

## **“Substantive Justice and Due Process in Criminal Justice Mechanism in India”**

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### **Abstract**

Substantive justice is the justice administered according to rules of law, whereas due process or procedural justice is the just and fair process which brings this outcome. These outcomes depend upon the substantive function of the law.

It is designed to offer corrective action in response to the violation of the right of another. For example, social justice, which covers the notion of equality? It ensures that fair and equal treatment is carried out in the process of accused being tried and convicted.

The literal meaning of substantive justice is providing justice with the power of law by applying correct principles and provisions of law, while due process as stipulated in Code on Criminal Procedure imposes checks and balance on the processes through which an individual is tried in a criminal case, these checks and balance are imposed to ensure that the outcomes produced are procedurally just. A substantive justice approach concentrates on positive rights, liberties and promotes liberal legal thinking.

In order to curb the delay in the process of providing justice to the victim it is very important that substantive justice and procedural justice go hand in hand otherwise it will be very difficult for the judiciary to synchronize and ascertain the charges to be framed against the accused. In case there is any sort of discrepancies during framing of charges it will lead to a great miscarriage of justice. Criminal justice mechanism although being a well-organized system suffers from lacunas arising due to imperfection of investigating authorities covered under the purview of procedural justice.

The phrase “Justice Delayed Is Justice Denied” is not something to live by for the whole life, the defense of dead lock of cases and overburdened judiciary is not going to make anything better. There are many real-life cases in which similar situation persisted, such as Rudul Shah

Vs State of Bihar in which the man was charged for murdering his wife and served 14 years of detention after his acquittal by Additional. Session Judge in 1968. The principle of considering a person innocent until proven guilty has no place in the society, as and when an innocent is charged he is considered to be guilty, therefore the criminal justice system needs to be reformed.

In this article author will try to explain the importance of these both concepts in process of attaining the desired outcome “justice” in a criminal case also will discuss the problems of under trails and solution for those problems in the context of attaining substantive justice.

### **Introduction**

Initially, substantive justice is denied during the pre-trial detention especially in minor offences. For example, if the defendant was actually found guilty he would have awarded much less punishment as compared which he has served as an under trail. A real-life example of this scenario is Prajwal’s case, he spends 5 years as an under trail charged under theft in Mysore Central Jail.

This pre-trial punishment falls for both on the innocent and guilty, the innocent have to serve this as a guilty and the most common element in these cases is the degree of poverty, they can’t afford a good lawyer or can’t afford the bond. This penal pre-trial process can misrepresent the determination of guilt or innocent, as many of the lower criminal courts offer probation period if accused pleads guilty which implies that the initial conviction will disappear if the defendant successfully completes the probation period, yet for many important purposes the conviction remains, permanently marking the accused as a criminal. As a result most of the defendants have been hauled up for suspected violation of law, yet they are innocent, till approved guilty. They, therefore, cannot be put on the same footing as convicts. Further, if they are allowed to mix up with hardened and habitual offenders, it would not be good for them and not good for society.<sup>1</sup>

Substantive justice is supported by due process both operate in parallel ways. If substantive laws are not consistent, not matter how liberal and protective procedural laws are they will not help desired substantive justice to be achieved. Therefore “due process” acts an engine of a car which makes it run smoothly. Under due process of law, the Court determines the justness of substance of law. Therefore every form of review other than involving procedural due process is a form of substantive due process.<sup>2</sup> In a democratic country judicial review of legislations is always considered to be fundamental to legal system.<sup>3</sup> It is the judiciary not the legislators who are empowered by due process clause to decide whether law enacted by the

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<sup>1</sup> Report by Mulla Committee in 1983.

<sup>2</sup> JOHAN NOWAK, CONSTITUTIONAL LAW 381 (St. Paul Minnesota West Publishing Co. 1978).

<sup>3</sup> Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461 (India).

State is fundamentally fair, in accordance with the Constitution and the principles of due process.

It is very difficult to provide complete definition and meaning of 'due process of law' because it's meaning and scope is far from settled in spite of the great amount of research that has been made by various authors. Moreover, there is no unanimity among the authors on the content, scope, limitation and meaning of due process. Further the word 'due process of law' is ambiguous and has been interpreted and reinterpreted by the courts in different sense under different circumstances at different points of time. Due process unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances.<sup>4</sup> Thus, due process can be said to be relative term rather than absolute which is dynamic and flexible. Therefore, the content and meaning of due process is much related to time, territory, the nature of legislation and nature of right to be deprived.

The expression 'due process of law' is not used in any provisions of the Indian Constitution. However, the due process can be inferred through the Articles 14, 19, 20, 21 and 22 together<sup>5</sup>. The judiciary has played a creative role in this regard. It has interpreted the 'procedure established by law' in Article 21 to be equivalent of the 'due process of law.' Article 21 in its draft form was Article 15. It provided that "No person shall be deprived of his life or liberty without the due process of law."<sup>6</sup> But the Drafting Committee at a later stage proposed the substitution of the expression "except according to procedure established by law" for the words "without due process of law." The Drafting Committee justified the amendment because the word due process gives scope for judicial supremacy to determine the content of law which is likely to create confusion and hurdles in the social transformation.

