CHAPTER VI

THE THEORY OF DUE PROCESS OF LAW IN INDIA

Being a part of the British system of administration in the past India inherited most of the English principles, practices and institutions in the matter of administering justice to the people. One such principle introduced by the Britishers here was the Theory of Due Process of law.

This theory was followed for quite a long time when India was a British Colony; it was continued even after Independence and is still a part of the Legal System of our country. But owing to changes in the conditions of society there has been a change and the impact of Crime Control Theory I seen with regard to most of the matters relating to civil and criminal justice.

But what we have to note is that there is the concept of Due Process of Law very much a part of the legal system of our country owing to the legal traditions and the principles enshrined in the Constitution. For example, the Preamble of the Constitution declares the high ideals for which the Constitution has been adopted.

These high ideals are to the effect that justice, liberty, equality and fraternity will be the goal of the new Republic. Among the specific provisions enacted in the Constitution are the provisions dealing with Life, Liberty and Property. And the State is prohibited from depriving the citizens of their invaluable rights by violating their fundamental rights. Thus, the legal process has to conform to the high ideals of our legal system and uphold the principles enunciated by the Constitution.

Although the Constitution and the laws do not in so many words declare Due Process theory as is done by the Constitution of the United States of America but the implications of the principle of Rule of Law, the principle of Equality and the principle of Natural Justice etc are that the principle of Due Process of Law impliedly operates in our country in regard to several aspects of the State Administration.

The laws that are enacted by the State, the implementation of the laws that is assigned to the Executive and the judicial action function that has to be performed by the courts in determining the rights and duties of the individuals must all conform to the principle of Due Process of law.

This chapter has the object of examining the status of the legal system of our country focusing on the principle of due process of law. The attention is focused on the working of the judicial process and the various other aspects of our legal system where the courts have considered the process to be just, fair and
equitable and thus followed indirectly the theory of due process of law.

There is also an examination of the Constitution whether we have the theory of due process of law or the rule of procedure established by law. Reference is made to decided cases on all these matters and a conclusion is drawn as to the question whether we have the theory of due process of law or we do not have such a theory at all in our legal system.

The authorities to whom powers are delegated exercise three kinds of powers under delegated authority; one is the power to make rules; the other is to enforce the rules and the third one is the authority to adjudicate upon disputes arising between the individuals and the administrative agencies. The discussion here is presented first to the application of the safeguard in relation to the rule making process of Administration under delegated authority.

As a result of the developments resulting in the vast application of the doctrine of Due Process a culture developed in the Common Law world of observing the requirement of due process in all matters where power is exercised by the authorities of State in relation to the individuals. Same thing has happened in India which is division of the general law scheme of law.

In the beginning, the safeguard of Due Process was considered to be relevant to matters of Constitutional Law, more particularly with regard to matters of determining the disputes which were governed by Constitutional Law only, but in course of time the Due Process Theory was considered to be relevant to determination of the rights and duties governed by Criminal Law and then to matters covered by the other areas of Public Law such as Administrative Law too.

In India, there has been a serious debate as to whether the principle of Due Process of Law is relevant to matters of protecting the freedoms of individuals. For that matter, the question has been whether the safeguard is relevant to the question of Fundamental Rights. In the beginning the Supreme Court had taken the view while deciding the cases like A K Gopalan v/s state of Madras Constitution of India follows the principle of ‘Procedure established by law’ and not so much the principle of Due Process of Law.

It was however in Maneka Gandhi’s case the trend of judicial thinking has changed and it has been considered by the court necessary to introduce the safeguard of due process in the matter of protecting the rights against arbitrariness of administrative action.

Like its effective role in matters of Constitutional Law in other branches of law also the doctrine of
due process has worked as an effective safeguard to the individuals against arbitrary actions of the administrative agencies. So much so that in the sphere of Administrative Law it has been adopted in quite a good number of matters and has received a wider application as a safeguard to the individuals against governmental action.

As far as Administrative Law is concerned, the three important aspects of Administrative Law which bring the agencies of State Administration in contact with the individuals are the system of making rules, applying the rules to individual cases and interpreting the scope of the rules when disputes arise between individuals and the agencies of State Administration.

