social life to better the conditions of Indian masses. Austin has described this as the 'seamless web' in the strand of unity, democracy and social revolution.<sup>6</sup>

Of all the issues concerning the newly independent nation, commitment to a democratic State and objective of social revolution dominated the agenda of Constituent Assembly. Suhas Palshikar while situating the nature of State as it emerges out of the constitution, says that the beginning of Indian State is marked with distinct enthusiasm for a welfare state seen in light of constitution as a document of social revolution and change.<sup>7</sup> However, later on expectation turned into scepticism during the 'license-permit-quota-raj' of Indira Gandhi to current dispensation under liberal economic agenda. But the genesis of welfare state is still there as the state keeps implanting new welfare economic policy. Palshikar also points to the fact that the Indian state as envisioned by the constitution does not have any 'well-nit theory of state'<sup>8</sup> as it closely rely with the provisions of governance in broader ideological and institutional framework. As Pandit Nehru himself explained, "...We have laid down, not theoretical words and formulae, but rather the content of things we desire."<sup>9</sup> going by this explanation the two important label that emerges is that the Indian state was to be a democratic state and a welfare state.<sup>10</sup>

According to Palshikar the constitutional conception of the state also follows the twin principle of 'neutrality and instrumentality', where the state is seen as an instrument of achieving the objective of liberty, equality, justice, fraternity along with the goal of social justice. But the major problem would arise if the state has to become the agent of social change and social revolution as envisioned and framed by Austin- where he calls the constitution the document of social change and social revolution- because to take up the task of social change the state has to be decisively interventionist and this would lead to situation where the state has to shake of its neutrality. But Palshikar suggest that the constitutional vision of the state strikes a balance between instrumentality and neutrality. However, the mainstay of Indian state remains that it is a neutral state.

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<sup>6</sup> Austin, "*The Expected and the Unintended in Working a Democratic Constitution*," 319-343.

<sup>7</sup> Palshikar, "*The Indian State: Constitution and Beyond*," 143.

<sup>8</sup> *Ibid.*, 145.

<sup>9</sup> *Ibid.*, 146.

<sup>10</sup> *Ibid.*, 146.

Nevertheless, there is another important factor that dominated the discourse of constitutional language of that time in codification of constitutional law that is the 'relative low capacity of the state'.<sup>11</sup> Low state capacity manifests itself in many ways to address the grievances of its citizens, political backlog in enacting suitable legislation and this also results in low capacity of institutions as well. The Indian courts also suffer because of low state capacity. The more positivist textual commitment of judiciary to provision of due process in initial years was severely impacted by the conditions of low state capacity.

The debates around the provisions of due process of law in India as it emerges out of Constituent Assembly debates shows that the prevailing circumstances and political culture decisively informed the conception of due process in India. When the debate on due process first started in the Constituent Assembly it was thought that it will be settled easily but the experience shows that it was otherwise true. Due process of law in fairness is a safeguard against state excess. Any provision of the due process was to be formulated keeping in mind the overall political and social condition of the country. It was also the point that the due process being liberal Individual right might come in the way of communitarian good that the state has set forth to achieve to better the conditions of mass citizen. Nevertheless, individual freedom and liberty could not be compromised learning from the experience colonial subjugation.

## **CONSTITUENT ASSEMBLY DEBATE AND DUE PROCESS**

Sir B N Rau advised the constituent assembly not to adopt the provision of due process as it existed in US. This suggestion was made after his meeting with Justice Frankfurter of US Supreme Court. In US under the provision of 'substantive due process of law' many of the social welfare legislation were invalidated, famously known as Lochner era. Provision of substantive due process gives court leeway to interpret the law in its spirit as well as in letter. It is not only the fairness of procedure of enactment of law but law itself could be invalidated. However, in *Nebia vs New York (1934)* federal court had overturned the judgement of *Lochner vs New York (1905)* and opined that the good of many could not be sacrificed for benefits of few. For the politics of US it was a radical departure but for India it

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<sup>11</sup> Choudhary, khosla and Mehta, "Locating Indian Constitutionalism," 1-13.

For more details see Mehta and Kapoor in 'Public Institution in India: Performance and design.' OUP. 2005



was an obvious case of balancing between individual rights and role of state under prevailing political culture.

After hectic debate on scope and limitations of due process of law the constituent assembly adopted the middle path and adopted the procedural form of due process. Article 21 of the constitution says that "*No person shall be deprived of his life or personal liberty except according to procedure established by law.*" However, the provision of Article 22 was added to safeguard the rights of individual in case of deployment of Preventive Detention Act. Nevertheless the principle of due processes as adopted by Indian constitution was merely a check on the powers of judiciary but not on the legislature. Parliament was empowered to enact such law to curtail the individual liberty in order to maintain public order or to achieve greater common good. Even in constituent assembly members were divided on what could be the exact provision of due process. Dr. Ambedkar himself was not sure about it but he too felt that some provision of preventive detention was required to deal with internal turmoil in Deccan Area and in aftermath of partition which became alarming with the assassination of Gandhiji. So, there was almost near consensus to limit the scope of individual liberty if sanctioned by fairly legislated laws.

There was important exclusion of 'property' from the due process provision. There was consensus on exclusion of property from the group of fundamental rights and this was also in line with the promise of abolition of zamindari system by Congress Party and equally important was to have the equitable distribution of land among the landless people and requires expropriation of land by the State to setup industries and other construction. This was important to achieve the objective of social revolution. But unlike other detail of due process like right to life and liberty which became justiciable in the court of law and court played an important role in its interpretation and evolution, in case of property there was no due process protection.

As the due process entered the court the debate on property was primarily about 'compensation' because the concern of due process in property concerned with the taking of property by the state after paying fair requital. However, the experience of land acquisition cases under the land Acquisition Act 1894 which provided for the leeway for 'eminent domain' of state in acquiring private property has shown that it has been a messy issue. Messy because in many situations land was acquired but not put to use and in many a situation compensations paid was not adequate or the procedure followed was

unfair. Even the position of the court has been that of confusion and silence which has resulted in unbearable loss for small farmers.

After the enactment of the forty-fourth Constitutional Amendment Act 1978, property has been removed as a fundamental right. Although, the enactment of "*Right to fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013*" has been a right move to get rid of anomalies of previous land acquisition Act, for example, now there is provision for fair compensation and resettlement for third parties who are dependent on acquired land. My contention in the later chapter is not to defend the rights of property but to map out the debate around property and suggest that some degree of due process could be subscribed to and followed in acquisition of property and in payment of compensation to ensure that if the procedure prescribed is fair and as per rule of law.

## **INSTITUTIONALISING DUE PROCESS**

The role of the Supreme Court has been very important in the evolution of principle of due process in India. The journey of due process provision as mapped out by Chandrachud<sup>12</sup> from being 'pure form' due process to 'procedural due process' and finally to 'substantive due process' has been the result of creative interpretations of due process principle by the Supreme Court. The Supreme Court as an institution responsible to safeguard individual life and liberty has expanded and enlarged the scope of due process. The judiciary has shown institutional imagination in expanding the scope of due process provision by looking not only into the letter of the law but spirit as well. By institutional imagination what I mean to say that the judiciary has been able to put into practice the ideas and expectations of citizen as they envision the role of judiciary in ensuring freedom and justice. Any institution that has been put into place does not have life of its own rather it is given life by its function and purpose it is set to achieve. Supreme Court as an institution of justice to a large extent has withstood the test of that purpose and has given people much hope and has strengthen the democracy.

This is also the result of the gain the Indian democratic state has made over the period of time in its political and social life. The political culture of our country has evolved and

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<sup>12</sup> Chandrachud, "*Due Process*," 777-793.

expanded with the discourses of rights and freedom emanating from different sections of society otherwise marginalised and tormented, which have impacted the functioning of our politics.

When the first case of due process came to the court that is *A K Gopalan case*,<sup>13</sup> the judiciary interpreted the case in textual manner, a more positivist reading of the law. This was also because the circumstances of that time were compelling on legislature, executive and judiciary to work together. The Supreme Court as an institution was taking its root in a democratic framework. Here the way due process provision was interpreted was a textual interpretation where the said limitation was on the executive power but not on the legislature. The court took a dynamic turn in *Maneka Gandhi case*.<sup>14</sup> The court said that the concerned authority cannot withhold the passport of an individual- in this case Maneka Gandhi- without giving the valid reason. And right to move anywhere in world is part of personal liberty. So, the proposition of the *Maneka Gandhi case* was that the 'procedural due process' was part of Article 21.

This was also the time when the court was trying to repair the damage it had suffered during emergency era when it failed to protect the rights of Habeas Corpus. The general election result in the aftermath of the emergency showed that people care about the rights and freedom. The political culture of the country had evolved by then and the discourse of 'substantive due process of law' in India started in late 1980s. However, its full expression came with *Naz Foundation judgment* and *Privacy Judgement*, where not just the fairness of procedure but substance of law itself was checked on the merit of Article 21. The substantive interpretation of due process has helped the court in expanding its scope of intervention in other area of governance which has also created tension within the institutions. But whatever be the case the evolution of due process in Indian legal-political discourse is the result of institutional imagination in which judiciary has played an important role.

The objective of this study is to map out the debates around the concept of due process principle in postcolonial India. The journey of due process in India starts with its emergence in Constituent Assembly, where it was first discussed to put in place to safeguard individual life and liberty. The content and intent of due process as adopted in

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<sup>13</sup> A. K. Gopalan vs State of Kerala. 1951.

<sup>14</sup> Maneka Gandhi vs. Union of India. 1978.

our constitution was conditioned by the political, social and economic conditions and it was equally aligned with the future objective of unity, democracy and social revolution. The democratic welfare state has had a tough task of balancing between individual rights and communitarian good. Adopted provision of due process in India is result of this balancing political act. My first chapter deals with the framework of theory and practice of due process in India. The term postcolonial only suggest that the journey of due process debate in the Indian State with the journey of Constituent Assembly which is the touchstone of Indian democratic state.

The debates as they emerged in Constituent Assembly as well as in political discourse outside, inform us that it is not possible to have a well-knit theory of due process of law. The practice of due process principle in any political-legal system has been contextual and informed and influenced by the political culture of the concerned society. However, my submission is that in Indian context its evolution and expansion of scope in defending Individual rights and liberty is the result of institutional imagination in which the institution of judiciary has played an important role. So, to map out the journey of due process principle in postcolonial India is mainly to look into the role of Supreme Court in defending the fundamental rights of life and liberty.

There are three suggested axis around which the evolution of due process of law could be understood. These are namely the 'Normative Axis' which spells out the abstract idea of justice and fairness that informs the debate around due process and secondly, the 'Political Axis' that tells about the theme of political and social aspiration that due process would address. And finally, the 'Institutional Axis' maps out the institutional role in upholding the spirit of fairness and justice through the interplay and functioning of law and machinery of state apparatus, and its role in deepening of democracy.

The second chapter deals with the function of the Apex Court in the evolution and expansion of scope of due process and its journey from being 'pure' due process to 'procedural due process' to 'Substantive due process of law.' The central theme of this chapter is to highlight the creative role of Supreme Court in institutionalising the provision of due process as safeguard of individual rights and freedom in changing socio-political dynamics. It also deals with relationship between law and politics in tandem with Article 21 of our constitutions which deals the provision of due process.

The third and the final chapter deals with the property debates and missing due process principle in understanding the rights of government in acquisition of property for 'public purpose' and 'compensation' being paid to the losers of the land. In no sense I am defending the property rights rather what I am suggesting is that there should be some degree of fairness and due process in acquisition of property and payment of compensation since it has ramifications also for the disadvantaged sections of the population. The role of state and court is important in understanding the debates around property because the rights to property as imagined in India has transformed through various application of law, statutes, constitutional amendments in changing political and social dynamics which reflects that there is institutional tussle in defining the claims of property rights in India. So, deciphering the debate around property would help us understand the complex social, economic and cultural values land has for individual and community in our society.

## CHAPTER ONE

### DECIPHERING THE PRAXIS OF DUE PROCESS OF LAW

The broader theme and founding imagination in the formation of many political systems around the world has been replete, simultaneously, with the quest for codification and formalism, and, desire for individual autonomy and freedom from government interference. Different political systems have tried achieving this dual goal through different measures. The debates around the principle and practice of due process of law concern with dominant legal-political codification to safeguard individual and other constitutional freedoms. The origin of due process conception could be located in the articulation of 'PER LEGEM TERRAE' implying, the law of the land, incorporated in the Magna Carta of England, 1215, which proclaimed that "no freeman shall be arrested or imprisoned or disseized, or outlawed or exiled or in anyway molested; nor will we proceed against him, unless by the lawful judgement of his peers or by the law of the land." However, the interpretation and definition of the conception of due process of law has practically been politically contextual in different political systems, as it evades any attempts of concrete definition or interpretation, although, being part of well-structured constitutional texts.

The discourse around due process of law could be broken up into three main arguments that is, one, its definition and subsequent interpretation in any political-legal system is historically contingent and contextual. This is the fact due to vague origin of due process as originating from the English *Magna Carta* of the year 1215. The principle of due process was, however, codified in a proper legal-political culture of US and when the Indian Constitution was written, the founding members of our political establishment thought it as an important component of principle of rule of law to be formulated and cherished to safeguard individual rights and freedom against the State.

Secondly, debates on due process of law have shown that its precise meaning remains elusive although it is part of the constitutional text in different forms. The journey of interpretation of due process in Indian legal-political domain is a case in point. When the first case of due process of law (A. K. Gopalan, 1951) case came to the court it was

interpreted textually just taking out the literal meaning of the provision of due process but in subsequent cases judiciary not only looked into the facts if the law was validly enacted but also into the fairness of the law itself. And, third argument is that the form and meaning of due process in constitutional democracies has emerged through authoritative practices of interpretation in court of law and through specific challenges brought before the law makers and the courts by Individuals and people's movements. In India the judiciary has acted responsibly in creative interpretation of the provision of due process in protecting individual rights and freedom. Very recently the Supreme Court while pronouncing judgement in privacy case<sup>15</sup> said that "as the constitutional system rests on moral system, the due process is the moral appeal for rights against the State."<sup>16</sup> And in saying so the Court has only expanded the scope of due process in upholding the rights of privacy of an individual.

Due process of law as a template for securing individual rights has evolved along the historical process and carries a possibility that could be tuned to suit the needs of different political system as in the case of US, where the a substantive notion of due process of law emerged in a presidential system but has been, almost, successfully been grounded in a parliamentary form of democracy in India. The distinction here could be understood in the nature of power and functioning of institution of judiciary in US as a Presidential form of government with the power and function not only of executive and legislature but also of federal and the provincial court is demarcated and are independent of each other where as in Indian parliamentary form of government, we have unitary chain of courts with highest court of law being the Supreme Court.

However, the evolution of conception of due process of law has been very tricky in post-colonial India, constrained by the goal of "nation building" and "social revolution"<sup>17</sup> at the beginning of Indian nation-state, when judiciary was by and large in tune with executive. Nevertheless, its journey from its pure form of due process to 'procedural form' as espoused by our constitution and its recent interpretation by Supreme Court in its more substantive form is the point of departure which reveals that Indian democracy has come a long way in responding to ever evolving political and social dynamics and aspirations of people

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<sup>15</sup> Justice K S Puttaswamy (Retd.) Vs. Union of India and others. 2017.

<sup>16</sup> Ibid., 38-39.

See for more details Ronald Dworkin, '*Taking Rights Seriously*,' Duckworth. (1977).

<sup>17</sup> Austin, "*The expected and the Unintended in working a Democratic Constitution*" 319-343.



So, in contextualising the conception of due process in Indian polity and deciphering its genesis in political-institutional culture, there would be a greater emphasis on looking at the political, social and economic dynamics that has shaped the concept of due process, rather, than just taking out its meaning as codified in legal texts. Looking into the political and social underpinning of legality of due process would give us more insight to appreciate its importance in safeguarding individual rights and freedom in our political culture. The political lens deployed would help us traverse the historical route in theorising and situating the context of due process in Indian polity. Although the first expression of prototype due process of law could be located in English law (Magna Carta of 1215), in its move towards a parliamentary form of democracy, where it is not yet codified and legally formalised, however, its concrete codification emerged in an presidential system of USA. After independence the Indian constitution also adopted the provision of due process as a cornerstone for protecting individual freedom<sup>18</sup> and has become part of legal-political discourse of Indian polity.

However, the due process principle of India is much closer to Japanese conception of 'procedural due process.'<sup>19</sup> The substantive due process interpretation states that the judiciary can look into the fairness of law itself if it curtails individual freedom and liberty, however, the procedural due process looks into the fact that whether the curtailment of individual freedom is sanctioned under validly enacted laws and statutes. This pushes us to raise the questions: a) "Whether or not the due process of law has roots and relevance in Indian political-legal culture, informing our modern-democratic political-legal discourses?", b) "How it has evolved through different axes of normative, political and institutional arrangements?", and, finally, c) "What has been the role of institutional anchoring<sup>20</sup> of due process in deepening of democracy?"

The Role of Supreme Court has been very important in adapting and anchoring the principle of due process in Indian polity. As due process provides safeguard to Individual against State excess, there has been constant tussle and tension between institutions of judiciary on one side and legislature and executive on other side in defining the scope and limits of rights and freedom. In curtailing of individual freedom and liberty, the legislature or

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<sup>18</sup> Indian notion of due process of law is more close to Japanese 'procedural due process' than 'substantive due process of law' of USA, a deliberate move by the makers of the constitution.

