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Evolution of New Dimensions of Article 21

Jurisprudential development

Life and liberty, which form the bedrock of the modern civil State, are recognised as the foremost, essential, inalienable natural rights, of man universally, without which humanity shall cease to exist. For the protection of life and liberty mankind has entered into a social compact creating the modern State and vesting on it the said responsibility. For the assurance of the right to life and liberty, the mankind has accepted the regime of democratic and civil government by replacing them with autocratic, authoritarian regimes. This means that people has accepted the rule of Constitutions from rule of man. The one of the foundation document is Magna Carta in 1215.

Article 21 of the Constitution of India recognizes such universally adopted principles safeguarding the life and liberty of man. Article 21 reads as:-

Protection of life and Personal Liberty "No person shall be deprived of his life or personal liberty except according to procedure established by law".

Article 21 does not say anything like 'right to life' or 'liberty', because such right are not at all conferment of the State, neither they are created by the State, simply they are endowment of nature and are basic human rights of man. So what Art.21 does is simply spell out the protective mechanism to safeguard the right to life or personal liberty of man. As evidently the right to life and liberty are inviolable, inalienable rights. But in a civil society, howsoever sacrosanct and inviolate a right may be, it cannot be absolute or unfettered in nature, it is always subject to certain limitations or restrictions as a part of the social/civil agreement. Such fetters are put and permitted in a social compact by the Law or Constitution of the compact for the better enjoyment of rights and liberties. Rather such limitations act as safeguards of rights and liberties.

Procedure Establish by Law

So, what Art.21 permits is limitation or abridgement of rights to life and personal liberties, which can only be done within the framework of law, i.e. by a procedure established by law. This implies that the right to life and personal liberty are guaranteed, but in certain situations they can be withdrawn which must be sanctioned by law. Man's life and liberty cannot be withdrawn or abridged without the sanction of law or by a procedure established by law.

To trace back the history of the phrase that came in to our constitution is way back from the Magna Carta, that says:

"No man shall be taken or imprisoned, disseised or outlawed, or exiled or in any way destroyed, saved by the lawful judgment of his peers or by the law of the land."

Due Process of Law

And later the phrase 'due process of law' came into being to include changing perception of the people when the charter was again confirmed in the customary fashion in 1355 A.D. which declared that "no man of what state or condition soever be he shall be put out of his lands, or tenements nor taken, nor imprisoned, nor indicted nor put to death without he be brought in to answer by due Process of law"¹.

The people would be made to say to the two Houses, "You shall be vested with the legislative power of the State, but one shall be disfranchised or deprived of the rights or privileges of a citizen unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it". (Taylor Vrs. Porter (quoted)²).

With this, the concept of the 'due process of law' took firm root, opening a new chapter in the history of protection of fundamental rights which the Colonist ruler transplanted in America where it grew to its full potential safeguarding the fundamental rights and privileges of man against tyranny and arbitrariness. The expression 'due process of law' finds mention in Amendment V and XIV by American Constitution.

The expression due process was left undefined possibly because they did not want to limit its operational area, as what was at stake was the life and liberty of person. The only thing in their

¹ Ref. Chaudhari, A. S. Constitutional Right and Limitation (vol.2) p. 734

² . Chaudhary, A. S. Constitutional Right and Limitation (vol 1) p. 178.

mind was how to protect life and liberty of person from arbitrary and tyrannical action, which was(is) possible from both the Legislature as well as Executive. Infraction of such rights may take place while a law is enacted by the Legislature as well as while a law is executed by the Executive. Thus flexible, ever stretchable expression like 'due process' was adopted. The framers "intended to provide safeguard against arbitrary Government, against Legislatures as well as Executives. If they cherished a desire to resist both legislative and executive arbitrariness they would naturally wish to have a guarantee of security in flexible terms. They preferred flexibility to certainty, but it was not limited to anything short of general purpose to afford immunity from any violation of fundamental rights". (C.E. Hughes, the Supreme Court of the United States, pp,186-187) quoted.³ The U.S. Supreme Court also rejected the idea of fixing the expression 'due process of law' into any concrete form or a fixed list of prescribed procedure to be adhered to. And, in Davidson Vrs. New Orleans (1878) it (the Supreme Court) explained that the meaning of the clause would be determined "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded" .³

So 'Due process of law' means a procedure which is just, reasonable correct and orderly and which is enforced by public authority in furtherance of general public good, must observe all requirements of the principle of liberty and justice, so that fundamental right of man is not limited or abridged or withdrawn. And as already stated it is left to the higher courts to decide as to what constitute 'due process of law' which has an ever changing content based on time place and personal philosophy. It is an all inclusive expression whose sole purpose is to safeguard the individual from arbitrary, capricious unreasonable action of the government. And the judiciary being the ultimate guardian of the civil rights and liberties of man maintain a proper balance between the personal liberty and social control by resorting to the 'due process of law'.

