



A CRITICAL APPRAISAL OF PERSONAL LIBERTY UNDER THE CONSTITUTION OF INDIA IN THE LIGHT OF JUDICIAL PRONOUNCEMENTS

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INTRODUCTION

“Eternal vigil is the price for liberty”.

The expression ‘personal liberty’ means the ability to act as one pleases. It means that liberty of every kind necessary to live as human being and ensure all round development of one’s own personality and to live with dignity. Personal liberty consists of the right of locomotion- to go where one pleases and when- and to do that which may lead to one’s business or pleasure, only so far restrained as the rights of other may make it necessary for the welfare of all other citizens. For example; the recent incidence of unwarranted police atrocity on the peaceful protestor; at Ramlila Maidan, New Delhi, to remove Yoga-Guru Baba Ramdev and his supporters assembled to protest against the rampant corruption and black money stashed in foreign bank by few Indian. Similarly, the refusal of Delhi Administration to hold ‘Satyagraha and Fast’ at Jantar Mantar and followed with arrest of Social Activist Anna Hazare are some of the instances of abuse of Police power by the State resulted into violation of the constitutional rights.



Rights and Liberty- Meaning and Scope

Rights are the necessary conditions for the personal, social, economic, political, mental and moral development of man. Rights are the social requirement of a social man for the development of his personality and society at large. Thus, there are two aspects of rights- personal and social. Rights of the individual are merely anti social privilege if these are a hindrance to social development. Rights have a social character and are given only to the man living in society and working in the overall interest of the society. The concept of rights includes personal as well as social interests. According to Laski, “Rights, in fact are those conditions of social life without which no man can seek, in general, to be at his best.” In the words of Barker, “Rights are the external conditions necessary for the greatest possible development of the capacities of the personality”. Rights are required for the development of one’s self and society. Because of this, no right can have anti-social character and every right is restricted by social interest. The basis for judging rights is their capacity for serving the individual and social interest. In the light of this meaning of rights, now let us discuss the concept of liberty.

The term liberty has meant different things to different people. It is derived from the latin word Liber, which means free. Liberty is not a philosophical or legal concept. Like, the State, Sovereignty and rights it is a product of specific historical circumstances and its meaning can only be made clear by looking at its development in the various political traditions. Caudwell says, “Liberty is a concept about whose nature men have quarreled perhaps more than about any other”. Some time it is identified with the absence of restraint-

a negative meaning. Sometimes it is identified with the availability of certain socio-economic conditions in which a man may develop his personality- a positive meaning. "Absence of restraint", it is said, "is too limited a definition; freedom has a positive as well as negative aspect." However, "Liberty" is distinguished from 'license'. License means freedom to do anything-desirable or undesirable. Thus, there is a two concept of liberty, i.e. Negative concept and Positive concept. It can be said that liberal thinking in the beginning supported a negative concept of liberty. It was basically the philosophy of personal liberty and it maintained that liberty is the absence of restraints. This view regarded Liberty as something having no relation with equality, rights or justice. The second view of liberty which emerged during 19th century was that of positive liberty and it maintained that liberty is available when positive social conditions for the fulfillment and development of human personality are made available and the State was entrusted with the responsibility of creating such conditions. This positive view understood liberty in relation to equality, rights and justice. Thus, Liberty is not merely an idea, or ideal, or slogan, or an emotion- but it is a fundamental concept without which man is hardly a man. It is concerned with the quality of human life. Thus, liberty and humanity are closely associated with each other.¹ In the backdrop of these let us find the scope of the expression personal liberty in light of some judicial pronouncement.