Of all the important aspects of Administrative Law the most significant is the system of making rules which usually is done under delegated authority and is known as Delegated Legislation. This particular function of making rules is known as Quasi-legislative function and the function of enforcing the rules through a new set up of officials of the administrative agencies are known as Quasi-Executive functions, and the third important function is that of deciding the disputes which is known as Quasi-judicial function.

For the purpose of performing the quasi-judicial functions the State has established a new set of agencies to perform the judicial functions which usually are the Tribunals, Boards or Authorities.

The methodology followed in presenting the discussion on this subject is to present first the rule position concerning the relevance of the doctrine of Due Process to administrative proceedings in general and then how the rule of due process is followed in relation to specific kind of functions of the administrative agencies, i.e., the quasi-executive, quasi-legislative and quasi-judicial functions:

I. Imperatives of Due Process Theory

What Due Process demands is that every action of the State authorities must be based on a valid law. It is necessary that the taking of somebody’s property in public interest may be there but it must be within the authority of law. While Article 21 of the Constitution of India takes care of Life and Liberty, Article 300-A. Takes care of property.

Procedure Established by Law mentioned in Article 21 of the Constitution of India embodies “Due Process” Some jurists are of the opinion that American “Due Process” and Indian “Procedure established by law” are different in guarding life and liberty. For judicial process to occur 1) there must be procedural as well as substantive laws passed by legislature. 2) There must be courts comprising duly qualified judges. 3) There must be infrastructure and ministerial staff to keep record of every day steps and progress 4) There must be some kind of technology to proceed with the procedure.
Another aspect of Due Process theory which needs a critical examination is that while substantive due process requires valid and reasonable laws to be enacted for application to the people in various circumstances, the procedural due process requires the methods of administering the laws also to be just, fair and reasonable. We have to see in which particular form the theory of Due Process of Law operates in our country, whether in the form of substantive Due Process or Procedural Due Process. An enquiry into this matter can be by examining the approach adopted in relation to judicial process.

For judicial process to be in place: 1) There must be procedural as well as substantive laws passed by legislature. 2) There must be courts comprising duly qualified judges. 3) There must be infrastructure and ministerial staff to keep record of every day steps and progress 4) There must be some kind of technology to proceed with the procedure.

The words Judicial Process and the Due Process need to be explained before proceeding further with the discussion. No Judicial Process in the world can work without laws. Therefore legal process or process of making laws must precede the judicial process. But here we are concerned with emergent trends in judicial process only. The trends are again classified in terms of legal knowledge, technology of courtroom, and electronic case management. When it comes to due process of law, it is police versus public.

The police becomes the arm of the repressive state and the public becomes intimidated threatened oppressed mass of subjects. In the words of Dr. S. Radhakrishnan even a democracy can be tyrannical at times when elected representatives get busy in retaining power for long term. How to implement Programs, How to chalk out policies, and to retain power out of these three the last one precedes the other two.

The state then has lesser and lesser regard for due process. Unfortunately India has reached this stage. We can say the emerging trend is India has such judicial process through which it is impossible to come out unscathed. There are two parallel judicial processes. First one is the routine courts and routine laws. The second one has special laws, special investigating agencies and special courts that mostly function from jails. On 17-11-2012 when condemned Ajmal Kasab was hanged, the celebrity criminal lawyer Ujwal Nikam said “for one decade. I was functioning 9 AM to 5 PM from the premises of Arthur Road Prison.”

II. Application of Due Process Theory to Judicial Process

Judicial Process While delivering an inaugural address at the National Conference on “Judicial Process Emerging Trends” on 29th September 2012 at Venkat
eshwara University Tirupati Justice L. Narsimha Reddy of the High Court of Andhra Pradesh dwelt elaborately on judicial process. Justice Reddy observed that Judicial Process is the complex procedure of hearing or trial of a case by the judge having jurisdiction to try and the litigant having locus standing to knock the doors of the court.