<sup>19</sup> Austin, *The Indian Constitution: Cornerstone of a Nation*, 132.

<sup>20</sup> Primarily focusing on the role of Supreme Court.

executive has almost always relied on the logic of State- which means that the State has ideological and political underpinning- to maintain national security and public good. It is the judiciary which has ensured that constitutional morality of due process prevails in safeguarding individual life and liberty.

In addressing these questions, this chapter will first examine the influence of Magna Carta (1215) of English Laws where the prototype exposition of the due process could be traced and political philosophy of John Locke<sup>21</sup> which, overwhelmingly, shaped the conception of due process in US along with the ideals of “Bill of Rights”. Taking this as a template of due process, this chapter would try and foreground the theoretical expression of due process in India as it emerges out of the constituent assembly debates, political discourses and judicial pronouncement. While discussing the provisions of due process, members of Constituent Assembly were considerate about the prevailing political, social and economic order of the country and the goal newly independent country had set to achieve for itself. Austin has described this as the ‘seamless web’ of unity, democracy and social revolution.<sup>22</sup> However, the dynamics of political culture have changed and roots of democracy have deepened in our polity. So, gains of constitutional democracy has contributed towards informed political discourse around due process as brought about by citizens and people’s movement by challenging the move of State in curtailing individual life and liberty and judiciary has performed a creative role in expanding and exercising the principle of due process. So it would be worth analysing the contribution of these three in foregrounding the discourse around due process of law in India.

Secondly, this chapter would discuss the different axis around which the due process of law could be contextualised. Then it proceeds to emphasis the need of ‘legal formalism’<sup>23</sup>, its basic tenets and functions in any polity striving to defend freedom and individual autonomy, as it plays out in the prevailing nature of State and politics. And finally, it illuminates and elaborates on the role due process of law in deepening of democracy as it promotes rule of law and also provides necessary impetus for institutional anchoring for the ideals of fairness and justice, which any polity strives to achieve and cherish, in search of democratic credentials.

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<sup>21</sup> Laslett, *Locke: Two Treaties of Government*

<sup>22</sup> Austin, “*The expected and the Unintended in working a Democratic Constitution,*” 320.

<sup>23</sup> Jeffrey C. Singular Jr. defines legal formalism as having important function in fostering the rule of law and restraining the arbitrary and abusive exercise of government power.

## HISTORICAL UNDERSTANDING OF THE DUE PROCESS OF LAW

The first legal codification and formalisation of the conception of due process of law emerges out of the US draft constitution which was decisively influenced by the political philosophy of John Locke. Locke is close to the opinion that any consequences of doctrine of political virtue is endured, safeguarded, checked, and defined by the concept of trust.<sup>24</sup> However, Locke did not give much theorisation to the concept of the term trust, rather, on 'consent' which according to him is the bedrock for establishment of any form of government through the 'fundamental Appointment of Society'- the constitution as we would prefer to say.<sup>25</sup> So, it is the concept of 'consent' which became important for Locke to put forth his conception of a form of government. Therefore the question was 'what would be the purpose of this constitution?'

Locke suggests that the very purpose of an individual giving his consent, provided others also does the same is to form a political society in order to preserve and promote his natural rights of life, liberty and property.<sup>26</sup> The trilogy of life, liberty and property- Thomas Jefferson later changed the word property to pursuit of happiness- forms the basic ingredients of provision of 'Bill of Rights' in US constitution. Along with Bill of Rights, in US Constitution, individual liberty is primarily safeguarded by the provision of due process of law. And it is here in the US Constitution that the proper legal codification of due process was considered as a safeguard to individual life and liberty. The 5th amendment<sup>27</sup> of US constitution provides: "...nor (shall any person) be deprived of life, liberty, or property, without due process of law..." which was held as mere limitation on the federal government by the US Supreme Court in *Barron v. Baltimore*<sup>28</sup> case. However, the aftermath of American civil war led to addition of the 14th amendment to the US constitution which provided for the limitation on the state authority as well: "...nor shall any state deprive any person of life, liberty or property without due process of law..." After the addition of this amendment now the principle of due process was constitutionally applicable on actions of federal as well as the State government.

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<sup>24</sup> Laslett, *Locke: Two Treaties of Government*

<sup>25</sup> *ibid*, p-108

<sup>26</sup> *Ibid*.

<sup>27</sup> Adopted in the year 1791.

<sup>28</sup> US, (7 pet, 242) 1833.

Nevertheless, historically the genealogy of the term due process of law could be traced to the expression '*per legem terrae*', implying, the law of the land, as espoused in the Magna Carta (1215) of the English law, promising that, "no freeman shall be arrested or imprisoned or disseized or outlawed or exiled or in any way molested; nor will we proceed against him, unless by the lawful judgement of his peers or by the law of the land."

Moreover, the concept of due process of law has never traditionally been a static term. Initially, it was merely thought of as the procedural restriction on the judicial power of the government in exercise of its power. Although, it developed and at times created an alleged judicial over-reach in the hands of federal courts under the provision of substantive due process, going beyond the procedure to the spirit of the legislation in putting reasonable restriction on the powers of both executive and legislature.<sup>29</sup> Application and interpretation of due process has always been informed by the political, social and economic contexts of that time and there is also conflict amongst different institutions in limiting and expanding the scope of due process.

The story of due process of law in India started with the birth of the Indian state during the course of its constitution writing, when for the first time it was advocated that a 'due process of law' clause be incorporated in Indian constitution, as it exists in US constitution. The demand seemed valid, emanating from the undercurrent of national movement for freedom and dignity, accompanied by social and economic independence. Moreover, coming out of domination of a colonial rule, the idea was fascinating and promising, but, there were important staggering issue of 'nation building'<sup>30</sup>- geographical integration of Princely States and British India as one union and 'Social Revolution'<sup>31</sup>- securing social and economic equality for its masses, confronting the newly independent country. The idea of freedom and justice which is the bedrock of any progressive society was considered equally important for Indian society especially with the legacy of freedom struggle amidst prevailing political instability, fragile political culture and gross economic and social inequality.

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<sup>29</sup> Murray v. Hoboken land and Improvement Co., 18 How. 272 (1856).

Congress can not make any process 'due processor law' by its mere will, pronounced US Supreme Court.

<sup>30</sup> Austin, "*The expected and the Unintended in working a Democratic Constitution*," 319-343.

<sup>31</sup> *ibid.*, 320.

The very abstract idea of freedom and justice was conditioned by the very realistic objective of achieving social revolution in economic and political-social life. Austin has described this as the 'seamless web' where one cannot be sacrificed for other. So the very idea of freedom and justice was rightly thought out as premised on the realistic attainment of equality and prosperity in economic, social and political life. So, there was a constant effort to balance the rights of individual with the welfare and prosperity of common good and community.

The Advisory Committee on Fundamental Rights recommended under Clause 9 that "No person shall be deprived of his life or liberty without due process of law."<sup>32</sup> In drafting committee, however, the phrase 'without due process of law' were substituted by the words 'except according to procedures established by law', accompanied by the half-hearted explanation that the phrase 'according to procedure established by law' is more specific to the Indian polity, making a departure from US conception of substantive due process of law. So, Article 21 (originally clause 9), as it was adopted, reads as follows:

*"No person shall be deprived of his life or personal liberty except according to procedure established by law"* a deliberate exclusion of the word 'property' unlike US.

This omission has much to do with the suggestion of eminent jurist Sir B. N. Rau, after his meeting with Justice Felix Frankfurter of USA, who recommended that Indian state would be better served if they were able to avoid the insertion of the term 'due process of law' because in the USA, this had led to dismissal of many social welfare scheme by the federal court,<sup>33</sup> suffocating the federal government in reaching the masses as it was trying to cope with the consequences of 'great economic depression.' Further, the intended exclusion of the word 'due', from Article 21, gives the impression that the court could not look into the justiciable aspects of the 'law' whether, it is reasonable or not. And, moreover, constrained by the insertion of the word 'procedure' and inclusion of the word 'established' clearly manifested the legislative expression of justice as foregrounded in Indian constitution under Article 21.

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<sup>32</sup> Rao, *The framing of India's Constitution: Select document*, Vol 2.

<sup>33</sup> Federal court's action in US is famously referred as Lochner era.

The due process of law in Indian constitution tilted towards the Japanese conception of procedural due process as mentioned in Article 31 of the Japanese constitution. A similar expression of the provision of the due process of law could be seen in Irish constitution as well. Article 6 of the Irish constitution states that the “liberty of the person is inviolable and no person shall be deprived of it except ‘in accordance with law...’”<sup>34</sup> However, ‘due process of law’ in the Irish constitution is interpreted in accordance with the meaning given to it by English laws not the American laws. But, not so secret and easily comprehensible fact is that, many political systems around the world have given reasonable thoughts to safeguarding the individual autonomy and freedom. The historical background of the framing of due process of law in Indian constitution could give an impression that the framers of the Indian constitution were simply too much concerned regarding the intent and content of due process provision or were simplistic in incorporating the texts of due process of law in our constitution but a critical study and understanding of due process of law in post-colonial India, presents the entirely different pictures of historical imagination of evolution of due process of law in India.

The broader theme and political underpinning of the historical imagination about the evolution of due process of law would be discussed in the next chapter of this dissertation. For the time being, I would limit myself to emphasis on the fact that basic modalities of framing of any law is very much subsumed in prevailing situation, circumstances and nature of polity informed by the functioning and operation of that very political culture. The ‘procedural’ due process of law as adopted by the Indian constitution - where curtailment of individual freedom was sanctioned through validly enacted law of legislature - was a response to prevailing concern of that period to balance between individual rights and community good, when Indian republic was taking its first step towards a constitutional democracy.

Nevertheless, another important dimension that is important, in tracing and knowing the history of due process of law in India, would be to skim through the ancient administration, text and scripture, legal text and nature of polity in India before its independence if the conception has any legal genealogy as we know it today in modern political-legal discourse and polity. As the word ‘due’ simply means ‘justice’, it is indeed pertinent to delve into the aspects of justice in administration of the pre-independent era. It is very obvious to say that there was no democracy in India before it got independence in 1947,

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<sup>34</sup> Austin, *The Indian Constitution: Cornerstone of a nation*, 110.

from British colonial power and before the Britishers colonised India there were many kings and monarchs ruling in various parts of India. However, it is also the historical fact that there were instances of existence of 'republic',<sup>35</sup> - not in a concrete political-legal form as it emerged in medieval Rome - in ancient India. Megasthenes and Panini wrote about the existence of several Hindu Republics of 500 B.C.<sup>36</sup> where the king was elected by the people, although, the right to vote was very much restricted to very few chosen one and electoral school was in alignment with racial and casteist sentiments. Administration of justice was inevitably associated with the figure of kingship. There was no distinction of different role of government in ancient India. The body of the king was symbolic of being government and figure of ordained guardian.

Even in Kautilya's Arthashastra, the king (although, king was assisted by his well learned ministers) was the final authority to deliver the justice to its subject, be it in political, social or economic arena. However, there is an important element of ancient judicial system of delivering justice that is till date part of our judicial system, 'the system of village panchayat' having its origin in ancient Indian culture and now being part of our modern constitution as well. In this system the five senior member of the village are entrusted to deliver justice, keeping in mind the communitarian values of that particular society.

But historically, something that easily gets bypassed here is the aspects of individual autonomy and freedom. Dr. Berolzheimer,<sup>37</sup> while commenting on the origins of the oriental civilisation, says that religious and philosophical view of Vedic Aryans are in some sense closely connected with the fundamental tenants of philosophy of law, which certainly become templates for developments of legal and ethical text in Greeks and Roman. The idea of 'Pax' -implying not peace but the one who ensure the peace, the sacred order- in medieval philosophy was derived from the Vedic 'Rita', meaning 'natural and human order' and closely related idea of 'Dham'<sup>38</sup> which is the manifestation of cosmos corresponding to 'Rita' as philosophical conception of justice. So, the history of pre-independent India has had no discourse on the modern discourse of due process pertaining to safeguarding the individual life and liberty rather it is replete with idea of community good and justice of which individual is a part of.

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<sup>35</sup> See, "Indian law Quarterly Review" Vol.3 pt.10 pp. 531-539 (1958), for the constitutional position of the king.

<sup>36</sup> Ibid., 531-539.

<sup>37</sup> "Modern legal Philosophy Series" Vol. 2. 37.

<sup>38</sup> Ibid., 37.



Therefore, It is also the fact that our constitutional experts, founding members and political leaders while writing the Indian constitution felt a gap and absence of existence of any legal philosophy informed by Indian political culture while writing the modern constitution for its citizens, relying heavily on the constitutional text of foreign countries. Upendra Baxi while comment on the functioning of Indian Supreme Court and relationship between law and political culture, wrote that, there is the 'crisis' in Indian legal system.<sup>39</sup> By crisis what he means is that there is a situation created in our social system where one cannot act independently or are constrained to act in ones fuller capacity as the Indian legal system has largely been the continuation of British colonial legal System. However, Baxi could not provide us with any alternative model of Indian legal system having its roots and genealogy in India legal philosophy.

The advent of conception of 'due process of law' is one such example, whose, genealogy in a political-legal sense, lies in English laws and American Constitution. However, a law originating in English polity but given a robust legal framework and life in a presidential form of democracy (USA) but borrowed and Indianised in our legal system of parliamentary form of democracy has been the creativity of historical imagination to secure its citizen a just, free and dignified life in a constitutional democracy amid all its cultural, political and social differences.

## **RULES OF FORMALISM**

### **A. *Due process of law as a rule-of-law formalism in USA***<sup>40</sup>

America's Declaration of Independence ushered in the sentiment espoused by John Locke in his political philosophy, particularly in *The Second Treaties of the Government*, pronouncing "Governments are instituted among Men, deriving their just powers from the consent of the governed." Locke's political philosophy has also given intellectual underpinning to the American Revolution and to the conception of individual rights, economic freedom and dignity of life in western politics philosophy. Lockean "trilogy of life,

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<sup>39</sup> Baxi, *The Crisis of Indian Legal System*, 1-40.

<sup>40</sup> . This section decisively draws from A)John Locke's 'The Second Treaties of the Government' and, B) Jeffery C. Singular Jr.'s work- 'Of Form and Function: Lockean Political Philosophy and Mass Tort. 2012

liberty and property” was altered by Thomas Jefferson as “life, liberty and pursuit of happiness (excluding property)” in “Bill of Rights.” Nevertheless, later on the fifth and fourteenth amendments of the US constitution restored the Lockean trilogy by including ‘property.’

The insertion of clause ‘due process of law’ in the constitution of US is the result of its fifth and fourteenth amendments and it says that “...nor (shall any person) be deprived of life, liberty, or property, without due process of law...” To appreciate the conception of due process of law, we would be better served to understand it as “Rule-of-Law Formalism”<sup>41</sup> According to Singular, rule-of-law formalism and formalism differs in its form and functions. The rule-of-law symbolises a dynamics where any law or legislation would change, according to the need of the hour, whereas, formalism insists in maintaining a rule merely because it has been placed in rule book. So what due process of law as rule-of-law formalism in US constitution signifies is that we should not adhere and stick to any formalism which has no utility in responding to our present situation.

Also, Lockean-Jeffersonian idea of individualism does not call for rigid prescription of any specific mechanism of securing rights. And also it is very conventional that ideas and content of the rights and justice changes with time and space. The due process of law as formalism serves two important functions, simultaneously. First, it’s a constraint on arbitrary power of the government and secondly, it ensures predictability<sup>42</sup> about the formal procedures of the law. The predictability about formalism (due process of law) has a undercurrent of fairness in fostering the degree of trust between the government and its citizen as it gives an incentive to government’s power (constitution derives its power from citizens) to act according to the law but at the same time it is constrained in application of any arbitrary power and to the individual an idea about the consequences of its action. So, predictability implies and insists on deterrence for individual as well as for the arbitrary action of the government. In this sense due process as the rule-of-law gives a beforehand knowledge about the consequences of one’s action.

However, another important aspect of any rule-of-law formalism is that its utility depends on its ability to respond to the changing nature and character of the polity. In this regard the content and intent of dynamics of substantive due process of law in US polity has been

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<sup>41</sup> Ibid., 899.

<sup>42</sup> Ibid., 99

on predictable ground, as it has been serving the different end of the polity in safeguarding individual rights by constraining arbitrary government's action. Even, Locke was of the opinion that "to have exactly the same constitution would not always be an advantage to the people."<sup>43</sup>

### **B. Due Process of law as Rule-of-law formalism in India**

Sir B N Rau, an eminent constitutional scholar, wrote to the members of the constituent assembly, that, the term 'due process of law, as it exists in US constitution should not be incorporated in Indian constitution. He made this suggestion after his meeting with Justice Felix Frankfurter of the US court. Justice Frankfurter was deeply troubled by the consequences of the ruling of US court, where many of social welfare schemes of the government were invalidated by the court citing the violation of spirit of due process of law, famously known as Lochner era. However, it was quite fascinating and suitably placed for a nation to try hard - coming out from two hundred years of colonial domination- to protect and promote, individual autonomy and freedom.