Judicial Interpretation

Respect for human dignity and personal liberty pervades the entire Constitution of India. The Constitution of India, the fundamental law of the land, enshrined Article 21, which lays down that no person shall be deprived of his life and personal liberty except according to 'Procedure established by law'. The most vital words in this provision are procedure established by law. The question of interpretation of these words arose in the famous Gopalan case² where the validity of the Preventive Detention Act, 1950, was challenged. The main question was whether Article 21 envisaged any procedure laid down by a law enacted by a legislature or whether the procedure should be fair and reasonable. In the instance case the attempt was made to persuade the Supreme Court to hold that the courts could adjudicate upon the reasonableness of the Preventive Detention Act. A three pronged argument was developed for this purpose: (1) the word 'law' in Article 21 does not mean merely enacted law but incorporates principles of natural justice so that a law to deprive a person of his life or personal liberty cannot be valid unless it incorporates these principles in the procedure laid down by it. (2) The reasonableness of the law of preventive detention ought to be judged under Article 19. (3) The expression 'procedure established by law' introduces into India the American concept of due process law; which enables the courts to see whether the law fulfils the requisite elements of a reasonable procedure. Thus, in Gopalan case, an attempt was made to win for a detenu better procedural safeguards than were available to him under the relevant law and Article 22. But the attempt failed as the Apex Court rejected all these arguments. The court held that the word 'law' in Article 21 could not be read as meaning rules of natural justice. These rules were vague and indefinite and the Constitution could not be read as laying down a vague standard. Nowhere in the Constitution was the word 'law' used in the sense of abstract law or natural justice. The expression 'procedure established by law' would therefore mean the procedure as laid down in an enacted law. But, Fazal Ali J, disagreeing with the majority view held that the principle of natural justice that 'no one shall be condemned unheard' was part of the general law of the land and the same should accordingly be read into Article 21. Similarly an attempt was also made to establish a link between Article 21, 22 and 19 and argued that when a person was detained, his several rights under Article 19 were affected and thus the reasonableness of the law, and the procedure contained therein, should be justifiable with reference to Article 19(2) to (6). Rejecting the argument, the court pointed out that the word 'personal liberty' in Art. 21 in itself had a comprehensive content and ordinarily, if left alone, would include not only freedom from arrest or detention, but also various freedoms guaranteed by

¹ M.P. Jain-Political Theory- Authors Guild Publications-Delhi, at page 341, 345.

² Gopalan v Madras, AIR 1950 SC 27.

Article 19. Similarly, Article 21 should be held as excluding the freedoms dealt with in Art. 19. The court ruled that Article 20 to 22 constituted a comprehensive code and embodied the entire constitutional protection in relation to life and personal liberty and was not controlled by Article 19. Thus, a law depriving personal liberty had to conform with Article 20 to 22 and not with Article 19, which covered a separate and distinct ground. Article 19 could be invoked only when a law directly attempted to control a right mentioned therein. This judicial approach meant that a preventive detention law would be valid and be within the terms of Article 21 so long as it conformed with Article 22, and it would not be required to meet the challenge of Article 19. Fazal Ali, J, differing with the majority, held that Article 19(1) (d) did control Article 21 & 22, because juristically freedom of movement was an essential requisite of personal liberty, and, therefore, reasonableness of the preventive Detention Act should be justifiable under Article 19(5). He interpreted the phrase 'procedure established by law' in Article 21 as implying 'procedural due process', meaning thereby that no person could be condemned unheard, a principle well recognized in all modern civilized legal systems. However, the way the majority handled Art. 21 in Gopalan case were not free from criticism. This case was characterized as the 'high-water mark of legal positivism'. The way Article 21 was interpreted made it impotent against legislative power which could make any law, however drastic, to impose restraints on personal liberty without being obliged to lay down any reasonable procedure for the purpose. It was not for the court to judge whether the law provided for fair or reasonable procedure or not. Some of the arguments adopted by the majority to reach the result could not stand close scrutiny. For instance, the concept of natural justice decried by the court as vague and uncertain, is not unknown in India. Since Gopalan case, natural justice concept has been applied by the courts in a number of cases and its area of application continues to expand with the lapse of time. Then, the majority characterized the concept of due process as vague and variable. The fact however remains that the Indian Constitution incorporates the very same concept to some extent in Article 19 in the form of 'reasonableness' of restrictions imposed on the rights guaranteed by Article 19(1). The argument that 'due process' and 'police power' concept go together in reality applies only to 'substantive due process' and not to 'procedural due process' and it was the latter, not the former, which was sought to be imported in Article 21. There is not much vagueness about the essentials of procedural due process because basically means "fair hearing", which is a very well known concept. There may be variations in the application of this concept to concrete factual situations but this is inevitable in any legal system. The court has applied the concept of fair hearing in multitude of cases and recognizes that this is a flexible and not a rigid concept. The concept of fair hearing is ingrained in the jurisprudence of any civilized country and it does not have to depend for its efficacy on any term like due process. The court could³ have interpreted Article 21 some-what liberally and purposefully and read natural justice therein. Thus, in Gopalan case, Court laid down that Articles 19, 21 & 22 were mutually exclusive and that Article 19 was not to apply to a law affecting personal liberty and a 'law' affecting personal liberty could not be declared unconstitutional merely because it lacked natural justice or due procedure. In other words article 21 gave a carte blanche to a legislature to enact a law to provide for arrest of a person without much procedural safeguard. It gave final say to the legislature to determine what was going to be the procedure to curtail the personal liberty of a person in a given situation and what procedural safeguard he would enjoy. Because of the impotence of Article 21 as a protection against legislative action, it may not be correct to assume that the Constitutional provision was of no value.