However the judicial creativity, which has expanded the scope of the concept 'due process of law' did not stop there with complacency by limiting the expression to procedural aspect only, rather it moved beyond to protect the substantive rights and liberties of person. This brought about a change in judicial attitude ushering in a transformation in the concept of 'due process of law'. Thus came the new concept of 'substantive due process of law' emphasising on the content

³ . Cushman, Robert F. Cases In Constitutional Law (5th edn.) p. 273.

of the law affecting individual's right to life, liberty and property. "Substantive due process is the concept that government may not enact a particular law because that law is inherently unfair and unjust and therefore can never meet the requirement of due process of law. The substance of the law must be just and must not unfairly deny persons their life, liberty, or property. Substantive due process thus becomes the vehicle for a natural law jurisprudence".⁴

Understanding plainly and affirmatively Art.21 implies that a person may be deprived of his life and personal liberty according to procedure established by law. Here law means enacted law. So according to Art.21 the sanctified right of life and personal liberty can be curtailed or limited by a law prescribing procedure to that effect. Literally understanding, the very basic and non-derogable right of life and personal liberty can be denied, curtailed or limited only by a procedure established by an enacted law and none other. Such laws are unchallengeable, because fundamental freedoms as enumerated in Art.19 (1) (a) can be limited but subject to reasonable restrictions whereas nothing like any restriction, whether reasonable or not, is mentioned in Art.21 as to the said procedure. So understood whatever procedure the law-makers prescribe is final and absolute and is not subject to judicial review under Article 13. So if the law makers so wish they can go against the constitutionally protected fundamental rights under article 21, which straightway goes against the natural law sanctioned natural right leaving individual at the mercy of law makers. Such an interpretation of Article 21, which was made in A. K. Gopalan case (1950) to be discussed below, amounted to positivism of Austinian hue emphasising heavily on the Sovereign Legislature and neglecting the natural rights of man as recognised by Constitution which any compact of Society/State swears to protect and preserve . However such construction of Art.21 was later overruled in Maneka Gandhi case, (1978) to be discussed later.

This Austinian approach as adopted and approved by the Supreme Court in A.K. Gopalan case armed the State with enormous power to play with fundamental rights of man. It conferred unbridled power with no safeguard in hand to uphold the right to life and liberty. Its ill effect could not be realised until the proclamation of Emergency for the 3rd time in 1975, possibly because the power of preventive detention was not so grossly misused than it was not during the Emergency of 1975. The positivistic approach putting the State/Government above the Law/Constitution assumed monstrous proportion with the declaration of Emergency in 1975 and

⁴ Goldman, Sheldon: Constitutional Law (Cases & Essays) p.428.

later by the amendment of Maintenance of Internal Security Act - 1971 (MISA) grossly limiting, and abridging fundamental rights and liberties of man and disowning /undermining the very ancient concept of natural law, common law of reason and rules of natural justice. The amended provisions of MISA were extremely drastic inflicting disaster upon the very ancient and natural rights of man as recognized and adopted by the constitution. Those were extremely subversive of very constitutional process and constitutionalism excluding the very sound and well founded power of judicial review. This exhibited the worst of the positivism, inflicting a serious and fatal blow to the constitutional edifice causing heavy casualty to the Rights of man.

To this entire unfortunate episode was added another deplorable and regretful decision of Supreme Court in A.D.M., labalpur Vrs. S.Shukla 1 (better known as Habeas Corpus case) aggravating the wound already inflicted by the Emergency of 1975 and Amendment of the MISA. This decision utterly disregarded the principles of natural law and natural law ordained right of life and liberty.

Delivering the judgement Ray C.J. held: "Art.21 is the sole repository of rights to life and personal liberty against the State. Any claim to a writ of habeas corpus is enforcement of Article 21 and is, therefore, barred by the presidential order."⁵

Explaining the meaning of Rule of Law Ray, C. J. further observed:- "The suspension of right to enforce fundamental right has the effect that the emergency provisions in Part-XVIII are by themselves the rule of law during times of emergency. There cannot be any rule of law other than the constitutional rule of law. There cannot be any pre Constitution or post Constitution rule of law which can run counter to the rule of law embodied in the Constitution, nor can there be any invocation to any rule of law to nullify the constitutional provisions during the times of emergency".⁶

Right to Life and Personal Liberty

For the better and effectual protection of the very basic right to life and personal liberty, it is highly essential to understand its true meaning and scope, which was initially treated in a literal

⁵ AIR 1976 SC 1207

⁶ Ibid.p. 1235

and adhoc manner and later evolved enormously making the sweep of Art.21 all encompassing and all inclusive.