The advisory committee on fundamental Rights of the Constituent Assembly recommended clause 9: "No person shall be deprived of his life, or liberty without due process of law."<sup>44</sup> This is identical with the amendment fourteenth of the US constitution, except for the exclusion of property. It read: "nor shall any state deprive any person of life, liberty and property without due process of law..."<sup>45</sup> The trilogy of life, liberty and property has its origin in 17th century political-philosophical writing of John Locke. Nevertheless, at a time when Indian constitution was being written, Lochner era's theory of liberty contract was poisoned to slow death in *Nebia Vs New York* case<sup>46</sup> the US court overruled the Judgement of Lochner era<sup>47</sup> - in which substantive interpretation of due process provision had considered the individual rights to be paramount - and said that rights and welfare of larger community cannot be overlooked for the benefit of few individual.in order to take upon the welfare schemes by the government. This was an eye opener to the nation which was high on upholding the spirit of freedom and individual autonomy but at the same time

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<sup>43</sup> Ibid

<sup>44</sup> Rao, *The framing of India's Constitution: Select Document*, Vol 2.

<sup>45</sup> Adopted in the year 1868.

<sup>46</sup> *Nebia Vs. New York*, 291 US 502 (1934).

<sup>47</sup> *Lochner Vs. New York*, 198 US 45 (1905).

was grappling with the task of political and geographical integrity of the nation and simultaneously concerned with responding to the economic and social aspiration of its people.

So, the issue around the provisions of due process of law, which was initially thought as something of little concern came out as fundamental tenets of Constitution which would decide the functioning of all three branches of the government in a decisive way. Article 21 (clause 9 of the draft constitution) of the Indian constitution differed with the US conception of due process in three fundamental ways: Right to 'property' was there but without the protection of due process, second, right to 'liberty' was qualified with the term right to 'personal liberty' and, finally, the words 'due process of law' were replaced by the words 'procedure established by the law'. Influenced by Article 31 of the constitution of Japan. Nevertheless, there was an addition of Article 22 in the constitution, which was meant to pacify the proponents of substantive due process of law, providing procedural safeguards from arbitrary arrest or detention by the government, similar to the due process of law in USA.

The entry of the conception of due process of law in India has been quite dramatic, since, never before it was part of political discourse in India. Although, a reference to the idea of due process could be traced in Nehru Report of 1928 and Karachi Resolution of 1931 which states that "liberty and property were the individual's 'save in accordance with the law.'"<sup>48</sup> It was argued that 'save in accordance with the law' permitted the review by judiciary.<sup>49</sup> Moreover, Government of India Act 1935, also did not talk about personal liberty but did mention that no person shall be deprived of his property unless otherwise sanctioned by the competent authority, provided for either on fixed or decided principle of compensation.<sup>50</sup> However, all this was done away by inclusion of the phrase "according to the procedure established by law".

The nature of Indian state at the time of its inception provides us an insight, about, how a newly born nation, dealt maturely with the principle of fairness and justice on one end and on the other hand the pressing issue of nation building and social-economic reforms and aspiration. Sir B N Rau in his concluding remarks suggested that, a wise step would be to

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<sup>48</sup> Austin, *The Indian Constitution: Cornerstone of a nation*, 110.

<sup>49</sup> *Ibid.*, 105 & 113.

<sup>50</sup> *Ibid.*, 109.

adopt a middle path by aligning ourself with the provisions of Irish constitution, which gives an elbow room for certain rights to be regulated and constrained by the “principle of Social Justice.”<sup>51</sup> The idea of social justice and national integration became two important tasks of Indian nation-state which also transformed the meaning and interpretation of due process in India.

When the constitution finally came into full force the provision of due process of law came to be primarily associated with safeguards of individual liberty and preventive detention. Indian state being a socialist state and economy being mixed-economy, right to property was almost totally constrained by legislative action. The prevailing politics and social aspiration of that era overwhelmingly influenced the ideas of fairness and justice whereby social justice and economic freedom itself became a touchstone of ideal justice and state security (stability being imperative for social reform) for achieving public common good. In this sense due process of law as rule-of-law formalism looks to be bypassed as a mechanism but a careful reading and interpretation of Indian polity and functioning of Supreme Court suggests that due process of law as the rule-of-law mechanism has evolved as an ‘signifiant mechanism’ in securing individual liberty and in constraining the arbitrary functioning of the government.

However, the conflicting debates and discourse over due process of law, after the commencement of Indian constitution in 1950, entered into Supreme Court of India and has continued till date, proving John Locke right that dynamics of any law changes with time and if any rule-of-law formalism is there, just for the sake of it, without responding to the changing aspiration of the society, it must be taken off the rule book.<sup>52</sup> The due process of law is not a fixed mechanism, as it evolves in time and context. The evolution of function of any law does impact its form. Similarly, the ‘form and function’ of due process of law as rule-of-law formalism has evolved over the period of time, responding to its polity by incorporating in it, its social and economic aspiration. At the same time it has also worked as the instrument of morality for the righteous conduct of state action. The evolution of due process from its ‘pure form’ of due process as in the Gopalan era, where there was restraint on executive action but not for legislative action, to the Maneka Gandhi era of ‘procedural due process’ in 1970s, where ensuring the fairness of procedure of deprivation was the task of judiciary to late 1980s time of ‘substantive’ due process of law

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<sup>51</sup> Ibid., 110.

<sup>52</sup> Singular Jr., “Of Form and Function: Lockean Political Philosophy and Mass Tort.” 888-919.

in which judiciary has gone on to see if the law itself being fair or not, for example the Naz judgement, is a classic case of ever changing nature of due process of law, informed by politics, society and economy of any nation-state.

## **EVOLVING AXIS OF DUE PROCESS OF LAW**

This section deals with the different axes around which the debates on due process of law have evolved in post-colonial India. Three different axes have been broadly identified to understand and interpret the conception of due process of law. First, the 'normative axis' of the due process of law tries to spell out the abstract idea of justice and fairness in a collective sense, that, which the due process of law as a rule-of-law formalism aspires to achieve through constitutional means. Secondly, the 'political axis' relates to dominant theme of social and political aspiration that the due process of law would address. As the major concern of due process is about the protection of individual autonomy and freedom but, government at the time of independence and even today has another important function of securing political, economic, and social aspiration of its citizen, which is primarily through redistributive justice, the major question that popped up has been "How to balance between abstract notion of justice and fairness, and nationalist goal of political and economic importance?" Finally, the 'institutional axis' delineates on the law that is a operational part and mechanism that is State apparatus, has been functioning in upholding the true spirit of justice and fairness. Here, the role of Supreme Court would be interpreted in 'institutional anchoring' of the conception of due process of law in Indian polity and the result of 'institutional imagination, in limiting and liberating the due process of law as 'form and function' of rule-of-law formalism.

### **A. Normative Axis**

The very intent of formalising the conception of due process of law in India is to try and achieve the idea of justice and fairness in a collective sense. In our constitution, individual rights and freedom has been considered as fundamental rights which cannot be violated and are 'justiciable' in the court of law, although qualified with 'reasonable restriction', notable being Article 19 of the Constitution which protects the freedom of speech and expression. However, Article 21 is constitutional expression of

due process of law in India, which reads as: “No person shall be deprived of his life or personal liberty except according to procedure established by law.” According to Austin<sup>53</sup> the debate about due process of law and liberty in India was primarily about ‘Preventive Detention and acquisition of property by the state’ as the word ‘property’ was deliberately removed from the final draft by constituent assembly. Nevertheless, people were given some respite by addition of Article 22, which provided for elaborate procedure of detention and rights of detainee in the face of preventive detention. The provisions of preventive detention were considered important, in the light of public security and few in the assembly could attack the provision of preventive detention. However, there were legitimate concerns regarding the misuse of the preventive detention clause by government machinery, infringing upon the fundamental rights of the citizens.

When India got freedom from colonial power and was writing her constitution, the aspiration and concerns of the people were different during its inception which could be aptly tapped from debates of constituent assembly debates. The important goals that the nation as political entity had identified for herself, in the words of Austin, were the goal of democracy, national unity and social revolution.<sup>54</sup> In my opinion, these three goals of national unity, democracy and social revolution, presented themselves as something which became pre-requisite for achieving the abstract goal of fairness and justice in a collective sense. In this sense the normative axis of ensuring the practice of due process of law not only protected the individual freedom by constraining the arbitrary power of the government but also expanded the mandate of the government for taking up the task of the redistributive justice and public good.

## **B. Political Axis**

The political axis of due process of law measures the differing themes of political, social and economic aspiration which quite apparently became the pre-requisite for realising the ideals of fairness and justice. In political and social realm they intended to achieve national unity, democracy and social reform, to better the condition of the

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<sup>53</sup> Austin, *The Indian Constitution: Cornerstone of a Nation*, 106.

<sup>54</sup> Austin, “*The expected and the Unintended in working a Democratic Constitution*” 320.



Indian masses. As these goals were inseparable, Austin, called it as 'seamless-web',<sup>55</sup> which has to go hand in hand. However, very soon there emerged a situation which was directly in conflict with constitutional norms regarding fundamental rights of an individual. The right to freedom of expression was coming in the way of national unity, for example, appeal by S P Mukherjee for annulment of partition was laced with communal hatred.

The removal of the word property from the provision of due process of law created another dilemma. There emerged a conflict between the economic rights of the people and expected aspiration of the democracy and social revolution in tension with each other. The Supreme Court and High Courts had annulled various laws relating to abolition of Zamindari System under the provision of Article 31 of the constitution which states that "no person shall be deprived of his/her property, except by authority of law. It was also mentioned that compensation would be paid to a person whose property has been taken for public purposes." The Government was finding it difficult to settle the refugee problem which was an outcome of the partition. To which Indian state responded with another amendment which shielded the laws relating to acquisition of property out of the scope of judicial review, which was taken to another level during the tenure of Indira Gandhi by passing the 42<sup>nd</sup> Amendment of the constitution.

However, as the Indian state moved forward in its quest of securing national unity and social revolution, the government was constrained by the 'low state capacity'<sup>56</sup>, which also has had bearing on interpretation and evolution of due process of law India. Low capacity implies that the state does not have enough resources to address the grievances of its citizens, which is also manifested in the low capacity of the institutions including the courts. The political blockade arising out of regional aspiration, interest groups, opposition parties, at times constrains the enactment of suitable legislation. Many times, a party in government tries to play the 'cultural and traditional' card to stop the progressive legislation for electoral gains like in the case of 'Naz judgement' and 'prohibition of child marriage' government painted itself in the bad light by relying on the pretext of the tradition and customs.

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<sup>55</sup> Ibid., 320.

<sup>56</sup> Choudhary, Khosla and Mehta, "*Locating Indian Constitutionalism*," 08.

Low state capacity also forces the state to take alibi of national security in curbing the individual rights and freedom which has also hitherto constrained the evolution of Indian political culture into an active political culture. The caste, class, race, regionalism and propaganda still dominates the Indian political discourse. Amidst all this what has happened is that courts have assumed the role of mediator between the government and the people. Substantive interpretation of constitutional provision looking into the fairness of law itself is the product of Supreme Court asserting its institutional autonomy and constraining state and politics in its arbitrary functioning.

### C. *Institutional Axis*

The evolution of due process of law in Indian polity is the result of historical institutional imagination as the court became the sole interpreter of the Constitution, it came upon the court to uphold the true spirit of due process of law. The institutional axis looks at the functional interplay between the law that is an operational and mechanism that is the state apparatus and role of judiciary in upholding the the spirit of justice and fairness in defending the individual liberty from any government interference. Although, with some hesitation- in Gopalan era<sup>57</sup> court opted for pure form of due process by denying the petitioner fundamental rights of safeguarding from arbitrary arrest. And during the emergency era, judiciary toed the line of executive, where the State and politics was in tandem with populist rhetoric of party in power.

Nevertheless, the court in order to save its own autonomy and dent it had suffered during emergency era, had a very progressive interpretation of due process in the Maneka Gandhi case.<sup>58</sup> Emergency era had also taught the court that if not intent than definitely content and text of the constitution was being eroded in prevailing political discourse. So, the task before highest judiciary was to read and interpret the constitution in its full imaginary spirit. By imaginary spirit I mean to signify the role of judiciary, as Chandrachud<sup>59</sup> has elaborated it primarily of a constitutional morality of transcending capacity from a particular position and disagreement for the development of framework of common institutional life. Secondly, constitutionalism in

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<sup>57</sup> A K Gopalan vs State of Madras. 1950.

<sup>58</sup> Maneka Gandhi vs Union of India. 1978.

<sup>59</sup> Choudhary, Khosla and Mehta, "*Locating Indian Constitutionalism*," 02.

its intent has to be taken further by highest judiciary reflecting in its judgement a quest for global dialogue on law, tradition and values by being grounded in Indian norms and practices.

In late 1980s amid the constitutional tension that emerged between community and individual liberty like in the case for rights of minority community over educational institutions and reservation on the lines of caste and denial of freedom and liberty of women across caste and religion gave courts an overbearing project in responding to the question of liberty, rights and identity. From adopting the procedural due process of the law in Maneka Gandhi case in 1978 (involving confiscation of her passport, restriction on freedom of movement) which states that the procedures deployed in deprivation of rights are fair, just and reasonable to the era of substantive interpretation of the due process of law by checking if the law itself was fair, just and reasonable. Moreover, the politics of late 1990s also provided the institution - amidst poor executive and legislative functioning - an opportunity to emerge as the defender of democracy not just the guarantor of constitutional rights.

The ushering in era of 'Public Interest Litigation (PIL)' gave judiciary much legitimacy amongst the people and in return judiciary has also been accused of judicial over-reach. However, the recent conduct of judiciary over the issue of individual freedom and right to privacy has given much hope to the people in judiciary and the substantive interpretation of the law regarding the right to privacy has a deeper bearing on the functioning of the government. Although, there are instances where judiciary has toed the line of executive in restraining the individual freedom and choice, for example Supreme court judgement setting aside the verdict of Delhi High Court regarding the decriminalisation of Article 377 or for that matter tussle between judiciary and government itself, regarding the appointment and promotion of judges of high courts and supreme courts. This shows that our institutions are weak and institutional autonomy as the prerogative of the government whims and fancy has not done good to health of any democratic institution and has not received much attention which speaks very poorly about our democracy. As the weak institution leads more inequality in any society.

## DUE PROCESS AND DEMOCRACY: A CONCLUSION

The conception of due process of law in India has not simply remained the preconceived normative yardstick, nor also significantly distinct from the pure reasoning of law and politics but also informed by the reasonableness of taking into account the inner contradiction and coherence of social norms and traditions. This template of relationship between due process of law as rule-of-law formalism and democracy gives us an insight into the way law has moved out of the domain of legal-political domain into the arena of social norms and values in deepening of democracy. The relationship between due process of law and democracy could well be understood through the role of institutional anchoring it has received by the progressive and substantive reading of due process of law -let alone a legal precedent- in giving a voice to the soul of people either suppressed for long or constrained by the government interference.

The relationship between law and democracy that in turn shapes the constitutional doctrine could also be analysed through the '*idea of compromise*.'<sup>60</sup> According to the idea of compromise, a constitutional culture could be the subject of following types of compromise: First, a compromise between social forces and norms of legality, where an understanding of normative values, itself could be premised on the competing claims of the social force and reality. Secondly, compromise appears between competing claims and values, and, incommensurable values. That is the question of priority between individual rights or group rights.

Many times the compromise is part of our constitution itself. And finally, the compromise in judgement of suitability of law in a particular situation, where there might be different interpretation and assessment of law and its consequences. However, in the beginning of the Indian Republic, judiciary had interpreting the due process of law in its 'pure form' which means deprivation permitted through validly enacted law. There was no judicial imagination and concern for values of freedom and dignity of life, as displayed by the judgement in Gopalan case which was the first case of due process of law. Nevertheless, the political culture and dominant values also decides the way judiciary has taken its turn in Indian politics.

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<sup>60</sup> Ibid., 11.

However, the Supreme Court Judgement on '*Right to Privacy*' has gone beyond the realm of reasonableness in giving primacy to individual rights. Here, the interpretation of provisions of Fundamental Rights by court took the cognisance of all other mutually competing rights in deciding the right to privacy which is source of individual autonomy and freedom of choice. This is all happening as the routes of Indian democracy have deepened over the period and judiciary has also moved out of the shadow of a just interpreter of law to an institution being equally informed and aware of social and political nuances.

The role of Public Interest litigation (PIL) - an elbow room created by judiciary for taking up on itself the role of executive and legislature - in giving hope to the masses in democracy, has been the legal creativity of highest judiciary, although for right reasons, many times accused of judicial over-reach. So, the journey of due process of law has been very contextual and creative in a sense that scrutiny of a substantive legislation is in itself a substantive exercise in deciding the content and intent of fairness and justice. In the words of Dr. Ambedkar, the idea of constitutional morality must not be understood as binary between normatively, and pure legal and political. There must be room for valid public criticism and scrutiny and the need to have suitable conditions for it. This is a direction towards the need of conversation and dialogue between law and legality for an informed political culture which would in turn make our legal practice more reasonable and creative in its judgement. The conversation between law and democracy will also help situate laws into our social norms and values.