Article 21 served as a restraint upon the executive which could not proceed against an individual to curtail his personal liberty save within the four corners of the law. It resulted in several postulates. A person could not be deprived of his life or personal liberty merely by an executive fiat without there being a valid law to support it and held that the night domiciliary visits by police constitute an infringement of personal liberty of an individual.⁴

³ See supra note 1 at page 3

⁴ Kharak Singh v U. O.I. ,AIR 1963 SC 1295, Satwant Singh v A.P.O., AIR 1967 SC 1836.

The courts insisted time and again that while depriving a person of his personal liberty, the procedure established by law must be strictly complied with and must not be departed from to the disadvantage of the person affected.⁵ Thus, Article 21 provided a safeguard against arbitrary or despotic executive action. Its chief value laid in that a person, whose life or personal liberty had been put in jeopardy otherwise than in accordance with the procedure established by law, could immediately take recourse to Article 226 and 32. In this way, a person whose personal liberty has been curtailed contrary to law was assured of an effective and expeditious remedy.

On the other hand, *Maneka Gandhi v India*⁶ is a landmark case of the post-emergency period. This case shows how liberal tendencies have influenced the Supreme Court in the matter of interpreting Fundamental Rights, particularly Article 21. A great transformation has come about in the judicial attitude towards the protection of personal liberty after the traumatic experience of the emergency during 1975-77 when personal liberty had reached to its all-time low. Since then the Supreme Court has shown great sensitivity to the protection of personal liberty. The Court has re-interpreted Article 21 and practically overruled *Gopalan* case.

In *Maneka Gandhi's* case (Supra), one of the major grounds for challenge was that the order impounding the passport was null and void as it had been made without affording her an opportunity of being heard in her defence. The Court laid down a number of propositions seeking to make Article 21 much more meaningful than hitherto. First, the court reiterated the proposition that Article 14, 19 and 21 were not mutually exclusive. This means that a law prescribing a procedure for depriving a person of 'personal liberty' has to meet the requirements of Article 19. Also, the procedure established by law in Article 21 must answer the requirements of Article 14 as well. According to K. Iyer J. no article in part III of the Constitution (dealing with fundamental rights) is an island. Just as a man is not dissectible into separate limbs, cardinal rights in an organic constitution have a synthesis. Secondly, the expression 'personal liberty' in Article 21 was given an expansive interpretation. The court emphasized that the expression 'personal liberty' was of wide amplitude covering a variety of rights "which go to constitute the personal liberty of man". Some of these attributes have been raised to the status of distinct fundamental rights and given additional protection under Article 19. This expression ought not to be read in narrow and restricted sense so as to exclude those attributes of personal liberty which were specifically dealt with in Article 19. The court held that the right to travel abroad falls under Article 21. According to Krishna Iyer Judge, "the spirit of man is at the root of article 21"; "personal liberty makes for the worth of the human person" and "Travel makes liberty worthwhile". Thirdly, this is the most significant creative aspect of this that the Court reinterpreted the expression 'procedure established by law' in Article 21, and gave it a new orientation. Article 21 would no longer means that law could prescribe some semblance of procedure, however, arbitrary or fanciful, to deprive a person of his personal liberty. It would now mean that the procedure must satisfy certain requisites in the sense of being fair and reasonable. The procedure "cannot be arbitrary, unfair or unreasonable". The procedure contemplated by Article 21. The court now has the power to judge the fairness and justness of procedure established by law to deprive a person of his personal liberty. The court reached this conclusion by holding that article 21, 19 and 14 were not mutually exclusive, but were inter-linked.