The judicial process sets in when the state, the citizen, or the legal person created by law viz an Institution registered under the Societies Act, a Public Trust registered under the Public Trust Act., a Co-operative Society registered under the Co-operative Act or a Corporation registered under Indian Companies Act sets in motion the trial by filing a plaint, suit or complaint in the court of law.

Judicial process is basically whole complex phenomenon of court working. The judicial process is not confined to what the judges alone do but it includes what the clerical staff the bailiff and the advocates who are officials of the court together do.

The logical question will arise as to whether the Quasi Judicial proceedings are also included in the judicial process. The argument of the research scholar would be that all quasi judicial process including arbitration, mediation and conciliation under respective laws must be brought in the arena of the Judicial Process.

**Judicial Dicta on the application of Due Process Theory**

(a) To Service matters:

In the case of State Of Orissa v. Dr. (Miss) Binapani Dei & Ors decided on 7th February 1967 the facts of the case and the principle of law the facts of the case and the principle of law decided by the Supreme Court were the following:-

In the year 1938 the first respondent joined the State government. Further in the year 1961 an enquiry was held into the issue of her birth date by the Government. She was then served with a show cause notice regarding her date of birth. The enquiry official has not disclosed the report and the opportunity to know about the evidence used against were not provided to the respondent.

Refixing the birth date of the respondent the order of compulsory retirement was passed by the Government. Being aggrieved by this, a writ petition was filed by the respondent in the High Court. Pertinently the petition was allowed. However the State went for appeal against it.

In the appeal it was vehemently contended by the State as follows
(i) It was beyond the scope of the High Court to determine disputed questions of fact while dealing with the writ petition under Article 21 of the Constitution,

(ii) It was again beyond the scope of the High Court to hear the appeal against the order of the state authorities and pertinently the order regarding refixing the birth date of the respondent was an administrative order

The Supreme Court held that:

i) The High Court is in no way precluded to hear any grievance against the decision on the question of fact by the petition under Article 226 of the Constitution of India. The High court in a particular case may decline the enquiry and may refer the respondent claiming relief in a suit, in a case whee the High Court deems fit that an enquiry into complicated questions of fact arises in a petition. But it is the sole discretion and not the question of jurisdiction of the Court. And in the present case no sort of interference was called for with the exercise of the discretionary power of the High Court.

ii) It was also held that an administrative order must comply with the principles of natural justice even if a case involves civil consequences. It is highly obligated to let the concerned person be informed about the case of the state as well as the evidence to be used against him thereof and in all circumstances an opportunity to get aware of the case must be provided before arriving to an adverse decision. In the absence of any steps to be taken by the State as admittedly, therefore the High Court is correct in setting aside the impugned order of the state

Bottom of Form

The Supreme Court has laid down some significant principle of law, in A. K. Kraipak & Ors. Etc vs Union Of India & Ors, - the case decided on April 29, 1969. The facts of this case and the principle of law laid down by the Court were as follows:-

A special selection board was constituted under the Rule 4(1) of the Indian Forest Service Initial Recruitment Rules framed under Indian Forest Service (Initial Recruitment) Regulation, 1966 under the purview of All India Services Act, 1951, for the sole object of selecting and recruiting the officials for Indian Forest Service in Junior as well as senior scale among the officials already recruited in Forest service
in the state of J&K. It was mandatory as per the regulation that one of the members of the board shall be the Chief Conservator of the Forests of that State.

The conservator of the forests was the Acting Chief Conservator who have superseded another one and whose appeal was pending with the State government against his supersession at time of selections of the board were made. The then acting Chief conservator was alos among the one who was desirous to be selected of the Indian Forest service. Pertinently the selection made by the Board includes both senior as well as junior scale.

Pertinently the name of the other three conservators including the one who was superseded who were rivals of the acting Chief conservators were deliberately omitted while his name was on the top of the list. The acting chief conservator did not sit while his name was under consideration but however participated in the deliberations at the time when the name of his rivals were considered. It has also been observed that he made participations while preparing the list of preference of the selected candidates.

Further the so prepared list was forwarded to the Ministry of Home Affairs and which was further forwarded with its observations to the UPSC, as per the mandate of the Regulation. Further the UPSC had made recommendations after examination of the records of the officials afresh.