## CHAPTER TWO

### DUE PROCESS AND INDIVIDUAL LIBERTY

#### INTRODUCTION

The story of due process of law in India as a legal principle started with the inception of Indian state during the course of constitution writing, when for the first time it was advocated that the clause 'due process of law' be incorporated in the Indian constitution, as it exists in the US constitution. The classic statement: "...nor shall any person...be deprived of life, liberty, or property without due process fr law; nor shall private property be taken for public use without just compensation," is the result of fifth and fourteenth amendments of the US constitution. The move to incorporate due process of law seemed valid, emanating from the undercurrent of national movement for freedom and dignity, accompanied by social and economic independence.

The recommendation of Advisory Committee on Fundamental Rights in Clause 9 states that "No person shall be deprived of his life or liberty without due process of law."<sup>61</sup> In drafting committee, however, the words 'without due process of law' were replaced by the words 'except according to procedures established by law', accompanied by the half-hearted explanation - half-hearted because there was no consensus on what would be the suitable content of due process in Indian context and even Dr. Ambedkar was not sure about its final content- that the phrase 'according to procedure established by law' is more specific to the Indian polity, making a departure from US conception of substantive due process of law. So, Article 21 (originally clause 9), as it was adopted, reads as follows:

*"No person shall be deprived of his life or personal liberty except according to procedure established by law"* a deliberate exclusion of the word 'property' unlike US. This deliberate exclusion of property from the list of justiciable fundamental rights only shows the

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<sup>61</sup> Rao, *The framing of India's Constitution: Select Document*, Vol 2.

prevailing political current of that time which tilted in favour eliminating zamindari system and equitable distribution of land resources and planned economic growth.

This omission has much to do with the suggestion of eminent jurist Sir B. N. Rau, after his meeting with Justice Felix Frankfurter of USA, who recommended that Indian state would be better served if they were able to avoid the insertion of the term 'due process of law' because in the USA, this had led to dismissal of many social welfare scheme by the federal court<sup>62</sup>, suffocating the federal government in reaching the masses as it was trying to cope with the consequences of 'great economic depression.'

Further, the deliberate omission of the word 'due', from Article 21, gives the impression that the court could not look into the justiciable aspects of the 'law' whether, it is reasonable or not. And, moreover, constrained by the insertion of the word 'procedure' and inclusion of the word 'established' clearly manifested the legislative expression of justice as foregrounded in Indian constitution under the Article 21. The due process of law in Indian constitution tilted towards the Japanese conception of procedural due process as mentioned in Article 31 of Japanese constitution.<sup>63</sup> Article 31 of the Japanese constitution states that "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." Although omission of due process from Japanese constitution is provided with other safeguards in the form of Article 32, 34 and 35.

However, the journey of the due process of law as a legal principle has come a long way by adopting some version of 'procedural due process' where the Article 21 of the Indian Constitution was interpreted textually to 'substantive due process,' when the judiciary is looking at the fairness and tenability of law itself in protecting the life and liberty of an individual. Some of the recent judgements - of Delhi High Court in the Naz Foundation case<sup>64</sup> and the Supreme Court judgement in what has come to be known as the Privacy Judgement<sup>65</sup> - where the courts categorically tested the merits of specific laws on the basis of Article 21 by applying the principle of substantive due process. This shows that the courts in India have steered away from the original intent of Constituent assembly that had consciously deleted the term 'due process of law'. While the justification for moving

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<sup>62</sup>. Federal court's action in US is famously referred as Lochner era.

<sup>63</sup> Austin, *The Indian Constitution: Cornerstone of a Nation*, 105-144.

<sup>64</sup> Naz Foundation v Govt. of NCT of Delhi. 2009

<sup>65</sup> Justice K. S. Puttaswamy (Retd.).. V. Union of India. Aug 24, 2017.

towards due process of law have been specified in particular cases, the definitive meaning of the term has been illusive and contested.

This chapter has following three descriptive objectives: Firstly, to define the meaning of due process of law in Indian legal-political domain. Secondly, to discuss the role of Constitutional Assembly Debates (henceforth, CAD) in accepting and abandoning the principle of due process of law and subsequent interpretations and lift over by the Supreme Court in India, primarily, in defending the individual liberty and provision of preventive detention. The subsequent lift over and evolution of due process in Indian legal-political domain is the result of creativity of institutional imagination. In upholding the rule of law principle, due process has given the Court necessary impetus in defending the individual freedom against the State.

The substantive interpretation of due process in Naz Foundation case and Privacy Judgement has been a radical departure from the judgment in A. K. Gopalan case, which was the first case of due process that came to the Court in 1950 and judiciary interpreted the provision of Article 21 textually and without looking at the fairness of the law itself. The role of judiciary has been prominent in giving life to the due process principle in post-colonial India as it entered the Court from Constituent Assembly. The chapter also discusses the relationship between Indian State and Supreme court as an institution responsible for protecting individual liberty by upholding the Principle of due process of law and how adhering to the principle of due process of law reflects as aspiration for 'Stateness'<sup>66</sup>. Stateness, as discussed by J.P. Nettl, refers to the idea of state that should not be confused with 'state' as embodiment of institutions and public authority. Stateness intends to capture the imagination of the citizens to constitute themselves into a state that permeates the entire constitution which was lacking at the birth-point of Indian State.

The central theme of this chapter is that the doctrine of due process of law in Indian legal-political domain has blossomed through the institutional imagination and credit goes to Supreme Court of India that has responded to the changing socio-political dynamics of the society. Mapping the forms and functions of the institutional imagination, this chapter will also discuss the three forms of the due process<sup>67</sup> which have evolved through institutional

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<sup>66</sup> Nettl, "*The State as a conceptual Variable*," 559-92.

<sup>67</sup> Abhinav Chandrachud has put forth the proposition that there are mainly three forms of the due process of law in Indian legal-political discourse.



imagination. And finally we will conclude by shedding lights on the relationship between law and politics vis-a-vis Article 21 of the Indian constitution.

## DEFINING THE DUE PROCESS OF LAW

The 'due process of law' as a conceptual category has remained contentious and contested in its meaning and definitions. The advisory committee on fundamental Rights of the Constituent Assembly recommended in clause 9: "No person shall be deprived of his life, or liberty without due process of law."<sup>68</sup> This is identical with the amendment fourteenth of the US constitution. It read: "*nor shall any state deprive any person of life, liberty and property without due process of law*"

As discussed earlier, Article 21 (clause 9 of the draft constitution) of the Indian constitution differed with the US conception of due process in three fundamental ways: Right to 'property' was not given due process protection, second, right to 'liberty' was qualified with the term right to 'personal liberty' and, finally, the words 'due process of law' were replaced by the words 'procedure established by the law', influenced by Article 31 of the Japanese constitution. However, the Article 22 was added to provide the procedures safeguards from arbitrary detention by the State.

The 'due process of law' unlike other legal principle has no fixed meaning or definition rather it has evolved in responding to the dynamics of social-political changes of different political system in different temporal-spatial dimensions. Not being limited to any fixed term and definite meaning, due process has always been an analysis about just and free treatment and respect for 'fair, just and reasonable' procedure. Nevertheless, whatever the meaning of the term 'due process of law' may be, when the first case of due process of law came to the court, that is A K Gopalan v State of Madras, it was interpreted as a restraint on the executive power, but never on the legislative arms of the government. This has been characterised as the 'pure form'<sup>69</sup> of the due process of law, which was the real intentions of the framers of the constitution, that is, that a person's life and personal liberty

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See Chandrachud, "*Due Process*" 777-793.

<sup>68</sup> Rao, *The framing of India's Constitution: Select Document*, Vol 2.

<sup>69</sup> Three categories of the due process of law as outlined by Abhinav Chandrachud. Chandrachud has put forth the proposition that there are mainly three forms of the due process of law in Indian legal-political discourse. See Chandrachud, Abhinav, "*Due Process*," 777-793.

could be curtailed if the curtailment proceeded within the limits of or as per validly enacted law.

Secondly, in 1978, the supreme court of India in *Maneka Gandhi v Union of India*, adopted the notion of 'Procedural due process'<sup>70</sup> which implied that individual life and liberty could be curtailed as long as the procedure by which the curtailment is taking place is 'fair, just and reasonable.' This was a move closer to the inclusion of Article 21 in testing the merits of clause of due process of law which was intentionally missing in the A K Gopalan case. The move eventually led to the 'Substantive due process of law'<sup>71</sup>, has been witnessed since the 1980s. This has been seen especially in 'Naz Foundation' judgement delivered by the Delhi High Court and the recent 'Privacy Judgement' by Supreme Court of India. Both the judgements have interpreted due process of law by testing it on the yardstick of Article 21, where the court looked into the substantive provision of the law themselves, to see whether it was 'fair, just and reasonable.' Moreover, the due process which was strictly speaking just procedural in nature has come to acquire substantive concept in the hands of Supreme Court which puts constitutional restriction not only on executive power but on legislative power as well.

The due process of law makes the State compliant to rule of law and provides a common balancing thread between State authority and individual rights. Moreover, liberal interpretations of Article 21 in consonance with Article 14 and 19 has enlarged the scope of the due process of law in generating other specific practice, procedure and rights. The Indian conception of the due process has evolved both in and out of judicial life and has permeated into the institutional imagination and practice of higher law. But it is not the other branches of the government but judiciary, which is the final interpreter of the constitution that has been empowered to take note of the actions of the executive and legislature whether it is in accordance with set constitutional provisions and in tune with principle of the due process of law.

The principle of the due process of law has been equated with the concept of natural rights in the Privacy judgment<sup>72</sup>. The potential flexibility and potent richness of the due process of law has provided the judiciary with opportunity to interpret and re-interpret its provision

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<sup>70</sup> Ibid., 777-793.

<sup>71</sup> Ibid., 777-793.

<sup>72</sup> Justice K. S. Puttaswamy (Retd.).. V. Union of India. Aug 24, 2017.

in the light of value of the respective social - political norms and practices. For example, the Apex court recently pronounced that the freedom guaranteed under Part III of our constitution and right to life and personal liberty under Article 21 also intrinsically provides and protects the 'Right to Privacy'<sup>73</sup> which is nowhere mentioned in the constitutional text.

## FROM CAD TO THE SUPREME COURT

The story of the due process of law in India started with the debates in the Constituent Assembly. Its treatment in the Constituent assembly, according to Austin,<sup>74</sup> was a well-balanced treatment of the conflict between on one hand the principle of the due process of law implying the abstract idea of fairness and justice as an intrinsic desire of every individual and on the other hand the mammoth task of national integration, democracy and social revolution and national security for common good. It appeared that the stability of the state became pre-requisite to the abstract idea of freedom and liberty in pursuit of common public good. What Austin has described as the 'seamless web' - a pursuit of strands of unity, democracy and social revolution. And these goals were indispensable in national development and in betterment of larger mass of the citizens.

Sir B N Rau, leading constitutionalist assisting and advising the Constituent Assembly, in his letter suggested that it would be wise to adopt the middle path where certain rights of the individual would be constrained by the principle of social justice as in the case of the Irish constitution.<sup>75</sup> Sir Rau was advised by US Supreme Court judge, Justice Felix Frankfurter that newly independent nation-state of India would not be well served by the adopting the provision of 'substantive due process of law'<sup>76</sup> (as it existed in the USA ) in constitution as it would come in the way of progressive and promising social legislation because in the USA, coming out of the impact of Great Depression, many of the social legislation were turned invalid by the court on the merits of provisions of Due process of law. However, in a radical departure in *Nebia V. New York* (1934)<sup>77</sup> US court gave primacy to collective rather than to Individual by over ruling the previous judgment of *Lochner V.*

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<sup>73</sup> Ibid. Privacy judgement.

<sup>74</sup> Austin, *The Indian Constitution: Cornerstone of a Nation*, 105-144.

<sup>75</sup> Ibid. Reference to Article 43 (2) 1 and 2 of the Irish Constitution.

<sup>76</sup> Rau was primarily concerned with the substantive provision of the due process of law not procedural due process of law.

See Austin, *The Indian Constitution: Cornerstone of a Nation*, 105-144.

<sup>77</sup> *Nebia Vs. New York*, 291 US 502 (1934).

New York (1905)<sup>78</sup> although for US polity it was a radical departure but for the Indian State Article 21 is the case of obvious context.<sup>79</sup>

The debate, discussion and deliberation in the constituent assembly about the provisions of due process of law has largely been the story of shrinking and fading of due process as constitutional means to protect individual liberty and personal freedom at the doorstep of legislative branch of the government for the purpose of economic and social prosperity so that the state could by all means pursue the goal of social peace, economic prosperity and political stability. According to Austin, finally the tale of the due process of law and individual liberty as it emerges from constituent assembly debate was the provision for preventive detention. The context of inclusion of preventive detention provisions appear to have been the prevailing communal tensions in North India and the catastrophe of Gandhi's murder. These were the prime movers as Dr. Ambedkar himself asserted that some measures for preventive detention have to be kept to contain the 'present circumstances in the country'.<sup>80</sup> The retention of preventive detention in the constitution of independent India was, however, accompanied with the insertion of the Article 22 putting in safeguards that should be followed in case of curtailment of Individual freedom under the provisions of preventive detention.

After the commencement of the constitution the principle of the due process of law came as follows: "No person shall be deprived of his life or personal liberty except according to procedure established by law."<sup>81</sup> It was in this trimmed and qualified form that it provided a repository to the Supreme Court to protect individual rights. Now it was contingent upon the court to protect the freedom of Individual, although, the legislature were free to decide by the dint of having authority to legislate over the degree of curtailment of freedom. The procedural form of due process which came into existence at the time of commencement of our constitution was a restriction on the power of executive branch of the government but not on the legislature.

Analysing the practice and functioning of the judiciary in the formative years of Indian state, it becomes clear that the judiciary was adhering to the principle of "political

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<sup>78</sup> *Lochner Vs. New York*, 198 US 45 (1905).

<sup>79</sup> Nussbaum, "SEX EQUALITY, LIBERTY, AND PRIVACY: A Comparative Approach to the Feminist Critique" 243.

<sup>80</sup> Dr. Ambedkar in CAD. See Austin *The Indian Constitution: Cornerstone of a Nation*, 139.

<sup>81</sup> Rao, *The framing of India's constitution: Select Document*, Vol 2.

questioning<sup>82</sup> by giving way to the overarching goal of democracy, national security and social revolution. Defining political question doctrine in a traditional sense gives us a circular definition that is, “every question about official action which is not a judicial question is a political question in the sense that it is a question that is to be decided by one or the other of the political departments of the government, or by the electorate.”<sup>83</sup> However, Jesse Choper<sup>84</sup> defines ‘political question’ doctrine as “*a substantive ruling by the Justice that a constitutional issue regarding the scope of a particular provision (or some aspects of it) should be authoritatively resolved not by the Supreme Court but rather by one (or both) of the national political branches.*”

Out of many criteria that Choper applies to highlight the aspects of doctrine of political questioning; two are very contextual to understand the very working of Indian Supreme Court. One that is ‘textual commitment’<sup>85</sup> principle to the doctrine of political questioning and second one is the ‘Functional Approach.’<sup>86</sup> Textual commitment principle involves the allocation of power among the different arms of the government, where by the Court should stay away from deciding any question which has been explicitly interpreted as the domain of other political department especially the elected one, in a sense applicability of doctrine of ‘separation of power’. Secondly the ‘Functional approach’, although it adheres to the principle of textual commitment, it goes further on elaborating functional role of judiciary - which rests on the notion of ‘Institutional competence’. It delineates the distinction between the functions of constitutional structures - that is questions relating to federalism and separation of power and those of individual rights and freedom but it is the question of individual rights and freedom that concerns the conception of institutional competence the most. And it is the question of individual rights where the courts should be adamant to consider it as non-justiciable although it may concern the question of purely textual commitment in political question doctrine.<sup>87</sup>

So, understanding the functioning of the principle of due process of law in our legal-political domain since its inception could be analysed through the doctrine of ‘political questioning’. Political question doctrine in its textual commitment form was the abiding

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<sup>82</sup> Roots of ‘political question’ doctrine could be traced to the Supreme court of USA in Marbury v. Madison. However, it got aptly defined in Baker v. Carr case.

<sup>83</sup> Shapiro, *Law and Politics in the Supreme Court: New approach to Political Jurisprudence*, 176.

<sup>84</sup> Choper, “The Political Question Doctrine: Suggested Criteria,” 1-67.

<sup>85</sup> *Ibid.*, 1-67.

<sup>86</sup> *Ibid.*, 1-67.

<sup>87</sup> *Ibid.*, 1-67.

principle for the court to decide the issue of the cases dealing with the provisions of due process of law and individual liberty. This is evident in what Austin called the 'seamless' web.<sup>88</sup> This seamless web comprises the strands of unity, democracy and social revolution, whereby any attempt to weaken one or to over-emphasise another would only disturb another strand in the web that in turn may disrupt and become detrimental to the unity of the web.

The strands of unity, democracy and social revolution were also thought to be the three pillars of socialism, secularism and democracy. In this scenario of push and pull it was the common consensus that the political arm of the government would have the upper hand to pursue the goal of common public good. The constitution of India as it emerges from colonial experiences had had its task cut out to secure its citizen the freedom and dignity and decided to give the union of India a stronger state in a quasi-federal setting. The very idea of individual freedom, liberty and fairness of justice was to be contingent upon the equality and parity of economic and social conditions of the Indian masses. Although the abstract political rights of freedom and liberty accompanied by the constitutional guarantee of fairness of justice was made part of political-institutional framework, but to realise its potential in daily life was a bigger challenge owing to the huge material and psychological gap that still exist in Indian society.

