

BOOK REVIEW

DUE PROCESS OF LAW

Book : *Due Process of Law* **Author :** *Abhinav Chandrachud*
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A JOURNEY WITH THE 'DUE PROCESS OF LAW' : RECORDING SOME REVELATIONS AND DISAPPOINTMENTS WITH THE WORK OF ABHINAV CHANDRACHUD

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'*Due Process of Law*' raises both the curiosity and expectations of Indian Constitutional law students since these words were deliberately deleted from the Constitutional text by its framers after much debate. Abhinav Chandrachud begins by saying that the judiciary has invoked 'due process' into the Constitutional doctrine over time even though the founding fathers of Indian constitution had deliberately chosen 'procedure established by law' over the 'due process' clause. The readers get introduced to the book with the interpretation of 'Substantive Due Process'. The author calls this doctrine a 'Constitutional oxymoron' at the best and 'historical hiccup' at the worst and presumes that "fairness" doctrine as constitutionalism has contributed to the development of substantive due process in India. The purpose of this book, as the author

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mentions in the introduction itself, is to track the development of and determine the contours of the 'substantive due process' clause in Indian constitutional scenario.

The misinterpretation and myths associated with the phrase 'substantive due process' and instances where it has been confused with the judicial review of legislative actions have been lamented upon. Chandrachud clarifies in the beginning that the fluid interpretation of the Constitutional provisions by the Indian courts and its subsequent emphasis on the doctrine of 'fairness' and 'non arbitrariness' lay the foundation of substantive due process in our country. It is important to note here that he has placed caveat by stating that the book does not intend to undermine the nuances of the constitutional development in our country. It merely observes and analyses the changes Indian constitution has gone through in these years.

He asserts that the framers explicitly granted the judiciary with the authority of substantive review under Articles 14, 19 and 22 of the Constitution which in turn paved the way for due process into the Indian Constitution. The author's claim can be conceded to some extent in the fact that Article 14, while providing for equality before the law or equal protection of the laws, leaves room for deciding upon substantive question of law. But Article 19 allows 'reasonableness' test only for the restrictions imposed under Articles 19(2) to (6) and not of the law itself. Article 22 too is a procedural provision. Therefore, the claim made by the author about vesting judiciary with the power of substantive review through these constitutional provisions is highly debatable. Chandrachud also argues that the excesses of the political Emergency in 1975 and the subsequent failure of the courts in protecting the civil rights during the period led to the legitimate rejection by the Court of the original intent of the framers and opt for judicial activism instead. There is no doubt that courts took upon activist's stance after the Emergency

which resulted in an accelerated increase in accessibility to courts but how far can this approach be equated with courts invoking the ‘substantive due process’ doctrine?

While highlighting the differences between the two jurisdictions, Chandrachud mentions that the judges in the American Constitutional Courts have created a hierarchically superior set of rights which represent a set of values inherent in the American Constitution and represents “fundamental principles of liberty and justice which lies at the base of civil and political institutions”. But Chandrachud claims that in India substantive due process did not trigger higher burdens of scrutiny since the test of ‘arbitrariness’ has been applied by the courts without creating any such hierarchy. This, as per Chandrachud, stems from the fact that the American Constitution treats those rights as fundamental which are rooted in the tradition and conscience of people, whereas in India, only those rights which are enumerated in Part III of the Constitution are termed as fundamental rights. The validity of such conclusion deserves more scrutiny as in various instances courts have enumerated new fundamental rights based on constitutional principles outside Part III. One such instance is that of Justice Khanna’s renowned dissent in *A.D.M. Jabalpur* case, wherein he noted that right to life is not rooted in Article 21 alone. This gradually came to be accepted by the Supreme Court of India in subsequent years.

As the chapter progress, Chandrachud makes a tall claim that it is a fallacious belief that the “due process clause” was deleted in its entirety under the Indian Constitution. Rather, the Supreme Court in the 2010 case, *Selvi v. State of Karnataka*¹ asserted that substantive due process is a ‘guarantee’ under the Indian Constitution. The thesis,

¹ (2010) 7 S.C.C. 263

according to the author, is premised on the ground that the 5th and the 14th Amendment of the American Constitution which guaranteed 'life, liberty and property' were divided into two provisions under Indian Constitution. He continues that Article 21 provided for right to life and personal liberty, Article 19 guaranteed rights to enumerated liberties. Therefore, even though the clause 'procedure established by law' was deleted by the Framers, Court permitted the analysis of 'reasonableness' of liberty deprivation under Article 19. This led the author to conclude that Article 19 continues to allow courts to apply 'due process' standards.