Thereafter, this prepared list was notified by the Government of India to the candidates. All the aggrieved officials, whose names were not included in the list, along with the three conservators, filed a writ petition for quashing the notification, in the Supreme Court under Art. 32.

On the following questions:

(1) Assuming in the present case that the proceedings being the administrative proceeding, whether the natural justice rules also applies to it;

(2) Whether the natural justice rules were violated in this case;

(3) Whether there was any basis for the grievances of these petitioners, when the recommendations laid down by the Board, were given due consideration by the Ministry of Home Affairs and the UPSC made final recommendations

(4) Whether there were grounds justified for setting aside the selection of the officials including the junior ones,

In this, the Supreme Court held that:

(1) The principles of natural justice are even applicable to the field that are not under the purview of any law validly made. In other words, these principles are supplementary to the law of the land and are
not supplant. These principles are not rules in the embodied form.

The main objects of these rules are not only to get justice but also to avoid the miscarriage of it in any form as well. If these particularly are the purpose of these rules, then there seems to be no enviable reason that these principles shall remain out of the purview of administrative proceeding however they shall be made applicable to them also, particularly if in case where it is difficult to distinguish between administrative inquiries and the quasi-judicial inquiries. As a matter of fact, the delivery of decision which is not just decision has far reaching effect in an administrative enquiry when compared to a quasi-judicial enquiry.

(2) In recent years, it can be seen that the natural justice principles has been taken sweeping change of a great deal of modifications and revolution. The applicability of a specific natural justice principle to the particular case may vary and largely depends upon the facts of the same, the legislation and its framework under whose purview the inquiry said plus the composition of the remains of person selected as tribunal.

On receiving a complaint regarding violation of the natural justice principle during the procedure in question, received by the court, it is the duty of the court to analyse whether the observance of the alleged natural justice principle was mandatory or arrive at just and fair decision depending upon the facts of the case. The enquiries held shall not be arbitrary or unreasonable but shall be in good faith and unbiased in consonance with the natural justice principles.

In the present case, the other members of the constituted board at the time of selections have no idea of the pending appeal by the superseded conservator with the State Government. Therefore the constituted board has no reason for not trusting the acting chief conservator’s opinion.

It has been observed that in addition to the conflict of interest and duties there exists that he was also adjudicating his own case. There were utmost chances that the Acting chief conservator had definitely acted with biasness having regard to the ordinary conduct of the human conduct and probabilities while deciding the issue.

Even though, he had not participated in some of the deliberations of the Board, but this does not negate that he being one of the member of the Board had participated in the deliberations while considering the claims of his rivals along with the finalization of the preference list thereto. There are reasons to believe that the Board in every circumstances have considered his opinion while dealing with the claims of the rival and preparation of the list thereof, thus there might have had its impact on the selection procedure.
Even though the members of the Board have stated that they have had mutual discussions while judging the suitability of the candidates and despite the other members made affidavit on oath that he had no at all influenced or tried to influence their decision, in group discussions, then also the fact can not be ignored is that every board member tend to influence and get influenced by the other members without even being aware of such influence.

Considering the facts and circumstances of the case, the decision of the Board regarding selection of the candidates, thus by no means be considered to be fair, just and reasonable as the biasness apparent in the form of influence by one of its members.

(3) Undoubtedly, the Board so constituted being a high powered body its recommendations had considerable weight while considered by the UPSC. Thus, the recommendation by the UPSC could not be separated from that of recommendations by constituted Board. Also this Board’s recommendations were foundation for the recommendations of the U.P.S.C. Therefore, it is necessary to hold the final recommendation by the U.P.S.C as vitiated, if the selection by the Board was held to be null and void.

(4) Again, as the selections of both senior as well as junior scales were made from the same source, it was deemed to be impossible to differentiate the two scales of Officials from each other. This was the reason that it was deemed unjustified to direct the Selection Board to consider only the three conservators that were rivals to the Acting Chief thus were excluded therefore all the selections by the board stands null and void.