So, the goal ahead of national leadership was to secure its citizens their immediate need of economic and social parity while simultaneously working upon the ultimate goal of deepening of democracy and national unity. It is also to be noticed that to enjoy the fruits of freedom and dignity of life there must exist suitable material conditions. Here it becomes apparent that to pursue the strands of unity, democracy and social revolution, the Indian state chose to speak in one voice. And that is the reason all the arms of the government were in an alignment to pursue the common good and the issue of the due process of law and Individual freedom were constrained by the principle of social justice.

The first case that came to the court concerning the constitutional interpretation of the due process of law was A K Gopalan case. In A K Gopalan v State of Madras<sup>89</sup> the issue before the Supreme Court was to decide the merits of the Article 21, Preventive Detention Act of 1950, argued the petitioner, did not provide any procedural safeguard against

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<sup>88</sup> Austin, "*The expected and the Unintended in working a Democratic Constitution*" 320.

<sup>89</sup> A K Gopalan v State of Madras, AIR 1950.

arbitrary detention and hence denial of personal liberty. However, the Court in its majority judgement textually interpreted that the due process of law provision under Article 21 did not prescribe any restriction on the legislative arm of the government where by the denial of liberty and freedom is sanctioned by the validly enacted law.

Textual commitment to the Principle of the due process of law was widely coinciding with agreed norms of principle of separation of power amongst different branch of the government in the US jurisprudence as well. Where the political question doctrine as it emerged from the *Baker v Carr* judgement leaves it to the political branch of the government to decide the question of politics. Nevertheless, the procedure that the political question doctrine adhere to is political and another implication of the doctrine of political questioning that is based on the 'functional approach' of the political questioning reveals that procedure in interpretation of due process of law is political and whatever be the limitations on the institutions the issue of individual liberty and rights should not be left entirely for the executive or legislature to decide. Rather, the court should take the lead in ensuring the fairness of justice through institutional mechanism. The functional approach of political question doctrine is a move away from textual commitment to the constitutional provisions in cases deciding the issue of individual liberty, rights and freedom where the judiciary as an institutions is tasked with protecting the individual freedom and rights. It cannot leave it entirely upon the executive or legislature to decide the cases of liberty and rights although at times it might be the aspects of political questions.

The Indian courts in late 1970s, for a variety of reasons, and primarily to restore its creditability which had suffered an unprecedented dent during the emergency era, enlarged the scope of due process of law. The increasing interpretation of due process of law in its procedural form had two important impacts on Indian polity. One, it gave individual freedom a new lease of life as the scope and merits of Article 21 protecting life and liberty was to be decided on the basis of whether the procedure established for deprivation of liberty were 'fair, just and reasonable.' And secondly, it was also an attempt by the judiciary to improve and establish 'institutional competence'. Improving the institutional competence in case of Indian Supreme court has not primarily been about adhering to the principle of rule of law or merely interpreting constitutions. Rather judicial action has been more political in a sense that Court as an institution has responded to the changing social political dynamics by entertaining the question of political and economic

sphere, which is otherwise the domain of executive and legislative branch of the government.

Special innovation of 'Public Interest Litigation' (PIL) by the court is a case in point. While it has given the court a much need acceptance in public discourse. But there has emerged an influential literature in recent years which had asserted that while deciding and entertaining issues under Public Interest Litigation, the court has crossed its constitutionally defined boundary. Upendra Baxi has termed alleged judicial excessive role as 'chemotherapy for the carcinogenic body politics' while others have taken it as a matter of concern.<sup>90</sup>

After all its the judiciary which is responsible for interpretation of the due process of law and broader implication and the liberal interpretation of the clause of the due process of law also encompasses the utility of Article 14 and 19, while deciding the case of curtailment of Individual liberty and rights. Supreme Court as an institution of public faith has come a long way and in many ways has trespassed the question of political questioning by interfering with executive and legislative functioning. Anuj Bhujwania argues that the Supreme Court in the aftermath of the Emergency trying to undo the dent it had suffered because of its proximity to narrative of political establishment started using the rhetoric of speaking in the name of 'the people' by projecting itself as the last well-wisher of the oppressed and marginals. This rhetoric of court speaking in the name of 'the people' only got strengthened in coming years of coalition politics, cementing its transition to a 'people's court.'<sup>91</sup>

## **STATE, STATENESS AND DUE PROCESS**

The founding members of our country opted for the European model of the 'State' for primarily two reasons. first, because of the colonial experience and secondly, they were apprehensive about the role of political parties if they could act independently of class, caste, religion and regional petty interest to give newly born Indian nation-state an ideological orientation which was necessary to carry out the goals of unity, democracy and social revolution. It was also identified as the basic value of any political community in

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<sup>90</sup> Rajamani and Sengupta, "*The Supreme Court*," 80.

<sup>91</sup> Bhujwania, *Courting the Public: Public Interest Litigation in Post-Emergency India*, 28-29.



relation to whether power and authority is to be exercised in pursuit of common public good.

Like the case of European model of the state, purpose of the Indian State was also expected to give society a sense of purpose and direction, while transcending the partisan political interest through proper constitutional codification and political forms and functions that institute norms and values considered good for the whole of the community. Although in a parliamentary form of democracy as the constitution adopted the British model of bicameral parliamentary form of government, it is the political parties which get the advantages of calling the shots but very consciously the framers of Indian Constitution decided to codify the substantive role of the state in the constitution itself thereby denying the political parties their due role of norm-setting in a parliamentary form of democracy.<sup>92</sup>

However, it is very difficult to find the value of stateness in Indian tradition, J. P. Nettl defines stateness as the idea of the state which should not be confused with 'State' as it means institutions and public authority. It is sum of all constitutional provisions which reflects the imagination of its citizen in pursuit of individual aspiration and common public good.<sup>93</sup> Idea of 'Rajdharm' as a guiding force for directly elected village panchayat for the model of governance advocated by Gandhi was not accepted as adequate to give Indian State the vital component of 'Stateness', so it was the idea of European model of State with codified role of State in giving direction to the society in pursuing the impartial goal of community good through properly formed political rules and conventions that gave Indian constitution the idea of 'Stateness'.<sup>94</sup>

## RE-FRAMING INSTITUTIONAL IMAGINATION

The institution of Supreme Court which in creatively interpreting the constitution especially the provisions of individual rights and freedom has provided the much needed stateness to the constitution. The role of judiciary has only expanded in the recent past, especially the advent of 'Public Interest Litigation' (PIL) has given the judiciary enough

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<sup>92</sup> Sudarshan, "*Stateness' and Democracy in India's Constitution*," 163.

<sup>93</sup> *Ibid.* pp 162.

For more details see J. P. Nettle, 'The State as a conceptual Variable', *World politic*, vol. 20 (July 4, 1968) pp. 559-92.

<sup>94</sup> *Ibid.*, 162.

leeway to come in contact with larger mass of the citizen and reflecting the imagination of the people in its judgment while upholding the rights and freedom of an individual against the State. As the crux of the PIL has been the extension of justice to the grassroots and making it more accessible to the economical disadvantaged groups. However, institutions as a structure and mechanism of order, which anticipate, create, apply and enforce the laws. These institutions also govern the behavior of the individual in a given social, political and legal system towards their own interest and community. The role of any institution could be normatively analysed as: One, creating and sustaining the fair rules of functioning for the basic institutional structure and Secondly, guiding citizens actions in accordance with these fair rules within the existing institutional framework, in order to enhance institutional credibility.

The role of Supreme Court as an institution in India has been very dynamic. It has almost touched every aspect of Individual not only as an institution primarily responsible for interpreting the constitution and the defender of the individual liberty, freedom and rights but also by extending and interfering in functions of the other institutions for which it has been rightly accused of institutional over-reach. When we talk about the framing or re-framing of the institutional imagination then idea is not to defame, defend or dismiss the institution but to understand it and analyse through its forms and functions, therefore the desired goal of institutions could be achieved by its sound ideas and leadership. Supreme court as an institution is in a sense a social and political architect and that is the context in which it has to pursue its institutional goal and good of community.

However, society and politics is equally responsible for imagining and sustaining how any institution would serve institutional purpose for either individual interest or community welfare. There is a need to have a realistic understanding of institutions as they do not themselves emerge or persist. It is created, sustained and its future is imagined and re-imagined for the purpose it has to serve. In order to re-frame and recover and then cultivate an institutional imagination, we should figure out and understand the source of power of institutions and its relationship to the citizen and ideas. Institutions are given part of our social-political set up, designed to promote and contribute to the pursuit of common good the main contributing factor to our formation and detrimental to when organised around other than the common good.

So, a realistic understanding coupled with the social and political architecture that we share and commit ourselves, helps us create an institutional imagination. The cultivation of institutional imagination and its propagation would be a simultaneous task of reflection and reimagining our political wisdom, received and rooted in our prevailing political culture. This also gives us a sense that thinking something institutionally for either individual or common good would also mean protecting the existing institutions keeping in mind institutionalist plurality and complexity seriously. So the issue is not whether or not we need to have institutions, rather the question is which ideas will shape them, what is the nature of political culture, who will take responsibility for them and to whom they will serve?

Of the various ideas and imaginations that shape and anchor the functioning of the Supreme court, one very important idea is the principle of due process of Law. It was discussed and debated in the Constituent Assembly of India but was not part of the final Constitution the way it existed in USA. However, at present, the due process of law has become an important legal principle and an integral part of the legal and political discourse. Much of this has accumulated around Article 21 as a resource for the protection of individual life and liberty.

It is pertinent to emphasise that the journey of due process of law in India is the result of 'institutional imagination' primarily that of Supreme Court. Supreme Court through its various judgements in different political situations has interpreted the clause in a way to suit the changing aspirations of the society and to respond to political culture. Re-framing of court's institutional imaginations has been contingent upon the functioning of the Court on empirical basis. Empirical basis allows Court to interpret the laws not merely on its textual commitment but going beyond text to more of its functional approach whereby the court has not merely limited its domain to 'rule of law' but entered into domain of 'conflict management' otherwise the responsibility of political arms of the government. This re-imagination of the institutional functional has the most bearing on the principle of the due process of law.

## THROUGH THE JUDGEMENTS

The evolution of the principle of the due process of law in Indian jurisprudence from being a case of textual commitment to procedural due process to substantive due process is the result of creative historical imagination of the Supreme Court of India. The two important pull factors that provided the necessary impetus for this creative imagination of due process of law in India have been primarily: One, is the 'internal appetite' of the judiciary to come out of the initial tag of reluctant interpreter and defender of the individual rights whereby it committed itself to the textual approach in deciding the matters of individual life and liberty.

It was also within the broader understanding of the goal of newly independent India where the leadership had its task cut out whereby abstract ideas of life, liberty and rights were considered contingent upon the real gain made in economic life and social parity. Secondly, there was this 'external push' factor, coming in the wake of various judgement, for example, in ADM Jabalpur case<sup>95</sup>, where judiciary had failed the public conscience during the era of emergency by allegedly siding with the government in dealing with cases of Habeas corpus.

This external factor was also the reflection of changing political dynamics of the society. Democracy and democratic values have taken some roots in our society. Institutions have been trying to put in imprints of their own autonomy and amidst all this the principle of the due process of law which solely is the domain of the judiciary gave it a necessary pill of credibility by protecting the individual life and liberty, bringing courts more closer to the public. The creative imagination of the due process of law has also been a retreat from the original intent of the framers of the constitutions. Nevertheless, it could be inferred that the intent of the Constituent Assembly was conditioned by the prevailing circumstances of the newly independent nation-state taking its first step on the path of constitutional democracy and the creative re-framing of institutional imagination in interpreting the principle of the

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<sup>95</sup> ADM Jabalpur v Shivakant Shukla, 1976.

Also known as Habeas Corpus case. A bench of five judges decided that under Presidential order of emergency, rights of any individual to move any court for the enforcement of Article 14, 21, or 22 of the constitution would remain suspended and Mala-fide. There was this lone dissent by Justice H R Khanna, who opined that Article 21 is not the only repository of the rights to life and personal liberty and that the right to life and liberty was not the gift of any constitution, so even in the absence of Article 21, State can not deprive any individual of his life and liberty without the due process of law.

due process of law has been made possible through the seeding in of democratic values in our political- legal culture. Now I will elaborate upon three judgements to trace the evolution of the due process of law from being procedural to Substantive Due Process of Law.

**A. Procedure Established by LAW: A K Gopalan case (1950)<sup>96</sup>**

AK Gopalan was the first case involving the interpretation of the principle of the due process of law regarding the 'fundamental rights' that came to the Supreme Court. A K Gopalan, who was detained under the provision of the Preventive Detention Act and appealing in the Apex Court, argued on the merits of Article 21-while in detention- that the Preventive Detention Act 1950, did not provide the necessary procedural safeguard against arbitrary detention. Majority of the judges in the judgement preferred the textual interpretation of the Article 21 and were of the opinion that the 'procedure established by law' in Article 21 should not be interpreted in the spirit of 'natural justice' and the text and intent of the Constitution does not permit the Court to do so<sup>97</sup>.

So, 'procedure established by law' under the Article 21 was a check on the executive but not on the legislative branch of the government. Court was of the opinion that to bring in the American conception of the due process of law - although the 'procedure established by law' is derived from American due process and resembles with Japanese 'procedural due process' which was also influenced by American Due process - to interpret the procedure established by law same as the 'procedural due process of the law' would hurt the original intent of the constitution as expressed in Article 21.<sup>98</sup>

The majority of the judges were in agreement that the Article 21 does not imply any notion of procedural due process of law as in the case of USA if the legislature had validly enacted a law that is the 'procedure', is validly 'established by law' then Article

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<sup>96</sup> A K Gopalan v State of Madras, AIR 1950, SC 27

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

21 cannot be considered as infringed or violated. In this case the court simply abided by the textual intent of the law in question.

However, Justice Fazal Ali differed on the issue of interpretation of the 'procedure established by law' and commented that the phrase 'procedure established by law' was imported from the constitution of Japan and Japanese Constitution itself drafted it under American influence and in USA the prevailing practice was based on the 'procedural due process of law'. So, it might be said that the Japanese due process also reflected the same view as the word 'law' was typical in both 'procedural due process of law' and the 'procedure established by law'. Justice Fazal was also of the opinion that Article 21 of the Indian Constitution gave every one a right to be heard before being reprimed and the deprivation under Article 21 of the constitution should only be prescribed if the distressed party was given the following safeguards<sup>99</sup>: 1) a notice; 2) an chance to be heard; 3) an impartial tribunal; and 4) fairness of procedure.<sup>100</sup> But Justice Fazal Ali's dissent had no takers and the majority of the judges were of the firm opinion that Article 21 in Indian Constitution was not the same either in procedural or substantive sense and doing so would defy the original intent of the Constituent Assembly.

#### **B. Procedural Due Process of Law: Maneka Gandhi Case (1978)**

The Maneka Gandhi Case<sup>101</sup> was an departure from the earlier interpretation of Article 21. A Bench of seven judges in Maneka Gandhi v Union of India over turned the earlier judgement in Gopalan Case. The Maneka Gandhi judgement was a departure from court's earlier style of functioning in more of legal positivism and deference to parliament as in the case of British tradition towards a more activist role and bringing in the rules of due process of law. Maneka Gandhi case came to the court at a time when the Court was struggling with its own credibility because of its inability to protect the rights of Habeas Corpus of an individual. In ADM Jabalpur case<sup>102</sup> which is popularly known as Habeas Corpus case, in a majority judgement, the Supreme Court had struck down the earlier judgment of the Madhya Pradesh High Court which had ruled in favour

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<sup>99</sup> E. Wills, "From Treaties on Constitutional laws"

<sup>100</sup> A K Gopalan v State of Madras, AIR 1950, SC 27.

<sup>101</sup> Maneka Gandhi v Union of India. 1978 AIR 597.

<sup>102</sup> ADM Jabalpur v S. S. Shukla. 1976 AIR 1207

of the petitioner for the enforcement of fundamental rights during emergency. With the only dissent coming from Justice H R Khanna who was of the opinion that even though Article 21 was not the only treasure trove of the right to life and liberty, the state has no business to deny any individual his right to life and liberty without due process of law.

Although the constitution itself permitted the curtailment of life and liberty under Article 21 of the constitution but the experience of the Constitution had taught the Court the bigger lesson that it is all right to move beyond the textual commitment of the constitutional law for the greater good of the Society. However, according to Manoj Mate this was also the time the Indian Court was coming under the influence of the American legal System and what we witness in Maneka Gandhi case was the potent Americanisation of the Indian legal System which had its root in Habeas corpus and a similar case of 'Korematsu case'<sup>103</sup> in US Supreme Court. Both cases had had a similar fate ending in denial of basic individual freedom and are considered a blot on Legal history of respective countries.

In Maneka Gandhi case, her passport was seized within a week of being issued. She filed a writ petition in the court challenging the impounding of her passport without supplying any concrete reason. The complaint stated that the denial of her passport by the concerned authority was unreasonable and arbitrarily violating any rules of procedure under the provision of Article 21 of the Constitution. In the case, a majority of the judges pronounced that the life and personal liberty under Article 21 cannot be denied under any arbitrary procedure rather it has to be 'fair, just and reasonable'. It was also found that taking away someone's right to go abroad was the violation of the fundamental rights and undoing so the passport authority has to provide the valid reason and person must be heard before it.