It is highly sceptical as to whether the author should have premised his claim on a single Supreme Court judgement which makes grave alterations to the Indian Constitutional jurisprudence. True, that Chief Justice K.G. Balakrishnan opined in this case that substantive due process is a 'guarantee' under the Indian constitution but neither was this judgement based on any precedent nor was this judgement followed up in any more cases within the span of next two years following the *Selvi* case.

The second chapter titled 'Meaning of the Substantive Due Process Clause,' aims at tracing the evolution of the 'due process of law' doctrine. The author begins his discussion with the 39th Chapter of King John's Charter of Liberties which is also known as the '*Magna Carta*' of June 1215 and its subsequent popularly known version reissued by Henry III of 1225. The phrase, 'due process of law' was then termed as 'law of the land' and was premised on hearing before condemnation, proceedings upon enquiry and judgement only after trial. It is wrong according to the author, to trace the due process of law in *Magna Carta* since due process emanates from the idea of free man whereas *Magna Carta* came into existence against a backdrop of political feud and merely guaranteed against arbitrary actions of an absolute monarch. The only importance of *Magna Carta* is therefore, that it placed the king below the law and made law supreme. The *Magna Carta* was not given the status of written constitution in England. Its interpretation, as the author mentions, was strict and narrow and the judiciary was never allowed to add any right to the set provided explicitly in *Magna Carta*. Yet, he claims, that *Magna Carta* is

considered to have had an instrumental effect in coining the 5th and 14th Amendment of the American Constitution which sets limitations of the legislative authorities and judicial review. Later, in 1905, the Supreme Court of U.S.A. delivered its judgement in *Lochner v. New York*.² The author highlights this case as one which has since occupied a defining position with respect to the application of ‘substantive due process’ doctrine. The post *Lochner* era however witnessed some difference. As Chandrachud notes, the U.S. Supreme Court began to read the new and peripheral rights into the penumbral zone of substantive privacy instead of reading them within the term ‘liberty’ under the 5th and 14th Amendment of the American Constitution. According to the author, three forms of substantive due process emerged in America since then. The first type involves ‘substantive scrutiny’ whereby it is presumed that an unbiased decision maker would not reach a substantive arbitrary result if fair procedure is followed. The second type involves deciding upon unenumerated fundamental rights whereby the claimant demands rights not explicitly mentioned in the textual provisions of the Constitution. The third type involves using certain parts of the Constitution to give meaning to or interpret certain other parts of the Constitution. This chapter gives us a detailed account of the various events which have resulted in the development of substantive due process clause in America which fulfils the first promise made in the introduction – to indentify the boundaries of ‘substantive due process’ clause in U.S. Jurisprudence.

The third chapter is named “‘Due Process of Law” and the Constituent Assembly of India.’ The few pages which this chapter occupies primarily record the speeches made and debates held by the members of the Constituent Assembly either in favour of or against the acceptance of “‘Due Process of Law”. The concern raised by those opposing the due process clause, as recorded in the chapter, is that the phrase gives judiciary an upper hand over the other organs of the state and is a major hindrance to proposal of the social welfare legislations to be enacted by the legislature in the years to come. Also

² 198 US 45 (1905).

the counter-majoritarian nature of the judiciary was highlighted time and again to weaken the case of due process clause. An interesting observation made in this section is with regards to the significance assigned to the influence of Felix Frankfurter, J. on Sir Benegal Narsingh Rau, a member of the Drafting Committee and an ardent opposer of due process clause. Emphasis has been laid on their communications both at the beginning and the end of the chapter. Frankfurter, J. was apprehensive about the pattern of interpretation of the 'due process' clause in the U.S. judiciary. The author does a good job of analysing the reason behind Frankfurter's, J.'s fear with the due process clause. The section of the chapter dedicated to the theory of original intent of constitutional law seems inconsistent and incoherent for this portion fails to make any connection with the rest of the chapter. Also, the reason behind emphasising the Original Intent theory has not been mentioned anywhere. On a whole, author's third chapter more or less resembles a replication of a recorded volume of the Constituent Assembly Debate. The author might as well have recorded his own opinions instead of quoting from the debates.

The fourth chapter named 'The Early Years' records the nature of judicial review as observed since 1951 in cases involving Constitutional provisions through Articles 14, 19 and 21. Chandrachud notes that in *A.K. Gopalan v. State of Madras*³, it was asserted by the Court that Article 21 confers substantive right to life in addition to its guaranteed procedural safeguards. It was further asserted that the phrase, 'procedure established by law' in Article 21 is not equivalent to the 'due process' clause in its procedural aspect since the later phrase has been deliberately avoided by the Framers of the Constitution. This Chapter progresses with the discussion of "reasonableness" under Article 19. The author claims that though Article 21 deliberately dropped the 'due process' clause, Articles 14 and 19 permitted the courts to scrutinise upon the substantive fairness of legislations under 'classification' and 'reasonableness' tests respectively. The precise reason is that though the scrutiny by the

³ A.I.R. 1950 S.C. 27.