(b) **Constitutional validity of the law on grounds of reasonableness**

The Supreme Court has laid down some significant principle of law, in Hamdard Dawakhana Wakf Ltd. V. Union of India and others⁶⁸ - the case decided by the Supreme Court of India on December 18, 1959.

The facts of this case and the principle of law laid down in this case were as follows:-

The Union of India had issued the Advertisement, banning the publication of some advertisements which were pertaining to certain medicines. This was the issue which was challenged before the Supreme Court in the aforesaid case.

The issue was whether the government can put a ban on such advertisements, when it relates to freedom of speech and expressions provided by the Constitution of India under Article 19. The Supreme Court, thus had to examine the constitutionality of the advertisement, on the touchstone of the Constitution, that whether it curtails freedom of speech.-
It was therefore unanimously held by the Hon’ble Supreme Court of India that: When any such enactment issued by the government is challenged on the ground of infringement of fundamental rights, it is crucial to determine the true character and nature of such enactment. In other words, we have to first ascertain its subject matter, the field in which it is intended to be applicable, its claims and objectives.

While doing so, it would be pertinent to arrive at the conclusion after having proper consideration of the various factors such as history behind the legislation, its objects and purpose, the neighbouring facts and conditions, the mischief to be suppressed, the proposed solution and the actual reason for such solution. Primarily, it was rule that the presumption should be in favour of an enactment that it is constitutionally valid.

On analysing the history behind the particular legislation in question in this case, the neighbouring circumstances and the scheme of the enactment, the Supreme Court observed that the main intent of the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954, was to prevent the self-medication and treatment by banning all those ways and means that may be used to promote the same and all other practises intended to extend the evil.

Its intent was not only to stop such advertisements which offend decency and morality. Being a strongest form of speech, the true character of advertisement can be apparent by the object for the endorsement for which it is engaged.

When an advertisement pertains to the expression or propagation of ideas then only it can be considered to be in reference to freedom of speech. However the personal business of the individual to distribute commercial advertisements and right to publish cannot be said to be a parcel of the freedom of speech provided by the Constitution of India.

However the legislation that prohibits advertisements in pertaining to the efficiency and significance in the treatment of specific diseases of particular drugs and medicines did not fall under the purview of Article 19.

The extent and purpose of the legislation, its true character and nature was not to interfere with the right guaranteed by the law of the land but it was to deal with the trade and commerce.

The definition of “advertisement ” in pursuance of the purpose of the Act was not too wide which included packaging labels and label on bottles along with instructions inside packaging box. If the definition
was not so broad and inclusive the very object of the legislation for which it was made stands defeated. In the section 3 of the Act, the use of the word “suggests” did not refer to the contention that the restraint placed by that section was disproportionate.

When it was written on the outer cover of the every packet that for the use of only registered practitioners, chemist hospital or lab’ then as per Section 14 (c) and R.6 of the legislation, the prohibited advertisements shall be sent without compromising confidentiality to a registered medical practitioner, to a wholesale or retail chemist, to a hospital or a laboratory by post only.

Pertinently the provisions of the Act were enacted and reasonable restrictions were imposed on the trade and commerce of the petitioners and were prevented by Article 19 of the Constitution of India in the interests of the general public at large.

It was alleged by the petitioner that the fundamental rights of the petitioner under article 19 was violated by the number of actions taken against them by the respondent. They additionally also challenged the validity of the legislation as it contravened the rights under Article 14, 21 and Art 31. Pertinently the Act was enacted on dated 30/04/1954, which came into force on dated 01/04/1955.

The preamble of the Act provide that it is a legislation to control and prohibit the manner of advertisement of drugs in particular case and for particular purposes of remedies respectively as alleged to possess magic qualities and to provide for the therewith connected matter.

In the case of Hamdard Dawakhana (Wakf) &Anr allegd that the petitioner faced difficulty in publicity of their products along with the objections raised by the authorities in respect of their advertisement, immediately after the Act was enacted. The Drugs Controller, Delhi, on December 4, 1958 intimated to the them about the contravention of the provisions under section 3 of the Act by them and thus ordered them to get back their products sent to Bombay along with other States as well.