The Court further observed that Personal liberty represents the basic value of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave the pattern of guarantee on the basic structure of human rights and impose negative obligations on the state not to encroach on individual liberty in its various dimensions. These are essentials for the individuals to develop his intellectual, moral and spiritual status. The expression 'personal liberty' was of wide amplitude covering a variety of rights, "which go to constitute the personal liberty of man". According to Bhagwati J., Article 21 "embodies a Constitutional value of supreme importance in democratic society". Thus, no person can be deprived of his

⁵ *Naranjan Singh v Punjab*, AIR 1952 SC 106.

⁶ *Maneka Gandhi v Union of India* AIR 1978 SC 597.

right to personal liberty except according to procedure established by law. The procedure of putting a poor person in prison for failure to pay his debts is in violation of Art. 21 “unless there is proof of the minimal fairness of his willful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means..”⁷

Maneka Gandhi case is having a profound but beneficial impact on the administration of criminal justice in India. The administration of criminal justice and the conditions prevailing in prisons have long been extremely deplorable. Every day one hears news of police brutality, prison maladministration and inordinately long delay in trial or criminal cases resulting in grave miscarriage of justice. In spite of the accent on socio-economic justice in the Constitution precious little has been done so far to improve matters in area of criminal justice. Administration of criminal justice is a State matter. But, since Maneka Gandhi case, the Supreme Court has in a number of cases tested various aspects of criminal justice and prison administration on the touchstone of fair and reasonable procedure. The protection of article 21 extends to all persons accused of offences, under-trial prisoners undergoing jail sentences etc., and thus all aspects of criminal justice fall under the umbrella of article 14, 19 and 21.

The Supreme Court has laid great emphasis on speedy trial of criminal offences and has emphasized: “it is implicit in the broad sweep and content of Article 21.” A fair trial implies a speedy trial. No procedure can be ‘reasonable, fair or just’ unless “that procedure ensures a speedy trial for determination of guilt of such person.” Long pre-trial confinement of an individual in prison jeopardizes his individual liberty. Speedy trial is thus “an integral and essential part of the fundamental right to life and personal liberty enshrined in Article 21.” In Nandini Satpathy’s Case ⁸ it ruled that the inordinate delay of trial amounts to a denial of fair hearing.

Recently the apex court have underlined the need for the courts to seek substantive justice, while trying the criminal cases, as they have to administer justice and justice includes the punishment to guilty, just as much as protection to innocent. According to the Apex Court, neither of these two tasks can be performed if the shadow is mistaken for substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required for nice balancing of the rights of the State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction.[emphasis supplied] The Court favors that every reasonable presumption must be made in favour of an accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair-play must be brought to bear when determining a matter of prejudice as in adjudging the guilt. But when all is said and done, what we are concerned to see is whether the accused has a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. The court is very clear in its mind that if all these elements have been taken care of and no prejudice is shown, the conviction must stand whatever the irregularities whether traceable to the charge or to a want of one. In other words the court said: “every reasonable presumption must be made in favour of an accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must bring to bear when determining a matter of prejudice as in adjudging guilt”.⁹

Recently the Apex Court took over the monitoring seeking direct report from CBI, investigation in black money stashed in foreign banks and suo-motu cognizance by Apex Court, the police atrocity in the wee hours, on peaceful protester at Ramlila Maidan, is some of the instances of abuse of power by State agencies, which jeopardized the liberty and freedom of the common citizen. In *Gimik Piotr v State of Tamil Nadu*¹⁰ while underlining the significance of the liberty of the individual has held that a person cannot be detained under the Preventive Detention Act in a casual manner as it would violate his fundamental rights to

⁷Jolly George Varghese v Bank of Cochin, AIR 1980 SC 470.