The Supreme Court of India in *A.K. Gopalan v. Union of India*, case held that Article 21 is complete code; procedure established by law need not comply with the principle of natural justice and reasonableness under Article 19 Court decisively rejected the application of due process of law under Article 21 pointing out that as long as a person was detained according procedure established by law, he could not challenge his detention.<sup>7</sup> However the attitude of judiciary gradually shifted from the procedure established by law to procedural due process. The 11 judges bench of Supreme Court in *Bank Nationalization*<sup>8</sup> case overruled the view of *A.K. Gopalan* and opined that each fundamental right is not complete code but interdependent which laid the foundation for due process clause in the Indian legal system.

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<sup>4</sup> 3 DURGA DAS BASU, CONSTITUTION OF INDIA 3084 (8<sup>th</sup> ed., LexisNexis Butterworths Wadhwa, 2009).

<sup>5</sup> INDIA CONST. art. 14, 19, 20, 21, & 22.

<sup>6</sup> 2 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 970 (4<sup>th</sup> ed., Universal Law Publishing Co. Pvt. Ltd. 2010).

<sup>7</sup> *A.K. Gopalan v. Union of India*, A.I.R. 1950 S.C. 27 (India).

<sup>8</sup> *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 S.C.C. 248 (India).

The Maneka Gandhi<sup>9</sup> is now accepted as the starting point of the introduction of due process clause in India after incorporating the concept of arbitrariness articulated in Royappa<sup>10</sup> under Article 21.

### **Justice not served**

The major problem in India is the 67% of total inmates are under trails above over 40% of them remain in jail for more than 6 months<sup>11</sup>; the reason is they are not able to secure bail. The maximum number belongs to a poor class of people and due to their poverty; they remain in jail like a lost coin in the river.

Prajwal an under trail in Mysore Central Jail, he spent 5 years in jail as under trail charged for 14 cases and found not guilty in all of them but still remained in jail because of insufficient resources. He was acquitted on 2011 but was still in jail till 2014 and the reasons were that the prison records were not updated for 4 years. What may have been done for him? Is this the example of the inadequacy of the authorities? Is this justice?

There are many problems in Indian jails some of them are: overcrowding, corruption, and extortion in prison, prison violence, homosexual abuse, health problems, and mentally ill prisoners. Reasons are jail authorities are not following the guideline prescribed by courts. Under trails and convicts are kept together due to which they are subjected to harassment and physical violence by other inmates.

Another case of miscarriage of justice is of Mohammad Aamir Khan who was the accused of Delhi High Court Bomb blast case. He was 18 years old when detained and remained there for 14 years without any solid evidence. After 14 years he was acquitted because his offence was not proved beyond reasonable doubt. Are 14 years are needed to prove or disprove any offence? The answer is no, this should be the obligation upon the state to dispose of the case in as much as possible short time. After 14 years being in jail, who was a boy of 18 years released, do this sound as a substantive justice. He was denied his right to liberty for 14 long years and when he was released entire Delhi was alien for him, he had nothing to do for a living and still carrying that stigma of a “terrorist”.

These examples reflect that there is the problem with the procedural aspect as Legal authorities are legitimate and effective when they act impartially, honestly, transparently, respectfully, ethically, and equitably. The criminal justice system that expresses these values is not only morally defensible but also quite probably stable and effective.

“Justice delayed is justice denied”-William E. Gladstone

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<sup>9</sup> Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248 (India).

<sup>10</sup> E.P. Royappa v. State of Tamil Nadu, (1974) 4 S.C.C. 3 (India).

<sup>11</sup> Report of National Crime Records Bureau, 2015.

More than three crore cases are pending in India, with the same view CJI TS Thakur suggested hearing and finalisation of cases during the summer holidays, if the counsel of both the sides were willing and also added that he will request the CJ of High Courts to list these cases to judges for the same. This would rather boost Indian judicial mechanism and may reduce the delay in the final judgment.

### **Bail as a right**

One of the right given to under trials is bail, an under trail has a right to bail if he is accused of a bail-able offence and it is at the discretion of the court to give bail under the non-bailable offence.

One of the examples of bail application is resent case of JNU's president Kanhaiya Kumar,<sup>12</sup> who was charged with sedition and criminal conspiracy. While addressing the bail Justice Pratibha Rani wrote the order presuming him to be guilty of the offence and passed it to H.C. His bail application was on the concrete grounds and supported by the police report that he was not the part of that event. Judge wrote the song and explained it in a very philosophical way. Question here is that was this procedure followed by the learned judge was appropriate? According to me she was inclined to provide conservative method of treatment and granted interim bail, which should not be the approach of a judge while addressing the bail application. As liberty of a person is of great importance and is one of the most important rights guaranteed in the Indian constitution. Granting or refusing a bail to an accused is the matter that has to be handled with caution and efficiency because the aim of the law is "bail not jail".

### **Conclusion**

Substantive justice is the "justice" in its fuller dimensions, not just the demonstrations of equality and fairness in the system. Correctly said by Amartya Sen in his book "Idea of justice", a law is not about 'niti' (rule), it is also about 'nyay' (justice). Law is not only for imposing, convicting or acquitting the accused but also to see whether those outcomes are just and fair or not.

Marginalised section of the society plays an important role in transforming towards substantive justice. When the weaker section will get the same treatment in the criminal justice system, which will be the time when one can say justice is served in its fullest dimensions. Cases like the Ruchika Girhotra case have constantly shown us how the substantive justice and due process of law methods have failed in time and thereby it is the high time for concerned authorities, general public and legal luminaries to think on the matter and address the loopholes.

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<sup>12</sup> Kanhaiya Kumar v. State of NCT Delhi, W.P. (Crl.) 558/2016, Crl. M.A. Nos. 3237/2016 & 3262/2016.