It results in various correspondences between the petitioners and the respective authorities. The Drugs Controller, Delhi State, on December 4, 1958 banned the sale of around forty products of the petitioner as set out in the petition. Subsequent to that, objection was also raised by the Controller of Drugs regarding advertisements related to other medicines. The controllers of drug from other states also raised same objections for the advertisements of products of drug and medicines manufactured by the petitioners.

They contended that the advertisements followed the mandate of Unani system and the Unani nomenclature which is recognized and well known across the globe, still the objections were raised. The
legislation was highly criticized and contended to be violation of Article 14 of the Constitution as it was
discriminative, having excessive power of delegation as well as violative of article 19 of the Constitution of
India as infringing the right of freedom of speech and expressions and right to carry on trade and commerce.

The Act was also contended to be violative of Article 21 and 31 of the Constitution of India. The
petitioners therefore prayed to the Hon’ble court that the Act and the Rules enacted were violative of the
fundamental principles of the Constitution of India and thus shall be declared to be ultra virus and
void and to Prohibit and quash the proceedings along with the notices issued by the respective authorities i.e.
the respondents.

The respondents in their declaration contended that there is clear indication of necessity of the
legislation having regard to the advertisement of drugs made by the petitioners.

They also denied the allegations regarding violation of the fundamental rights under Article 19 and
also denied any contravention to Article 21 and 31.

It was contended that the advertisement restriction are for the general public at large and not to any
particular class. The main object of the act as noted from the preamble was to prevent the public from self
medication in respect of severe diseases,
This is because the effect of self medication in respect of serious diseases are severe which ultimately affect
the health of the large community detrimentally and is very harmful to the well being of any person as
rightly mentioned in the legislation and its allied rules.

It has been observed that some drugs were induced people to take recourse to self medication because of the
over exaggerated advertisement of such products and this pressed the necessity of having a legislation to
have compete check on such misleading advertisement and prevent public at large from the detrimental
effect of self medication by compelling the manufacturers to route their products through recognised sources
only.

The Supreme Court unanimously held that the phrase any other diseases or conditions as specified in
the rules’ which give the Central government enough room to make additions in the list of diseases falling
within the mischief of section 3 is in the form of uncontrolled powers on the executive and thus ultravirus.

The legislation had not prescribed any criteria or standards to analyse the addition of the disease
valid and duly specified. Hence even the schedule to the rules also stands ultra virus. But at the same time
striking of such impugned term will not affect or invalidate the remaining clause d or other clauses of
section 3 because of its severability.
The first part of section 8 stands unconstitutional so far as it authenticate any duly authorised person to seize and detain any article, document or thing on suspect of it containing any advertisement contravening the provisions of this law which is nothing but unreasonable restrictions on the fundamental rights.

The above mentioned particular part of setion 8 was not in consonance with the scope and purpose of the Act for which it has been enacted, however it also failed to provide proper procedure for the seizure and detention of things and the safeguards thereto which can be observed other legislations do and it is pertinent ot note that if thi portion of the law is severed then the remaining would become meaningless and hence it could not be upheld.

It is not at all mandatory to refer to the Bhatia Committee report or the Press Enquiry Committee or their report thereto as they were published a way back in 1954. In the year 1889, Indecent Advertisements Act was passed in England in order to control and supress indecent advertisements which relates to nervous debility, gonorrhoea, syphilis or other complaints or infirmity arising from intercourse and thus such advertisement was prohibited.

The Venereal Diseases Act was passed in England in the year 1917 which placed restrictions on advertisements relating to treatment for venereal diseases.

It is to be noted that The Pharmacy and Medicine Act, 1941is the corresponding material to the impugned legislation. And it would not be proper to say that Parliament did not have any material before it to proceed with the enactment of the legislation in question. This includes the legislation history, the analyzed evil that is to be remedied as well as the background in which the legislation was enacted.

In the case of Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar, it was held that for the court to uphold the presumption of constitutionality of the legislation it may consider the historical background thereto, the common knowledge matters and may take into its consideration every fact which can been conceived while enactment.