⁸ AIR 1978 SC 1025

⁹ *Dumpala Chandra Reddy v Nimakayara Belireddy and other*, delivered on July 14th, 2008.

¹⁰ *Gimik Piotr v State of Tamil Nadu*, delivered on Nov 15, 2010, (unreported)

Personal Liberty. Further observed that “Persons found guilty of economic offences have to be dealt with a firm hand, but when it comes to fundamental rights under the Constitution, this Court, irrespective of enormity and gravity of allegations made against the detainee, has to intervene”. The gravity of the allegations resulting from such activities cannot be a justification for invading the personal liberty of a citizen, except in accordance with the procedure established by law. Under preventive detention, a person can be kept in custody without trial for even over a year on the ground that if released he might resume his illegal activities again. Further observed that “as the fact reveal, that, there was no pressing need to curtail the liberty of a person by passing a preventive detention order. Foreign currency cannot be smuggled as the person cannot move out of the country on account of his passport being impounded”. The Apex Court noted that the authorities chose to keep him under preventive detention after obtaining a confessional statement about alleged smuggling of foreign currency by him. It said that detention order was passed despite the fact that his passport was impounded and ruled that there was no need to keep petitioner under preventive detention without trial, the impugned order infringed the Personal liberty.

Similarly, the Apex Court observed that while issuing the order for CBI probe should be exercised sparingly, and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incidence may have national and international ramifications or where such an order may be necessary for doing complete justice. In the instant case a writ petition was filed in the Calcutta High Court, for protection of democratic rights alleging that since the police administration in State was under the influence of the ruling party of the State, which was trying to hide the incident, investigation in the incident may be handed over to CBI. The High Court deemed it as appropriate to hand over the investigation into the said incident to the CBI. The impugned order of the High Court, without consent of the State was challenged before the Apex Court by the State Government, while dismissing the appeal of State underlines the significance of the Fundamental Rights. The Court Observed: “The article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to procedure established by law. The said article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim.

Further observed that the jurisdiction conferred on the Supreme Court and on the High Courts under Article 32 and 226 of the Constitution, the power of judicial review being an integral part of basic structure of the Constitution, no Act of parliament can exclude or curtail the powers of the Constitutional Courts with regard to the enforcement of fundamental rights. As, a matter of fact, such a power is essential to give practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. It is evident from the said observation of the Apex Court that whenever the question of violation of basic Human Rights come for consideration before the Court, the court would be obliged to pass the appropriate direction to the State as well as any investigating agency to protect the fundamental rights granted by the Constitution, zealously and vigilantly.”¹¹

The conventional thinking in the past was that the appropriate role of the judiciary is to merely declare or interpret the law and not to make law or expand the meaning of any Constitutional provisions. It is accepted that certain degree of legislative activity is inherent in the process of judicial interpretation. If we look back into the history it reveals that from its inception our Supreme Court has spelt out quite a few fundamental rights which are not expressly mentioned in the part III of the constitution.

While interpreting the fundamental rights the apex court in certain cases observed that certain unspecified rights are implicit or inherent in the express enumerated guarantees. The Apex Court has deduced other fundamental rights which are not expressly mentioned in the constitution. Like the right to privacy, the right to travel abroad, the right to free legal aid, Freedom from cruel and inhuman punishment or treatment, Right to education, Right to pollution free and healthy environment, Right to livelihood etc., this activist judicial interpretation which has expand the horizon of the fundamental rights of our people. Thus,

¹¹ State of West Bengal & others v The Committee for Protection of Democratic Rights, West Bengal and others, delivered on February

fundamental rights, enshrined in part III of the Constitution are inherent and cannot be extinguished by any statutory provisions. Any law that abrogates or abridges such rights would violate the basic structure doctrine.

CONCLUSION

In backdrop of the afore cited instances, in the humble opinion of the author the inescapable conclusion is that consistent with its accountability to the law and enormous public duty entrusted upon, the investigating agency ought to ask itself whether its conduct and investigations so far measure up to human rights jurisprudence or not?. It is to be noted that the executive lawlessness is tantamount to a deliberate violation of the personal liberty enshrined under Indian Constitution and that the essence of the rule of law is that it should never operate under force or fear and favour.