

## Unit 37. Procedure Established by Law vs Due Process of Law



In this post we shall see two important terms often cited in Supreme Court Judgments – Procedure Established by Law and Due Process of Law – their meanings and significance.



The former is Indian constitutional doctrine and the latter is American, but now the boundaries are very narrow. Let's start our discussion with Article 21 of Indian Constitution. What does it say?

### Article 21 in The Constitution Of India

**21. Protection of life and personal liberty:** No person shall be deprived of his life or personal liberty except according to procedure established by law.

### Procedure Established by Law vs Due Process of Law

As we have seen, the term “procedure established by law” is used directly in the Indian constitution. Due Process of Law has much wider significance, but it is not explicitly mentioned in Indian Constitution. The due process doctrine is followed in the United States of America, and Indian constitutional framers purposefully left that out. But in most of the recent judgments of the supreme court, the due process aspect is coming into the picture again. Let’s see the difference in detail.

### Case 1: Procedure Established by Law

It means that a law that is duly enacted by the legislature or the concerned body is valid if it has followed the correct procedure. Following this doctrine means that, a person can be deprived of his life or personal liberty according to the **procedure established by law**.

So, if Parliament passes a law, then the life or personal liberty of a person can be taken off according to the provisions and procedures of that law.

This doctrine has a major flaw. What is it?

It does not seek whether the laws made by Parliament is fair, just and not arbitrary.

“Procedure established by law” means a law duly enacted is valid even if it’s contrary to principles of justice and equity. Strictly following procedure established by law may raise the risk of compromise to life and personal liberty of individuals due to unjust laws made by the law-making authorities. It is to avoid this situation, SC stressed the importance of due process of law.

### Case 2: Due Process of Law

Due process of law doctrine not only checks if there is a law to deprive the life and personal liberty of a person but also see if the law made is fair, just and not arbitrary.

If SC finds that any law as not fair, it will declare it as null and void. This doctrine provides for more fair treatment of individual rights.

Under due process, it is the legal requirement that the state must respect all of the legal rights that are owed to a person and laws that states enact must conform to the laws of the land like – fairness, fundamental rights, liberty etc. It also gives the judiciary to access the fundamental fairness, justice, and liberty of any legislation.

The difference in layman’s terms is as below: **Due Process of Law = Procedure Established by Law + The procedure should be fair and just and not arbitrary.**

### History of Due Process of law

The due process developed from clause 39 of the Magna Carta in England. When English and American law gradually diverged, due process was not upheld in England but did become incorporated in the Constitution of the United States.

### Change of situation in India: Maneka Gandhi vs Union of India case (1978)

In India, a liberal interpretation is made by judiciary after 1978 and it has tried to make the term 'Procedure established by law' as synonymous with 'Due process' when it comes to protecting individual rights.

In **Maneka Gandhi vs Union of India case (1978)** SC held that – 'Procedure established by law' within the meaning of Article 21 must be 'right and just and fair' and 'not arbitrary, fanciful or oppressive' otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied. Thus, the 'procedure established by law' has acquired the same significance in India as the 'due process of law' clause in America.



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