The court unanimously held that it is for the court to consider all the facts and circumstances while dealing with the question of constitutional validity of the legislation while in the present case it was observed that there existed the danger of self medication across the globe including India, this was brought to the notice of the government by the medical practitioners and acquainted personnel thereto. They also warned about the dangers and consequence of unethical advertisement of proprietary drugs for specific diseases which are more harmful evil. Hence it is beyond doubt that the state of facts existed at the time of enactment of the legislation as necessity.

These facts were already known and it is irrelevant to reiterate them. The court examined the
provisions of the present legislation having in mind the background along with the real intention, scope and object of the act.

The preamble clarifies that the main intent of the Act was to control and prohibit the advertisement in relation to particular disease and remedies that claim to have certain magic that is about to happen after administration and connected advertisements thereto.

(c) Application of the rule regarding ‘procedure established by law’ and rejection of the theory of Due Process of Law

In the well known case of A.K. Gopalan v The State Of Madras on dt. 19th May, 1950 the Supreme Court held that the term ‘procedure established by law’ does not have the same meaning as per the meaning of the phrase ‘due process of law’ as enumerated in American Constitution.

Rather it has the meaning of ‘procedure’ as laid down in the positive law which means and includes laws enacted by the Parliament or the State Legislature and not the mere principles of natural justice. The facts of the case and the principle laid down by the Supreme Court in this case may be analysed as follows:-

The petitioner has filed a writ of habeas corpus under Article 32 for his release from detention under the Preventive Detention Act, on the ground that the said Act was in contravention of the provisions of the Constitution of India and was ultimately ultra virus and hence it lead to the illegality of the detention.

It was held by the Supreme Court unanimously that the preventive Detention Act, 1950, did not contravene any of the provision enumerated in the Articles of the Constitution of habeas corpus and for his release from detention and inspite Sec. 14 was ultra virus in since it infringed the provisions under the Constitution of India, and for the reason that the severability of this section was possible from the remaining sections of the Act, the invalidity of Section 14 by no means affect the validity of the Act as a whole, and the detention of the petitioner, hence was not illegal.

The majority judgment unanimously held that in Art. 9.1 the word 'law" has been used to represent State-made law and not cannot be considered as an equivalent of law in the abstract or general sense which embodies the principles of natural justice; and the tem "procedure established by law" means procedure established by law made by the State, i.e, the Parliament or State Legislatures.

It would not be proper to interpret this expression in the consonance of the meaning given to the expression "due process of law" as explained in the American Constitution by the Supreme Court of America.

Pertinently Justice Patanjali Sastri stated that "Law" in Art. 21 does not refer to the jus natural of
civil law but it surely means positive or State-made law per se. Further the term "Procedure established by law" however does not by any means refer to any procedure which may be prescribed by a competent legislature, but it refers to ordinary well-established criminal procedure, i.e., those established. Usages and normal modes of particular procedures as sanctioned by the Criminal Procedure Code, the general legislation of criminal procedure followed in India.

In order to avoid the constitutional transgression, there is only alternative to this construction that is to interpret the reference to "law" as to imply a constitutional 'amendment protanto' as it is only a law which is enacted by the procedure provided for such amendment that could modify or override a fundamental right without any contravention to the Article 13(2).

However Justice Fazl Ali stated that there is nothing revolutionary in considering the view that the term "procedure established by law" shall include the principles of basic justice which are considered as the root of all civilized systems of law and which have been clearly stated by the American Courts and jurists thereto as comprising in:

(1) Notice,
(2) Right to be heard,
(3) Impartial tribunal and
(4) Predefined course of procedure.

These four principles are actually different perspective of the same right to name a few the rights to be heard before he is condemned. Thus the term "procedure established by law", whatever it exactly means, shall necessarily comprise within the principle that no person shall be condemned unheard by an impartial tribunal.

Justice Fazl Ali also further stated that the preventive detention is nothing but a direct violation of the right guaranteed under Article 19 (1) (d), even if the said sub clause is construed in narrow sense, and hence a law relating to preventive detention is subject to such limited judicial review as is permitted by under Article 19 (5).