So in a departure from Gopalan era what was intentionally missed, was now being taken into account that any curtailment of individual life and liberty has to be in tune with the want of 'natural justice'. The Maneka Gandhi Judgement also enlarged the scope of procedural due process by incorporating the provision of Article 14 and 19.

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<sup>103</sup> Korematsu v United States, 323 U.S. 214 (1944)

The Maneka Case became a land mark judgement in Indian jurisprudence and made an important statement that the 'procedural due process of law' is part of the Article 21 and natural justice.

### C. *Substantive Due Process of Law: Naz Foundation*

The proposition in the Maneka Gandhi case that the procedural due process of law is part of the Article 21 and it could be also inferred from Article 14 and 19 that a person's life and liberty could not be infringed without following the due process of law. The emergence of the principle of the 'Substantive Due Process of law' could only be considered as the necessary corollary in the evolution of due process of law. Since 1980s, Indian Supreme Court started examining the merits of Article 21 on the basis of whether the substantive provisions of the law in themselves are 'fair, just and reasonable'.

In Mithu judgement<sup>104</sup>- this was the first case to question the legal validity of section 303 of the Indian Penal Code- although the case involved was a procedural due process case but the inference could be drawn from court's reasoning that the substantive due process is very much part of the Indian constitutional law although the court struck down the substantive law. Chief Justice was of the opinion that "a savage sentence is an anathema to the civilised jurisprudence of Article 21."<sup>105</sup> So, it could be inferred that a 'savage' punishment imposed by any substantive law could reasonably be nullified on the merits of the Article 21, because "if a law were to provide that the offence of the theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21."<sup>106</sup>

The most important case involving the provision of the substantive due process of law has been the Naz foundation judgement<sup>107</sup> delivered by the Delhi High Court. The case concerned the merits of Article 377 which penalised the conduct of 'carnal intercourse against the order of the nature,' applicable on the Lesbian, Gay, bisexual and transgender community or LGBT community. However, the Court said that the Article

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<sup>104</sup> Mithu, Etc., Etc v State of Punjab. 1983 AIR 473

<sup>105</sup> Ibid.

<sup>106</sup> Ibid. Chief justice in his remark while pronouncing the judgement.

<sup>107</sup> Naz Foundation v Govt. of NCT of Delhi. 2009



377 “insofar as it criminalises consensual sexual acts of an adults in private” contravened the Article 21 of the Constitution.<sup>108</sup> It was a substantive law invalidated on the substantive ground on the merits of Article 21. But to its sad journey, the decision of the Delhi High Court was reversed by the Supreme Court which held that the ‘necessity of substantive due process’ had been “read through a combined reading of the Articles 14, 19 and 21 in Indian constitution...” that the substantive due process was a constitutional law “test’ under which a law has to be ‘just, fair and reasonable,” which involves question of “legitimate State interest and the Principle of proportionality.”<sup>109</sup> In delivering its judgement the Apex court accepted the logic of State interest which seem to have eroded the substantive premise of Individual freedom and right to privacy.

Nevertheless, the Naz judgement is an unintended opening for comprehensive development towards the undeclared human rights of the minority sexual orientation and conduct and also inaugurates a new jurisprudence against the practice of stigmatisation with promise of multiplier effects in other areas( Baxi).<sup>110</sup> The Naz decision should be read as ‘dignity-plus’ as suggested by Upendra Baxi, is interspersed with the development of the notion of ‘constitutional morality.’ Here constitutional morality reflects dignity as identification of an individual as free being who develops his or her body as he or she sees suitable. At the root of the dignity is the autarchy of the private will and Individual’s liberty of choice and action.

However, it seems highly unlikely that the Indian State is in mood to look progressively to the demand of LGBT community as it abstained from voting in favour of LGBT Bill in UN Assembly and in Indian Parliament a private member bill for de-criminalising Section 377 of IPC was defeated vehemently. But the Supreme Court has agreed recently to entertain the petition regarding the annulment of Section 377 of IPC.

Whatever be the fate of this judgement, Naz Foundation case has been the clear case of substantive due process of law and an exceptional movement which transcends the precedents of conventional delivery of judgement by creating and inventing the judicial interpretation to secure privacy as an aspect of life and liberty.

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<sup>108</sup> Ibid.

<sup>109</sup> Suresh Kumar Kaushal vs Naz Foundation. 2014

<sup>110</sup> Baxi, “*Dignity with and since Naz,*”

## CONCLUSION

Liberty has a single meaning for most of its history: government by law to serve the common good. Liberty means life without subjugations except for public reasons expressed through well-defined boundaries. Moreover, the ethical foundation of any society would not just pursue liberty as a mere value but the source and conditions of all other moral values. The Principle of due process of law which safeguards personal life and liberty is not merely a constitutional virtue but has effective implications for political and social life of an individual. The evolution of the principle of the due process of law has not taken place in any vacuum rather it has a political underpinning. There has been a constant push and shove between judiciary and political branch of the government and at times an alignment of actions as well. However, the state and law have become important conditions in a peacefully organised society. Rule of law envisages the supremacy of law and that no arbitrary power is used to infringe upon the rights and liberty of an individual.

The role of the Supreme Court in the evolution of the principle of due process has been central. This imagination has come about on empirical grounds. As the Supreme Court is the only institution which is empowered to interpret what constituted the due process of law, the institution was under obligation to stand upto the expectation which it had failed during the emergency era. So slowly and gradually court started moving out of the moral compulsion of the doctrine of “‘political questioning’ where by it was bound not to entertain the issue which would otherwise be decided by the political branch of the government and has taken a different role of a ‘promiscuous’<sup>111</sup> institution by which Mehta meant that the Supreme Court is “not only interpreting the laws but also promulgating the values, formulating policy and taking over executive actions, along with determining constitutionality of legislation.

It also pronounces duly enacted constitutional amendments unconstitutional.”<sup>112</sup> Here it has come under criticism for expanding its role. The doctrine of political questioning which in a nutshell means the separation of powers is being constantly violated by the Supreme Court. It is also being said that the doctrine of due process of law has given the court

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<sup>111</sup> Mehta, “*The Indian Supreme Court and the Art of Democratic Positioning,*” 233-260.

<sup>112</sup> Ibid.

enough space to curtail the power of the government in ensuring the other important rights under social legislation. Moreover, in any legal-political setup it is important to have checks and balances. Now, when the courts are not only deciding the matter of rule of law but also the issue of political and economic importance and have started to pitch into the role of conflict management then it is important to have scrutiny of court as an institution. Public legitimacy has also become the issue of perceived comparative democratic credibility for courts as well.

The rule of law is constitutionalism plus; it needs that all laws should adhere to certain principles. Henceforth, it can also be said for the functioning of Supreme Court as well that while interpreting the principle of due process of law, institutions should abide by certain principles like: a) there should be limitations not only on the interpreting role of Court but legislature as well in safeguarding the personal liberty and life. The rule of law is not just the rule of law but a rule incorporating and reflecting what the law ought to be, a political ideal - in a sense it should become a part of moral tradition of community. b) Second is the crucial issue of the modern times that is legal limits on the administrative actions. In today's times the figure of executive has become everything in deciding anything. The office of the executive can do anything be it judicial, executive or legislative.

## CHAPTER THREE

# DUE PROCESS AND CLAIMS TO PROPERTY RIGHTS IN INDIA

### INTRODUCTION

The classical statement in the fifth amendments of the US constitution states that- “No person can be deprived of his life, liberty or property without the due process of law; nor shall private property be taken for public use without just compensation”.

However, the right to ‘due process’ in relation to fundamental rights of property as provided by Article 19(1) (f) and Article 31 of Indian constitution has continuously been watered down to an extent of its practical demise with the enactment of forty-fourth Constitutional (Amendment) Act 1978, which left the property rights defenceless without constitutional protection in the Court of law. The right to due process in an acquisition of property by the State has primarily taken place in the context of the award of ‘fair compensation’ to the owners/losers of the land. Through various amendments, laws, and statutes the State has empowered itself to expropriate property in the name of public utility. Till date it has not been defined as to what exactly constitutes the public purpose. The land being acquired by the government in many places has been given to private players for private uses.

The aim of this chapter is to highlight the apparent disconnect and conflict between varied interpretations and applications of the principle of due process and claims to property rights in India. This disconnect comes from the very deliberate removal of property rights from the constitution and at the same time existence of different State laws for Acquisition of land and paying compensation. As the makers of the constitutions and founding members of political establishment were keen on pursuing the goal of unity, democracy and social revolution which Austin termed as strands of ‘seamless web’ they felt it

necessary to carry out the task of zamindari abolition and acquisition of land for a public purpose in pursuit of planned economic growth. And in doing so the debates around the property has primarily been shifted to the payment of 'compensation' to the owners as the issue of land was taken out of court and made the exclusive domain of legislature.

As it became the matter of compensation, the State created an 'eminent domain' to acquire land by defining land as social property. However, the category of eminent domain and compensation has only strengthened the State as the due process principle has been missing from discourse of property debates and law. Although, in hindsight we can say that the removal of due process principle from property rights was the need of the hour owing to the kind of inequalities that still exist in our society but this chapter would suggest that better debate and discourse along fair compensation and fair procedure, would have only yielded better results in fair compliance of procedures of acquisition of property and awarding compensation.

Another focus would be to discern and delineate the issue of due process of law in viability and acceptability of fair compensation in expropriations of property by the State. The rights to property as imagined in India has transformed through various applications of laws, constitutional amendments, and statutes which points towards the tussle between the legislature and judiciary as the judiciary has its constitutional limits to just interpret the legislated laws. The evolution of property debates and the apparent due process disconnect in existing laws, constitutional amendments and statutes will be discussed at two levels- a) descriptive level to explain the laws and, b) prescriptive level to indicate what are the implications of the law.

The role of Courts in deciding the issue of property rights has been confusing and complicated for common men. Nevertheless, the role of the courts is important in ensuring the due process of law. Whatever, be the laws regarding the fundamental rights of property in India, my admission is that the person denied of their land ownership must be given a chance, a notice before the acquisitions is being done in the interest of the larger common good and at least the due process must be followed in paying the compensation to the owners. This also brings into the focus as to what is due and what would be the rights to due process in guaranteeing fair compensation to the owners in a situation where land comes under the 'state list' and various States have different laws and conventions of acquiring land and paying compensations.

The issues of eminent domain and recently amended 'land Acquisition Act 1894' (LAA) now rectified as 'The Land Acquisition, Rehabilitation and Resettlement Act 2013' has generated new debates around the institutions of property in India, and it is not very pleasing to see as to how the right for fair compensation itself has been bereft of any application of due process of law through the dilution of - albeit unsuccessfully- the provisions of acquisitions and compensations to favour the private players?

The debates also hover around the question of 'why the fundamental rights of property, in particular, have been abandoned to pursue the goal of directive principles of State policy?' And its implications on the institutions of property and debates around the conflict of liberal rights versus zamindari claims. So, given the seriousness of debate around property and the layered economic and social values of land for individual owners, it is very important to explore the nuances of not having the due process of law in guaranteeing the fair compensations. And in doing so I would wish to revisit the strands of social revolution in Granville Austin's formulation, which has been largely the reason why due process in affirming the right to property was abandoned to pursue the larger public good. I will then argue why we need to have the principle of due process of law in our constitutional polity.

## **PRESENT STATE OF DUE PROCESS AND PROPERTY RIGHTS IN INDIA**

Right to property as it came out of the Constituent Assembly was listed in the text of the Constitution as a fundamental right in Part III of the Constitution but without the protection of due process provision. It ensured to "every citizen the right to acquire, hold and dispose of property and providing safeguards against deprivation of property by a law of parliament by allowing such deprivation only for public purpose and that too on remuneration of fair compensation." The matter of compensation was fiercely discussed in the constituent assembly. Pandit Nehru, Sardar Patel, and Dr. Rajendra Prasad were in agreement that land had to be acquired and abolition of zamindari system and intermediaries was essential to carry out the task of social change and industrial progress.

But where they were not in the agreement was the kind of compensation that had to be paid against the expropriation of property. Pandit Nehru was in favour of paying minimum amount but Dr. Prasad wanted that compensation paid must be in tune with the claims

made by Zamindars of their property, whereas, Patel advocated the payment of 'fair compensation' and was backed by then the Finance minister John Mathai.<sup>113</sup> The draft prepared for the Congress Party meeting of August 4, 1949 carried the provision for providing the compensation for property acquired for public purpose but it also contained the provision that the legislature would be free to decide the different sets of principles for payment of compensation for the property acquired for different purposes.<sup>114</sup>

The Advisory Committee of the constituent assembly decided to remove the protection of due process from private property and gave the legislature control over deciding cases of ownership of private property. This provision not only gave legislature an upper arm but also tempered the idea of abstract justice by curtailing the individual fundamental right to property but simultaneously also disempowered the judiciary to exercise oversight over the protection of the right to property, and to apply the principle of due process in case an individual denied of his property goes to the court for any such remedy.

A. K. Ayyar in his concluding speech in the Constituent Assembly said that the 'sole end of the property is Yagna and to serve the social purpose' and the law was 'an instrument of social progress'.<sup>115</sup> K. M. Munshi informed the assembly that "if legislature lays down genuine principles for compensation then the Court would not be entitled to constitute its own sense of fairness for the parliament." This is how the right to property as mentioned in Article 31 and rights under the Article 19(1)(f) came into being without the provision of rights of due process in the application of fundamental rights of property. The removal of the due process clause from property rights was presented by the Constituent Assembly as the need of the hour to pursue the pressing issues of social reforms and primarily the abolition of the zamindari System.

The reason and logic for removal of due process rights from property could well be stated from the fact that the newly independent Indian State was faced with the daunting task of removal of intermediaries accompanied by the objective of distribution of land. Providing due process rights in property would have dampened the spirit of forming a just and equitable society owing to large inequalities in Indian society which required a social revolution at a large scale to get rid of it. The adoption of provision regarding the rights of

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<sup>113</sup> Austin, *Working a Democratic Constitution: A History of the Indian Experience*, 76.

<sup>114</sup> Austin, *The Indian Constitution: Cornerstone of a Nation*, 121.

<sup>115</sup> *Ibid.*, 125.

property in Article 31 was thought to be in tune with the conditions and circumstances of that period. Leaders of the political establishment amidst all differences of opinion and interests agreed that giving due process rights in property would mean curtailing the hands of government in pursuing the interest of larger public good as the landlords would never want to forgo their land holdings. This became very apparent from the fact that Dr. Prasad in those days was receiving so many delegations from his fellow Bihari landlords- prominent Among them was Darbhanga Maharaj of Bihar- in order to save their property in land and get favourable compensation approved from the assembly. Although Prasad met them in a personal capacity he ensured that the assembly is informed about these informal meetings maintaining the constitutional propriety of his post.<sup>116</sup>

Finally the property rights in Indian constitution as it emerged from the Constituent Assembly and the constitutional text, and was subsequently disputed in the Court has been about the question of how to balance the right to property with the right to fair compensation for its expropriation by the State and in turned creating a reasonable balance by limiting the acquisition power of the State by adding the clause of 'public purposes.' Nehru himself was pursuing the longstanding party demand of Zamindari abolition through a promise of paying equitable compensation. Although Nehru made it clear that equity was applicable to both the community and individual: "*no individual can override ultimately the rights of the community at large. No community should injure and invade the rights of the individual unless it is for the most urgent and important reasons.*"<sup>117</sup>

For the newly independent India, this was completely a new development which was being influenced by the idea of 'eminent domain' where the State is constitutionally empowered to acquire land but on payment of compensation through validly enacted laws. So, the eminent domain on the one hand recognises the power of the State to acquire land but simultaneously on other hand it also recognises the rights of property of an individual against the State. Hereafter the whole debate about the expropriation of the property has been about the degree of compensation that is being paid in lieu of acquisition of property by the State.

Moreover till date the debate around compensation has been equally influenced by the differing interpretations of the constitutions and related constitutional amendments along

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<sup>116</sup> Austin, *Working a Democratic Constitution: A History of the Indian Experience*, 75.

<sup>117</sup> Austin, *The Indian Constitution: Cornerstone of a Nation*, 125.



with political debates generated around justice and fairness of the degree of compensation offered and paid as the pursuit of social revolution took the rights of property out of court and placed it in the hands of legislatures. And as long as the property was concerned the rights to due process in property was dead.<sup>118</sup> All the constitutional amendments and laws concerning property in India have dealt with the issue of compensations and have played into the hands of legislatures. Next section will deal with respective constitutional amendments and Supreme Court judgments that have dealt with the issue of property rights and compensations and would focus on the apparent constitutional disconnect and inconsistency in recognising the due process in awarding fair compensations.

## **DUE PROCESS DISCONNECT AND EVOLUTION OF DEBATES AROUND RIGHT TO PROPERTY IN INDIA**

The due process debate in the Constituent Assembly, according to Austin was primarily about two important issues: firstly about preventive detention and secondly about the expropriation of property by the State on payment of fair compensation.<sup>119</sup> The government of India Act 1935 in Section 299<sup>120</sup> also stated that “No person shall be deprived of his property in [British India] save by authority of law.” The expert committee on rights constituted by the Congress Party in summer of 1946 while omitting any references to the due process rights and personal liberty, maintained that no property could be taken from its owner without ‘compensation prescribed by the law’ (Prasad paper, file 16-P/45-6-7).<sup>121</sup> Sir B. N. Rau, in fact, was of the opinion that any clause of due process should be dispensed of in any manner and even warned the constituent assembly that ...