Court in both the cases is substantive, the same cannot be termed as scrutiny under the 'due process' clause. The 'due process' clause is applicable only for rights involving life, liberty and property. The rest of the Chapter comprises of multiple number of Supreme Court cases discussing 'reasonableness' under Article 19 and 'classification' under Article 14. Interestingly, the author admits that the 'procedural due process' types doctrines under Article 19 cannot be equated to the true 'procedural due process', yet the rest of the chapter is devoted to Articles 14 and 19 with meagre traces of Article 21 in places. Adequate discussion on the early years of 'Due Process of Law' remains wanting in this chapter.

'The Birth of Procedural Due Process' which is also the fifth chapter of the book, attracts the reader's attention for myriads of reasons and comprises of a significant portion of the author's arguments. The journey of Indian judiciary in formulating the jurisprudence of procedural due process is accounted for in detail in this chapter of the book. The author premises his discussion on 'judicial access' as a form of procedural due process and begins his discussion on procedural due process with *Kesavananda Bharati v. State of Kerala*⁴. He then takes us through other landmark judgements of the Supreme Court of India which defines India's Constitutional history. These include *Indira Gandhi v. Raj Narain*⁵ and *ADM Jabalpur v. Shivkant Shukla*⁶ in which Justice Khanna's gave his renowned dissenting opinion. This discussion ends with highlighting *E.P. Royappa* case⁷ and the overshadowing impact made by *Maneka Gandhi v. Union of India*⁸. An intriguing aspect of this chapter is the way the author highlights Justice Bhagwati's journey alongside the case discussions. The author records that in *A.D.M. Jabalpur* case Justice Bhagwati vehemently asserted his deference to the framers of Indian Constitution

⁴ (1973) 4 S.C.C. 225; A.I.R. 1973 S.C. 146.

⁵ A.I.R. 1975 S.C. 2299.

⁶ (1976) 2 S.C.C. 521.

⁷ (1974) 4 S.C.C. 3.

⁸ (1978) 1 S.C.C. 248.

and opined that Article 21 is a qualified right capable of deprivation through a validly enacted law with valid procedure, in *Maneka Gandhi* case he discarded the original intend doctrine and endorsed Justice Khanna's assertion that Article 21 is not the only source of right to life and personal liberty. The author very meticulously mentions that the change in Justice Bhagwati's opinion is a "telling indication of the legitimacy of judicial activism following the Habeas Corpus case and of the willingness of the courts to discard the constraints of original intent". The same paragraph however, cages some words which tersely indicated some accusation. The main argument in this chapter seems to assert that the understanding of "procedure established by law" under Article 21 has widened over time. Chandrachud opines that though the rigid boundaries of distinctness of fundamental rights loosened in *R.C. Cooper* case, it was in *Maneka Gandhi* case that the Supreme Court, for the first time, held in majority that right to life and personal liberty is subject to higher norms based on 'fairness' and 'reasonableness' thereby including tests under Article 14 and 19 into Article 21. He further mentions Justice V.R. Krishna Iyer's opinion in *P.N. Kaushal v. Union of India*⁹ whereby Justice Iyer asserts that though the test of reasonableness is built in Article 19, the test is implicit under Article 14. This case has been highlighted by the author so as to integrate his reasoning with the proposition of *Maneka Gandhi* case. The decision in *Maneka Gandhi* goes onto mention that Articles 14, 19 and 21 forms the golden triangle of fundamental rights in the Indian Constitution. Chandrachud interprets this relationship more specifically in the form of isosceles triangle. The author draws this isosceles triangle as against the 14th Amendment of American Constitution whereby the two key angles namely, equality and right to life share the same space and derive sustenance from each other. Article 19 on the other hand, 'casts its luminous glow' of reasonableness on Article 14 and 21 and lends meaning to the mutually derived understanding of Articles 14 and 21. This chapter suffices well for a reader with an interest in mapping the journey of procedural due process in our country. The cases are discussed in great detail

⁹ (1978) 3 S.C.C. 558; A.I.R. 1978 S.C. 1484.

with distinct highlight on the opinions of every judge associated with the case. What this chapter fails to establish however is the connection between the cases which makes the chain of discussion appear disjunctive. The case discussions are very informative but fail to provide something novel which the readers could take forward from the discussions. Also, the trivia added to the facts of some cases such as *Maneka Gandhi* being thrown out of her marital residence after her husband's death, is of no relevance either in the case or in academics.