Justice Das in this regard stated that Article 19(1) enumerate a legal capacity to exercise the rights guaranteed by it and if any citizen is deprived of the freedom of his person because of lawful detention resulting from a conviction for an offence or otherwise he cannot thereby claim the rights provided under sub clause (a) to (e) and (g) of Article 19(1) of the Constitution; for instance if a citizen's property is compulsorily acquired under Article 31 then he cannot claim the right under sub clause (f) of Article 19(1) in respect to that property.
Briefly, the rights under subclause (a) to (e) and (g) of Article 19 end in case lawful detention begins and therefore the validity of a preventive detention Act cannot be adjudged or determine by Article 19 (5). MAHAJAN J stated that despite of the precise scope of Article 19, the provisions of Art. 19(5) in no case can apply to a law dealing with preventive detention, in as much as there is a special self-contained provision in Article 22 regulating it.

(d) Application of the rule regarding reasonableness to determine the validity of law

In the well known case of Maneka Gandhi v. Union of India the Supreme Court on 23rd January 1978 decided an important question that whether the natural justice principles were applicable to administrative proceedings and also whether the natural law rights are part of the legal system as that of Fundamental Rights enshrined in the Constitution of India.

In this case the Supreme Court had finally to decide on whether the rule in respect of ‘Procedure established by law’ is similar to certain extent to the rule of due process of law. The brief facts of the case and the principle laid down thereof by the Supreme Court in this regard are analysed as follows:-

Under the Passport Act, 1967, the requester was issued a passport on 1-6-1976. However on the 4-7-1977, the requester received a letter from the Local Passport Official Delhi intimating to her about the decision of the Government of India to impound her passport under section 10(3)(c) of the Act on the ground of "in public interest".

As per the letter, the requester was asked to return her passport before 7 days from the receipt of that letter. The requesterright away replied to the Local Passport Official through letter requesting him to provide a copy of the declaration of reasons for making such order as provided in section10(5).

The Government of India, through Ministry of External Affairs sent reply that in the interest of the general public not to furnish her copy of the declaration of reasons in respect of making such order.

Section 3 of the Act provides that a person shall not depart or attempt to depart from India unless he holds in this behalf a valid passport or travel document.

The petitioner based her arguments on the following contentions:
Moreover, the doctrine that Articles 19 and 21 regulate flows in different channels, was laid down in the case of A. K. Gopalan's in a very different context from that in which that approach was displaced by the counter view that the constitution shall be read as an integral whole, with possibly overlap of the subject matter, of what is sought to be protected by its various provisions, particularly by articles dealing with fundamental rights.

The observations in A. K. Gopalan's case that due process with regard to law relating to preventive detention are to be found in Article 22 because it is a self-sufficient code for laws. That observation was the real ratio decidendi of Gopalan's case. Other observations relating to the severability of the subject matters of Article 21 and 19 were mere obiter in that case.

This Court has already held in A. D. M. Jabalpur's case by reference to the decision from Gopalan's cast that the ambit of personal liberty protected by Article 21 is wide and very comprehensive.

The Court laid down that the questions in respect of either deprivation or restrictions of personal liberty, concerning laws falling outside the purview of Article 22 remain really unanswered in the A.K. Gopalan's case. The field of 'due process' for preventive detention cases is wholly covered under the purview of Article 22 but other parts of that field not covered by it are 'unoccupied' by its specific provisions.

In as much as what may be called unoccupied portions of the vast sphere of personal liberty, the substantive as well as procedural laws made thereof must satisfy the requisites of both Article 14 and 19 of the Constitution of India.

Provision of the Constitution which deals with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights that cannot, mingle at many points.

They are all part and parcel of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow unimpeded as well as impartial justice (social, economic and political), freedom (not only of thought, expression, belief, faith and worship, but also of association, movement vocation or occupation as well as of acquisition and possession of reasonable property), or equality (of status and of opportunity, which ultimately imply absence of unreasonable or unfair discrimination between individuals, groups and various classes), and of fraternity (assuring dignity of the individual and the unity of the nation) which our Constitution visualises. Isolation of various aspects of human freedom, in order to protect them, is neither realistic nor beneficial but would ultimately defeat the very objects of such protection.