*“The courts, manned by an irremovable Judiciary not so sensitive to public needs, the social or economic sphere as the representative of a periodically elected legislature, will, in effect, have a veto on legislation exercisable at any time and at the instances of any litigants.”<sup>122</sup>*

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<sup>118</sup> Ibid. 128

<sup>119</sup> Ibid., 106.

<sup>120</sup> Ibid., 106-144. Later omitted by the Indian (Provisional Constitution) Order, 1947.

<sup>121</sup> Ibid 109

<sup>122</sup> “Procedure established by law to due process of law”

He even referred to the conditions of the US courts where around forty percent of the litigations were about due process and said that due process means only 'what the court says it means'. And this was also echoed by the popular sentiments of the assembly to keep compensation out of courts, where ever it primarily concerned abolition of zamindari system. Finally, after much debate and discussion over the property rights, the constitution of India gave its citizens the Fundamental Rights 'to acquire, hold and dispose of property' under Article 19(1)(f), although with a rider under that the 'right to property could be deprived under Article 31.' Article 3 broadly stated that no person could be deprived of his property without the sanction of the law; property acquired for the public purpose must be in tune with the terms of compensations fixed by the law; and laws relating to the acquisition of property must be 'assented' by the President and it also made provision for the police power in relation to the property rights and finally a likely legislation on land reforms in stipulated time frame.

However, within few months of commencement of the Constitution, there was a concrete move to amend the constitution and the First Constitutional (Amendment) Act 1951 was brought in primarily to deal with the issue of Zamindars and rent-farmers, although, it was also extended to State's police power. Over a period of time, rules and statutes relating to property rights and compensation have been twisted, tempered and chipped away. The final blow to fundamental right to property came in the form of Forty-Fourth Constitutional (Amendment) Act 1978 which abrogated the Article 19(1)(f) and Article 31 from the Indian Constitution. The Forty-Fourth Constitutional (Amendment) Act while removing property as a fundamental right also placed it as a statutory or legal right under Article 300-A which states that "*No person shall be deprived of his property save by authority of law.*"

The most significant thing about this amendment was that while removing property as fundamental rights and placing it as mere legal rights it also made it non defensible in the court of law as a fundamental rights which had the protection of constitutional remedies provided by Article 32 of the Indian Constitution. Article 32 gives a person a right to move directly to the Supreme Court if he/she feels that his/her fundamental rights have been violated, asking for the restoration of the right. When property is no more a justiciable right it does not make any sense to make an appeal in the highest court in case of denial of property rights. And even before the forty-fourth constitutional amendment act, other constitutional amendment acts such as, the first, fourth, seventh and twenty-fifth amendments along with the cases which addressed the constitutional validity of these

amendments, such as the Golaknath case; and cases such as Minerva Mills, dealt with rights of property and issue of fair compensations.

Since its inception, the Parliament has engineered so many constitutional changes to property rights prompted by key judicial judgments. While tracing the occurrence of these constitutional changes and alterations in the erosion of property rights it is also important to identify the crucial components of existing property rights and the compensation criteria that has come to existence as a result of constant tussle between parliament and the judiciary and while doing so it would be equally important to discern, what these exiting laws, statues would follow up in understanding the regime of compensation while acquiring land by the State.

#### **A. *The first and the seventh Constitutional (Amendment) Acts***

The quest for social revolution as one of the strands of the 'seamless web'<sup>123</sup> and broader political understanding of that period with the Congress Party as well as in the governments to get rid of zamindari system and intermediaries with or without paying compensation and push for State-centric development did not go down well with the big landlords and they had approached the court for remedy<sup>124</sup>. The Courts also responded favourably to the demands of the landlords and in many instances junked the government's initiatives by holding it unconstitutional and violative of the fundamental right of property. What was perceived as an emerging judicial threat forced the government to look for measures to acquire land under 'police power's for 'social revolution' and the result was the enactment of first Constitutional (Amendment) Act 1951.

After the first amendment Article 31 A, 31 B and the Ninth Scheduled were added to the Constitution. The said aim of this amendment was to enable land reforms and constraining any move that would invalidate the land reform policy in a sense a first step toward curtailing the jurisdiction of the Courts. And this was amply clear from the letter written by then Prime Minister Pandit Nehru to his Chief Ministers where he made it obvious that to achieve the goal of social revolution, the government was committed to doing anything. Nehru wrote...

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<sup>123</sup> Austin, "*The expected and the Unintended in working a Democratic Constitution*," 319-343.

<sup>124</sup> First of which was Kameshwar Singh vs. State of Bihar 1951

*“...but if the constitution itself comes in our way, then surely it is time to change that constitution to that extent... We shall find a remedy even though this might involve a change in the Constitution.”*<sup>125</sup>

Article 31 A enabled the State to Acquire the estates in public interest and other various issues relating to management and regulation of property. Whereas Article 31 B gave protection to the various laws brought about by the federal government and the States by putting in the constitutional provision by which these laws - if placed under the Ninth Scheduled – could not be nullified on the ground of violating any Fundamental Rights.

Similarly, the Seventh Constitutional (Amendment) Act 1964, was brought in to provide protection to certain State land reform laws from the purview of the courts. It was also prompted by the Supreme Court judgment in 1961, when the Court under the provision of Article 14 held the Kerala Agrarian Relations Act 1961, unconstitutional as inadequate amount was paid for larger tracts of land than for smaller holdings (*karimbil kunhikoman vs. The State of Kerala* 1962).

#### **B. *The fourth and the twenty-fifth constitutional (amendment) Act***

The first amendment act of 1951 could neither solve the issue of fundamental rights involving property nor pacify the simmering tension between parliament and judiciary. And every time there was a tension between the social revolutionary stands of the seamless web and the provision of fundamental rights, more or less the solution was sought in amending the constitution. The coming of Fourth Amendment was primarily concerned with property. In a major shift, the amendment went beyond the provisions of land reforms. Three previous judgments of the Court mainly the Bela Banerjee case (1953), Subodh Gopal Bose case (1953), the Solhapur Mill case (1951) provided the required impetus for the birth of Fourth Constitutional Amendment Act. Apart from amending the Article 31, another clause 2A was added to it. Article 31 (2) originally read as:

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<sup>125</sup> Nehru's letters to his Chief Ministers, dated February 01, 1951.  
 khosla *letters for a Nation: from Jawaharlal Nehru to his Chief Ministers (1947-1963)*, 112.

*'No property, movable or immovable including any interest in, or in any company owning any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principle on which, and the manner in which, the compensation is to be determined and given.'*

After fourth constitutional amendment, the article read as follows:

*'No property shall be compulsorily acquired or requisitioned save for a public purpose and save by the authority of law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principle on which, and the manner in which, the compensation is to be determined and given and no such law shall be called in question in any court on the ground that the compensation by that law is not adequate.'*

The newly added Clause 2 A said-

*'Where a law does not provide for the transfer of ownership or right to possession of any property to the State or to a corporation owned or controlled by the State. It shall not be deemed to provide for the compulsory acquisition or requisition of property notwithstanding that it deprives any person of his property.'*

The legal jurisprudence and debates around property till date was in tandem that Article 31 (1) which states that "No person shall be deprived of his property save by the authority of law" and Article 31 (2) were to be read in alignment and henceforth what the court would do is that it read and interpreted the term 'deprivation' of any kind and 'acquisition' of property by the State to be identical.<sup>126</sup> The very purpose of Article 31 2 (A) was to stop

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<sup>126</sup> Dwarkadas Srinivas of Bombay Vs. The sholapur Spinning and Weaving Company Ltd. AIR 1951 Bombay 86.

In this case, Supreme Court illustrated on the police power of the state. Management and estate of the company was entrusted with government appointed directors on charge of mismanagement. On being challenged, the Court termed this ilea and invalid on the ground that the compensation

any such legal interpretation by confining and fixing the terms of compensation only where the expropriation involved the transfer of any ownership or acquisition of property by the State and not for any kind of deprivation of property rights.

Another important change was that the new text of article 31 (2) made it clear that the Court had no business in deciding the merits of compensation whether it was adequate or inadequate. This provision was in a response to Supreme Court judgment in *Bela Banerjee Case*<sup>127</sup> where the court had opined that - it was the discretion of the legislature to put forth the criteria on the basis of which compensation is to be given for the property acquired, however, such criteria should ensure that compensation is “a just equivalent to what the owner has been deprived of” and the text of such principle “is a justiciable issue to be adjudicated by the court.” So, the target of the fourth amendment was to rein in the role of the court in deciding the issue of compensation by making it clear that any issue of compensation was to be decided by the legislature, not by the judiciary.

However, the fourth Constitutional (Amendment) Act which came as a mixture of both radicalism and constraints had left a subtle scope for courts to meddle with the question of acquisition of property and compensation and this was also met with another constitutional amendment- The Twenty-Fifth Constitutional Amendment act.

Justice Subba Rao in the *Vajravelu Mudliar case*<sup>128</sup> said that the Parliament could not enact a law of acquisition that simply provides for ‘illusory’ compensation. According to Justice Subba Rao,

*‘If the legislature, through its intent, promises to provide for compensation or shows the willingness to do the same, but in effect and action acquires*

was not paid. Court was of the opinion that compensation should be paid because under the Article 31(2), deprivation was also an act of acquisition. Court clarified that whether acquiring or regulating of private property, compensation should be paid.

<sup>127</sup> *State of West Bengal Vs. Mrs. Bela Banerjee AIR 1954 SC 170*

The petitioner challenged the legality of *Bengal Land Development and planning Act 1948*, (which was enacted to acquire land for refugee), on the ground that the date on which the compensation was paid did not exceeded the market value of the land and hence inadequate. Although the State argued that the it had the discretionary power to decide the quantum of compensation under Article 31(2) but the Supreme Court rejected the argument..*Bela Banerjee case*.

<sup>128</sup> *Vajravelu mudliar case Vajravelu Mudliar Vs. Special Deputy Collector AIR 1965 SC 1017.*

The land was acquired for the purpose of building houses under the *Land Acquisition (Madras Amendment) Act 1961*. This was challenged and upheld by court under the Article 31 and 14 of the Indian Constitution.

*property without providing any compensation for it, then the legislature will be exercising the power it does not possess, in a sense illegitimate exercise of power by the legislature. If the legislature enacts a law for taking over a property by giving an illusory compensation or by suggesting the principles for ascertaining the compensation that does not correlate to the property taken or to the value of such property at or within a fair and reasonable proximity of the date of expropriation or the principles are so designed and so arbitrary that they do not provide for compensation at all, one can easily say that the legislature enacted the law in Fraud of its power. In nutshell, If the question concerns to the adequacy of compensation fixed or criteria evolved for fixing it turns out that the legislature enacted the law in Fraud of power in the sense explained above, then the question is within the ambit of the court.<sup>129</sup>*

Although, Justice Subba Rao maintained his position in subsequent judgement of Metal Corporation case,<sup>130</sup> not all judges were in agreement with Justice Subba Rao's idea of 'justiciability of compensation.' And later on justice Hidayatullah in the Shantilal Mangaldas case<sup>131</sup> chided Justice Subba Rao's stand in Metal Corporation case as "obiter and not binding." But the issues around compensation became even more complex by the decision of Supreme Court in Bank Nationalisation case<sup>132</sup> where the majority judgment was in much alignment with what Justice Subba Rao had called for the 'justiciability of compensation.' Challenging the validity of the Banking Companies (Acquisition and Transfer of undertaking) Act 1969, the petitioner had argued that the compensation paid was inadequate.

The Act did not clearly mention the principles of determining the granting of compensation to the banks, to be paid in a value of bonds, securities, etc. But the ground for challenging the compensation package was that the Act did not adhere to the provisions of the Article

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<sup>129</sup> Ibid.

<sup>130</sup> Union of India Vs. Metal Corporation of India Ltd. AIR 1967 SC 634.

<sup>131</sup> State of Gujarat Vs. Shantilal and Mangaldas AIR 1969 SC 624, 1969 (1) SCC 509.

The validity of *Bombay Town Planning Act 1958* was challenged on the basis that the compensation to be paid on the market rate of land at the declaration of scheme was not in any manner just equivalent to the value of property acquired and hence inadequate. Court opined that since the Article 31(2) was amended (Fourth constitutional amendment), there was no scope for Court to entertain the question of 'inadequacy of compensation.' And the market value of land in 1927 was taken as a valid criteria of payment of compensation in 1957 as well.

<sup>132</sup> R. C. Cooper Vs. Union of India 1970 (2) SCC 298.

31 (2) as the principles for determining the compensation were disrespectful for awarding compensation and some of the other important assets of Bank like goodwill and unexpired leases for premises, etc., were not taken into consideration for calculating the compensation. The court accepted the argument and declared that there remains the right to compensation and any attempt to give 'illusory' compensation would only harm the constitutional guarantee which provided for compensation against acquisition. The Court also declared that the legislature was not the final authority to decide the principles of compensation. Although after this judgment some changes were made to Banking Companies (Acquisition and Transfer of Undertaking) Act 1969, in crude political term it provided the necessary impetus for enactment of the Twenty-Fifth Amendment.

Another important case related to property was the Golak Nath case<sup>133</sup>. The Golak Nath family approached the Supreme Court under Article 32 and wanted the Court to declare the Seventeenth Amendment (land reform law being kept under Ninth Scheduled), the First Amendment and the Fourth Amendment ultra vires of the constitution. They argued that the provisions of the Punjab Security of Land Tenures Act 1953 which declared the larger portions of their land holding 'surplus' had denied them the Constitutional rights under the Article 19 (1) (f) and (g),<sup>134</sup> to acquire and hold property and to practice any profession; and in doing so the provision had also denied them the right to equality under the Article 14.

Justice Subba Rao speaking for the majority judges said although the judgment would not affect the earlier amendments but at the same time now onwards Parliament cannot take away or abrogate any of the fundamental rights given in the Constitution. This judgment also introduced the important notion of the 'basic structure' of the constitution, which implies that the fundamental rights being part of basic structure of the constitution which cannot be violated rather efforts should be made to preserve it. Although the doctrine of 'basic structure' was just mentioned in this judgement, however, its full pronouncement only came with judgement in Keshvanada Bharti case (1973). The political currents of that time favoured the government of that time to overcome the issues raised by Golak Nath case in pursuing the goal of Directive Principles of State Policy (DPSP) over the

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<sup>133</sup> Golaknath and Others Vs. State of Punjab AIR 1967 SC 1647.

<sup>134</sup> Article 19 (1) (g) states that 'All citizens shall have the right to practice any profession, or to carry on any occupation, trade or business.'



Fundamental Rights. And these prevailing political current got its expression in the form of subsequent Twenty Fourth and Twenty-Fifth Amendments to the Indian Constitution.

The Twenty Fourth Amendment to the constitution empowered the Parliament to amend any part of the constitution in any manner it deemed suitable and provided that the President 'shall' give his assent to any constitutional amendment presented before her/him without exercising any of her/his discretionary power. The Twenty-Fifth Amendment while keeping aside all previous judgments that dealt with the issue of paying just compensation, removed the word 'compensation' from the Article 31 (2) and inserted the term 'amount' instead. It prohibited the Court from questioning the 'amount' on the ground of being 'inadequate' or paid in some other means than cash.

Most importantly a new Article 31 C was added to the constitution through the Amendment which states that any law that has its purpose of fulfilling the goal of Directive Principles of State Policy could be challenged in the Court of law on the ground that it did not do so. These amendments were challenged in Keshvananda Bharti case<sup>135</sup> but unsuccessfully. Moreover, in relation to property the Keshvananda Bharti judgement endorsed the property related amendments, this not only constrained the Court from interfering in the issue of acquisition of property and rights of compensation but it also gave an elbow room for the Janata Party government to get rid of property as fundamental rights from the Constitution, although allegedly under pressure from the Communist.

### C. *The Forty-Fourth Constitutional (Amendment) Act, 1978*

The Forty-Fourth Constitutional (Amendment) Act 1978 abrogated the Article 19 (1) (f) and the Article 31 from the constitution ending the Fundamental Rights of property. After this amendment property became a statutory legal right under the Article 300-A, which states that "No person shall be deprived of his property save by authority of law." And in later judgment even the Supreme Court while deciding the Jilubhai case,<sup>136</sup> underscored the point that right to property under Article 300-A does not fall under the ambit of the doctrine of 'basic structure' of the constitution. Thus the Supreme Court in

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<sup>135</sup> Keshvananda Bharti Vs. State of Kerala 1973.

<sup>136</sup> Jilubhai Nanbhai khachar Vs. State of Gujarat 1995.

The State of Gujarat had acquired the mines from the erstwhile farmers under the newly legislated laws, and on being challenged the supreme Court was of the opinion that State could do so under the Article 300-A and did not entertain any question of inadequacy of compensation.

abiding the constitution of India does not interpret the right to property as a Fundamental Right.

Now that a person cannot approach the Supreme Court (under Article 32) in case of violation of his fundamental rights of property, he or she can, however, approach the High Court (under the Article 226). According to Jaivir Singh<sup>137</sup> the erosion of property from being a fundamental right to a legal right could be more comprehensively understood in the extent of liberty the Courts have today in upholding the property rights and in deciding the issue of compensation.