'Substantive Due Process', as the final chapter is called forms one of the lengthiest chapters of the book where the author focuses his discussion primarily on the application of substantive due process doctrine in India. According to the author, the substantive due process seeped into the Indian Constitutional history through three main doors. The first way is by holding judicial review as a part of 'Basic Structure' of the Constitution. Second way is through rigorous application of the 'arbitrariness' test on legislative actions. Third way is by applying 'substantive due process' doctrine to Right to Life jurisprudence under Article 21 of the Constitution for rights creation. Chandrachud therefore makes the following recording in this chapter:

Chandrachud highlights two landmark cases where the Court exercised substantive due process while applying the Basic Structure test of judicial access. The first among them is *Minerva Mills* case¹⁰. The Court struck down Section 4 of the 42nd Amendment not because it precluded judicial access but rather because it tampered with the constitutional values of fundamental rights enshrined in Articles 14, 19 and 21 and instead gave primacy to the Directive Principles of State Policy over Fundamental Rights. The second case is that of *S.R. Bommai*¹¹ in which the Court, besides concluding that Presidential Proclamation under Article 356 was subjected to judicial review, went a step further and conceded to applying the 'reasonableness' test upon the veracity of such proclamation. The *Bommai* case marked the beginning of applying Basic Structure tests outside constitutional amendments.

¹⁰ (1980) 3 S.C.C. 625; A.I.R. 1980 S.C. 1789.

¹¹ (1994) 3 S.C.C. 1; A.I.R. 1994 S.C. 1918.

The author also mentions the way by which substantive due process doctrine also seeped through the arbitrariness test applied to legislations. Whether adjudicating upon the Rent Act in *Malpe Vishwanath Acharya v. State of Maharashtra*¹² or upon the Securitisation Act in *Mardia Chemicals* case¹³, the Court applied the arbitrariness test as emanating from constitutional values in the absence of identified equal protection or liberty deprivation provisions. This resulted in loose enunciation of the ‘arbitrariness’ doctrine in India which in turn threatened to develop a new ‘fairness’ test under Article 14. As a consequence, the arbitrariness test began to be applied even in absence of ‘equal protection’ cases or cases involving deprivation of life and personal liberty.

The author has mainly considered privacy related cases while discussing the application of substantive due process clause into right to life jurisprudence. Through *Selvi v. State of Karnataka*¹⁴, Chandrachud highlights that this is the first case since the deliberate deletion of the ‘due process’ clause from the Constitution, that the Supreme Court declared “substantive due process” to be standard or a guarantee against which law would be assessed. The author also mentions the *Naz Foundation* case¹⁵ to highlight that Delhi High Court found that a measure that puts a vulnerable group defined on the basis of characteristic that relates to personal autonomy, in a disadvantageous position, must be subjected to strict scrutiny. This is a form of substantive due process. As per the author, the Supreme Court has invalidated many statutes on expressed or implied theory of dignity by applying the substantive due process doctrine. The author also mentions that some of this ‘dignity’ rights were rooted though expressedly in the Directive Principles of State Policy, they were read into Article 21 so as to apply substantive due process doctrine. Interestingly, in the end of the chapter, the author clarifies that though the courts are comfortable in applying the “reasonableness” test to

¹² (1998) 2 S.C.C. 1; A.I.R. 1998 S.C. 602.

¹³ (2004) 4 S.C.C. 311; A.I.R. 2004 S.C. 2371.

¹⁴ (2010) 7 S.C.C. 263.

¹⁵ (2009) 111 D.R.J. 1.

statutes, they would not, in normal circumstances, consider whether the legislature has “applied its mind” while enacting the law.

The main weakness of this chapter is its repetitive nature. A single argument has been presented over and over again in different forms which in turn made the chapter bulky. Also, the reason behind mentioning ‘public interest litigations’ in this chapter, does not appear to be very clear to me.

On a whole this book serves as a store house of information. Minute factual details about cases whether landmark judgements or not, have been meticulously recorded in this book. But how much of this information is relevant to the discussion of the topics proposed is questionable. The book scores poorly under the head of ‘originality’ due to repetition of arguments, extensive quoting from the original texts of judgements, Assembly debates and the minimum level of analysis throughout the text. No doubt in certain circumstances, the quoted texts provide authority to arguments but generous quoting of judgements makes it a lengthy read. The most prominent weakness of the book, as it seems to me is the overemphasis of the *Selvi* case to establish the explicit application of substantive due process in Indian Constitution. It is pertinent to note that no other constitutional bench has ever mentioned ‘substantive due process’ as a threshold. *Selvi* case neither follows precedent nor has this case been followed as a precedent. Therefore basing claim on such a judgement can only make an argument sound weak. The book is a decent read for those who want to know about the evolution and progress of ‘due process’ doctrine in the legal systems. But the analytic skills of the author and its novel contribution to the existing literature on due process remains wanting making the book just another ordinary read.