Although Article 300-A which says that “No person shall be deprived of his property save by authority of law” is a mere duplication of Article 31 (1) it is not accompanied by the Article 31 (2) in the constitution which mandates that the acquisition of property must be accompanied by compensation. The abrogation of the principle of compensation and the right to approach the court in case of inadequate compensation being paid against the taking of property is the serious erosion of property rights in India. Moreover, Article 300-A is being perceived as a mere constraint on the executive actions but there are no such constraints on the action of the legislature in deciding the issue of the compensation.

Now even the Courts have decided not to entertain the question of inadequacy of compensation for the deprivation of property. This is evident from a High Court judgment which says - “the various amendments in the constitution will stand defeated if it is held that Article 300-A envisions payment of adequate compensation for the deprivation of property to the owner.”<sup>138</sup> A similar sentiment was echoed by Supreme Court in Jilubhai case when the Court opined that “judicial interpretation should not be a tool to re-induct the doctrine of compensation as concomitance to acquisition or deprivation of property under Article 300-A.”<sup>139</sup>

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<sup>137</sup> Singh, “*Separation of powers and the erosion of the ‘right to property,’*” 303-323.

<sup>138</sup> Elizabeth Samuel Aron Vs. The state of Kerala. 1991.

The management of the company was overtaken by the Kerala State industrial Enterprises Ltd, an agent of government company. The petitioner challenged the Section 3(1) of *Kerala relief Undertakings (Special Provisions) Act, 1961*. The case did not sustain in the Court.

<sup>139</sup> Jilubhai Nanbhai khachar Vs. State of Gujarat 1995

Along with the issue of compensation and Parliament having an upper hand over the judiciary in deciding the issue of taking of private property of an individual and compensation, there are other important factors that have complicated the debates around property rights in India. One is the issue of 'public purpose' in the acquisition of a vast area of land by the State and the subsequent protection provided to the existing laws pertaining to taking of property in categories that cannot be challenged in the court of law.

#### **D. *The Land Acquisition, Rehabilitation and Resettlement Act 2013***

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR Act) has been enacted to end the archaic land acquisition provision of centuries-old Land Acquisition Act 1894. LARR Act has defined the scope of public purposes by enlarging the limits of acquisition of land under the provision of 'public purpose.'

For example where a land is to be acquired for private purposes the consent of 80 percent of the landholders is required and the State has been barred from acquiring land for private players. There is provision for estimation of Social Impact Assessment and Environmental Impact Assessment while taking away of land from private players. There is the creation of legal entitlement of fair compensation third parties as well and their rehabilitation. And the compensation has been fixed at four times of market value for taking of land in rural areas and two times the market value in urban areas.

### **DUE PROCESS AND THE EMINENT DOMAIN**

The debate and discourse around compensation in the exercise of taking of property by the State in India suffers through the legal disconnect at constitutional level itself when it comes to the relationship between due process and the eminent domain. The Constituent Assembly while debating the issue of fundamental rights came to the conclusion that keeping the principle of due process in property rights would dampen the very aim of securing social revolution and equitable justice.

Land distribution and the abolition of zamindari system was the proposed goal of the Congress Party during the freedom struggle as well. So, the Indian Constitution purposely did not provide for the provision of due process in property rights. The provision of eminent domain as it emerges from the Land Acquisition Act of 1984 did remain the prime tool of State expropriation of private property until recently replaced by the Land Acquisition, Rehabilitation and Resettlement Act 2013 (LARR Act). The exercise of the eminent domain has always been the discretionary power of the State; deep-rooted in the privilege of the sovereign. This gives the State the power to acquire land from the private owners for the perceived public purpose by paying compensation, as determined by the law.

The legal disconnect between the principle of due process and the provision of eminent domain lies at the constitutional level itself as the constitution does not recognise the application of due process in the domain of private property and the different constituent states of the Indian Union have different laws as land falls under the State List which means that there exist varying State action in using eminent domain for acquiring land with different implication.

The power under eminent domain viewed roughly from the Land Acquisition Act 1894 gave the State unfettered power to acquire land without bothering about its implications for socio-economic fallouts. Apart from the indifference shown to the environment and ecological assessment, there was no obligation on the State to rehabilitate and resettle those affected by the acquisition of land by the State and in this case, the poor landowners have been the worst sufferers.

Another important critical category is the misuse of 'public purpose' provision in acquiring land through eminent domain. In this backdrop, the "*Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation, and Resettlement Act 2013*" has been enacted to define the ambit of public purpose and also to recognise the rights of the third party who are affected by the acquisition of land. Along with considering the preconditions of Social Impact Assessment and Environmental Impact Assessment in the acquisition of land and payment of compensation being fixed at four times the market value for rural areas and at twice the market value for urban areas. However, the most important improvement has been the creation of the legal entitlement to compensation and rehabilitation and resettlement for all the affected persons or losers.

However, coming to the point of legal disconnect at the constitutional level the Supreme Court of India could never spell it out clearly what the due process in compensation means when the State initiates an eminent domain action. There has been utter confusion in the court in deciding what the due process would be in awarding fair compensation. According to the provisions of the Land Acquisition Act 1894, land was to be acquired on the 'market value' of the property. And in regular land exchange practice market value of land is decided on the basis of 'circle rates' and/or the sale deed of the identical property. But the circle rate and the sale deeds both do not represent the true value of market price.<sup>140</sup>

As the sale deed is generally reported less than the actual transaction to make saving on stamp duty charges and circle rate is always almost less than the market value being decided by the State. The Court while deciding the cases of compensation gives primacy to the higher value sale deed while the land acquisition collector uses the circle rate in awarding the compensation. The resulting mismatch gives scope for the dispute associated with compensation as the court being lenient uses the sale deed formula to determine compensation which results in higher compensation being paid to the litigants.<sup>141</sup>

However, there are instances where even the court has given bizarre justification for payment of inadequate compensation. For example, Supreme Court accepted the logic of Gujarat government in deciding the *Indrajit C Parekh Vs. State of Gujarat*<sup>142</sup> that even a payment of 'Single Rupee' from the exchequer should be considered as sufficient to ensure the acquisition of any company under part II of the Land Acquisition Act 1894. And courts have accepted the expropriation of companies as public purpose acquisition which has only compounded the problem.

The mismatch arising out of variation in payment of compensation leads to excessive litigation but the people who go to the Court are of higher financial might and get higher compensation from the court but here also small farmers are left with no option but to live with doubly compounded loss - loss of land and less compensation in this sense litigation

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<sup>140</sup> Singh, "Inefficiency and Abuse of Compulsory Land Acquisition: An Enquiry into the Way Forward," 46-53.

<sup>141</sup> Ibid.

<sup>142</sup> *Indrajit C Parekh Vs. The state of Gujarat*, AIR 1975 SC 1182.

is socially regressive as well. So even the slight scope of due process in payment of compensation is violated by Court as well as the State authority.

## **EXPECTED MECHANISM OF DUE PROCESS IN FAIR COMPENSATION**

Taking of land by the State under eminent domain without prior information has violated the principle of due process at both the levels - at the level of taking of property and secondly at the level of payment of compensation. Although the legal disconnect between due process and eminent domain does not permit the application of due process at the level of acquisition of property, what we can certainly propose and debate about is that some degree of application and adherence of due process at the level of payment of compensation is necessary. The debate around the payment of fair compensation which entered the court with Kameshwar Singh Vs. the state of Bihar was settled within the Court in Jilubhai case<sup>143</sup> where the court said that "judicial interpretation should not be a tool to re-induct the doctrine of compensation as concomitance to acquisition or deprivation of property under Article 300-A." High Courts in similar cases have taken the same stand. This has resulted in the scenario where the legislature has become an overwhelming authority to decide which property to be acquired at what rate and for what purposes.

So any expectation for the application of due process in payment of fair compensation has to be legislative in nature. It has to be determined at the level of the legislation itself otherwise the Judiciary cannot do anything. So, whatever, be the laws of acquisition of property and payment of fair compensation for the purpose of public use and national development the principle of due process of law must ensure that the owners of land must be given a fair chance of 'right to hearing'<sup>144</sup> in the court of law in case if they feel that process by which their property has been taken arbitrarily or the compensation paid is not fair or adequate. And even before that, there could be the provision of pre-condemnation hearing<sup>145</sup> to decide what could be the possible content of public use or the necessity of enforcing the provision of eminent domain in taking of private property. The power of eminent domain delegated to concerned authority should be subject to regular check and balance.

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<sup>143</sup> Jilubhai Nanbhai khachar Vs. State of Gujarat 1995

<sup>144</sup> Sixth and Fourteenth Amendment in US Constitution.

<sup>145</sup> Hudson, "*Eminent Domain Due Process*," 1280-1327.

Going by the history of use and misuse of eminent domain we can say that the misuse of eminent domain is primarily related to acquisition done for private projects. So one thing that could be done is to minimise the scope of taking away of land and improve the utility of already acquired land as many acres of land are left being unutilized or untouched. Another important measure that could be taken as illustrated by Ram Singh<sup>146</sup> is to have near correct information about the value of land. To make the process of taking much more fair and efficient it would be helpful to use all relevant information and it should be shared with all the affected parties before the terms of compensation is decided.

## CONCLUSION

According to Namita Wahi<sup>147</sup> abandoning of due process of law in property has been the result of consensus between the parliament and the judiciary as the Court almost every time sided with the legislature in abolition of zamindari system except in the case of Kameshwar Singh and furthering the case of national development. But the reason people approaching the court is due to the sense of social and cultural affinity they have with land holdings and secondly the rights and faith in judiciary for some kind of justice. Land is not just a source of livelihood but it is also the symbol of culture and community identity.

So, to have the due process of law procedure in acquisition of property and awarding compensation would only make the process more democratic and equities of intended national development to reach to greater mass. Not following the due process or the deliberate negligence of any rule of law principle has only resulted in creating more inequality in our society. The debate around the provision of eminent domain has largely been about the payment of compensation and the various states have made different provisions to make compensation.

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<sup>146</sup> Singh, "Inefficiency and Abuse of Compulsory Land Acquisition: An Enquiry into the Way Forward," 46-53.

<sup>147</sup> Wahi, "State, Private Property and the Supreme Court"

Any land acquisition under eminent domain creates a severe imbalance between the State and the land losers and if the losers are small farmers than the implication is worse. The issue of public purpose has not been defined and is being abused regularly to benefit the private players. This rampant abuse of provisions of eminent domain in the absence of any scope go due process in either taking of property or awarding of compensation has seriously undermined the very aim of abandoning of fundamental rights of property in pursuit of Directive Principles of State Policy.

Although the LARR 2013 has tried to address the question of compensation in taking of land by creating the legal entitlement for fair compensation; it has rather than limiting the ambit of public purpose use has broadened the scope of acquisition of land for private players and for private purposes under the new LARR Act. The consequences of not having any concrete provision of a due process in making compensation have left a large void in the jurisprudence of eminent domain as the absence of due process being rights against the state have made eminent domain more undemocratic and arbitrary. Consequences of not having due process of hearing before or after the taking are done is more mercilessly being borne by the small farmers and large no of the third party being dependent on the land. The performance of the court has also been very dismal in ensuring the fair compensation. After an initial push and shove with the legislature in deciding the issue of fair compensation and at times asserting its rights of hearing the grievances of the public in case of inadequacy of compensation, it has also accepted the logic of Parliament being supreme in deciding the terms and conditions of acquisition and fair compensation.

Although the constant tussle between the discourse of liberal rights vs. zamindari claims has erupted in our political discourse till date the issue of land distribution has remained almost wholly contentious. Recently in Sanjeev Agarwal Vs. Union of India<sup>148</sup>, petitioner argued that fundamental rights to property should be restored in our constitution by abrogating the provisions of forty-fourth amendment act. Although the petition was rejected by Court in the year 2010.

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<sup>148</sup> Sanjeev Kumar Agarwal Vs. Union of India, 2009.

SC gave notice to Union of India and sought the explanation from the government why the right to property cannot be restored. However, the case was dismissed later in the year 2010.



However more the land is being divided and fragmented along the hereditary line there are more legal cases being fought over it. Giving fundamental rights to the property would not have seriously served the purpose of social revolution and national development. Land distribution was the need of the hour under the prevailing circumstances of deep socioeconomic inequality of the Indian society. However, having the provisions of due process in making the awards of compensation would not have been a misplaced technique to avoid the excessive litigation in the court or the hardship faced by small farmers. Due process being the important element of rule of law would only strengthen the democratic process of taking of property and payment of fair compensation.

## CONCLUSION

Historically, every democratic state has a commitment to rule of law to ensure fairness and justice. In fairness, due process of law as a form of rule of law is a safeguard for individual rights and freedom against the excess of the state action. The purpose of adopting due process provision in the constitution was to balance between the rights of Individual citizen and that to of state in achieving common public good. Constituent Assembly by adopting the provision of due process had put the fundamental rights of individual life and liberty on a higher pedestal. The individual rights of life and liberty were only to be curtailed and constrained in the interest of either national security or for the purpose of achieving social change and social revolution.

However, there was a deviation from the original content of due process as practised and codified in US constitution. In case of India, it is the context and political condition of the newly independent country that dictated the kind of due process providing that could be put into constitution. The due process provision of US is decisively influenced by the Lockean idea of 'bill of rights.' According to this the individual rights of life, liberty and property are paramount and something that an individual possess and preserve in any just and fair society.

In case of India the due process of law adopted was a 'procedural due process' unlike the US which has 'substantive due process' provision. The term liberty was qualified with 'personal liberty' and word 'due' was removed with 'procedure established by law,' with another exception in which the term 'property' was completely removed from the list of justiciable rights.

## PROCEDURE IS POLITICAL

The provision of due process as adopted by Indian constitution was result of political compromise, in a sense the objective of constitution was not only to secure its citizen the rights of life and liberty but also to help create a better condition to enjoy and endure these rights. The very objective of achieving the abstract idea of freedom and justice was premised upon the physical and material condition of economic and social life. The political stability of state was equally an important issue to be dealt with. The due process provision under Article 21 of the Indian constitution states that “No person shall be deprived of his life or personal liberty except according to procedure established by the law.” This indicates that the individual rights and freedom could be curtailed and hindered for the purpose of common public good or in the interest of the state. However, there are limitations on the power of judiciary but not on the power of legislature who are constitutionally empowered to limit the rights of an individual.

The evolution of due process law in Indian political-legal discourse has shown that as the political culture of the country has become more informed, the citizen have become more aware and the institutions have taken roots in a democratic framework, it has also impacted and influenced the functioning of a democratic state and its institutions. Abhinav Chandrachud has classified the evolution of due process of law into three forms. These are what ‘pure’ form due process as adopted by the Indian state and adhered to by the judiciary as well.

At this juncture of Indian state apart from the issue of Individual fundament rights the purpose of community good and state security dominated the functioning of government and its institutions. After the emergency started the era of ‘procedural due process’ where the judiciary looked into the fairness of procedure of law if that is validly enacted. But this was also the time when judiciary was also facing the credibility issue as it had failed to live up to the expectations of citizens in protecting their rights of Habeas Corpus. For the courts the credibility was to come through the credibility of the institutions. So the court also learnt its lesson and made an effort to get its credentials rights in public perception. Nevertheless, the court in days to come moved close to US version of ‘substantive due process’ in which the substance of law itself is checked if that if fair and just.

This also created a tension between the institutions of the government on one side and judiciary on the other side. The substantive due process provision gave judiciary enough leeway to take the issues otherwise in the domain of either executive or legislature. And in many cases judiciary has been accused of crossing its limit.

Another important issue related with the provision of due process is the issue of property. Removal of property from the list of justiciable rights as well as from the protection of due process was a consensus but there was disagreement on the kind of compensation to be paid. So, the debate on property in India has primarily been about the issue of acquisition of property by the state and payment of compensation. As there has been a legal disconnect at the level of the constitution itself because property has no due process protection. The stand of the court has also been confusing. But the question of fair compensation still goes to the court. So, in order to make the issue of acquisition and fair compensation more democratic and transparent and to reduce the burgeoning litigation in it, we should follow some degree of due process in payment of compensation and acquisition of property.

## **BALANCING ACT**

Nevertheless, the role of the Supreme Court as an institution has been very creative in evolution and expanding the scope of the due process of law. The role of the court has been that of balancing between the rights of individuals and the goal of national development and social change. The creative role of the judiciary has been commendable in institutionalising the provision of due process in a democratic political culture. The evolution of the due process principle in India has been marked with the deepening of democracy in social and political life.

The Indian democratic and welfare state as it emerges from the spirit of the constitution committed itself to the objective of creating a just and fair society. And in achieving this objective of a just and fair society, the relationship between the law and the state is very important. This role could be better understood with the role of institutions in our polity. In the case of evolution of the role of due process and its role in deepening of democratic culture, the institution of the Supreme Court has given a much important push in giving voice to people either marginalised or suppressed by government interference.

So, it is very important to cherish the expanded role of due process in our democratic culture. The debates around due process of law could be much wider and sound if it is being done with more social and political purpose not just in the court of law but also in our day to day run of political life. The state always tried to hide behind the logic of national security and public good without outlining the framework of its original intent. So, it has been the court that has come to the rescue of individual citizen and its through provision of due process only in defending the rights of life and liberty. Let us hope for better improved political culture and participation of people in making our institutions more democratic and hence democracy more vibrant.

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