The meaning of personal liberty came fore discussion for the first time in A. K. Gopalan's case from where the real journey of Art.21 began. In this case the expression personal liberty received a very narrow and restricted treatment. It adopted the narrow meaning given by Divey in his Constitutional law. Taking note of the inclusion of the word 'personal', which is a very narrow and limited, with the word liberty, the Court did not include all that comes and implied by with the term 'liberty, '. Construing narrowly Mukherjea, J. held: "In ordinary language 'personal liberty' means liberty relating to or concerning the person or body of the individual and 'personal liberty' in this sense is the antithesis of physical restraint or coercion. According to Dicey who is an acknowledged authority on the subject 'personal liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit legal justification.... In my opinion, this negative right of not being subjected to any from of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory,"⁷

This is indeed a very restrictive interpretation of the expression 'personal liberty', which has not been followed by the Supreme Court in its later decisions. In Kharak Singh Vrs. State of U.P.⁸ the Supreme Court took the opportunity to examine the width, scope and content of expression 'personal liberty' and departed from the narrow interpretation as stated above and observed: "... 'personal liberty' is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Art.19 (1). In other words, while Art.19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Art.21 takes in and comprises the residue".⁹

In Maneka Gandhi Vrs. Union of India 4 the true meaning, scope and content of expression personal liberty again came up for consideration and interpretation wherein the court observed: "the expression 'personal liberty' in Art.21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to

⁷ AIR1950 SC 27 p.96,97

⁸ AIR1963 SC 1295

⁹ Ibid at p.1302

the status of distinct fundamental rights and given additional protection under Art.19". Further, "...if a law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Art.21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex hypothesi it must also be liable to be tested with reference to Art.14."¹⁰

Right to live with human dignity

In Francis Coralie Mullin Vrs. Administrator, Union Territory of Delhi the Supreme Court held: "...the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

Following the Francis Coralie observation as to the scope of Art.21 the Supreme Court in People's Union for Democratic Right Vrs. Union of India held: "the rights and benefits conferred on the workmen employed by contractors under the provisions of the Contract Labour (Regulation and Abolition) Act 1970 and the Inter State Migrant Workmen (Regulation of Employment and Conditions of service) Act, 1979 are clearly intended to ensure basic human dignity to the workmen and if the workmen are deprived of any of these rights and benefits to which they are entitled under the provisions of these two pieces of social welfare legislation, that would clearly be a violation of Art.21".¹¹

The concept of dignity of man is not only an aspect of individuality but also of sociality and is an integral facet of the very concept social justice envisioned in the Directive Principle of State Policy. This was emphasised by the Supreme Court in Consumer Education & Research Centre Vrs. Union of India¹² as : "The preamble and Art.38 of the Constitution of India-the Supreme law, envisions social justice as its arch to ensure life to be meaningful and livable with human dignity. The Constitution commands justice, liberty, equality and fraternity as supreme values to

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¹¹ AIR1982SC 1473(1485)

¹² AIR1995 SC 922 (938)

usher in the egalitarian, social, economic and political democracy. Social justice, equality and dignity of person are cornerstones of social democracy. The concept 'social justice' which the Constitution of India engrafted, consists of diverse principles essential for the orderly growth and development of personality of every citizen. "Social Justice" is thus an integral part of justice in generic sense. Justice is the genus, of which social justice is one of its species. Social Justice is a dynamic device to mitigate the sufferings of the poor, weak, Dalits, Tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person. Social justice is not a simple or single idea of a society but it is an essential to relieve the poor etc. from handicaps, penury to ward off distress, and to make their life livable, for greater good of the society at large.

RIGHT TO LIVELIHOOD

The meaning of life under Article 21 came for interpretation in *Olga Tellis Vrs. Bombay Municipal Corporation*,¹³ when the permanent and slum dwellers, who were eking out their living in the pavement, leading a life of filth in the slum area of Bombay and life, shelter, occupation and everything mean to them the pavement and the slum, were asked to be evicted with no place to go and take shelter and no means and area to pursue to their avocation to feed their family. In this case, exhibiting true allegiance to the Constitution and its ideals the Supreme Court gave a befitting interpretation of the meaning of the right to life under Article 21. It held:

"The sweep of the right to life conferred by Art.21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution the death sentence, except according to procedure established by law. That is but one aspect of right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is

¹³ AIR 1986 SC 181(193,194)

regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what make live livable, must be deemed to be an integral component of right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life."

RIGHT OF PRISONER

As to the rights of prisoners Mr. Justice Douglas said:"Prisoners are still persons entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedure that satisfy all the requirements of due process". "Conviction of a crime does not render one a non person whose rights are subject to the whim of the prison administration, and therefore, the imposition of any serious punishment within the prison system required procedural safeguards..."¹⁴ (quoted) Sunil Batra Vrs. Delhi Administration Mr. Justice Marshal said: "that a prisoner does not shed his basic constitutional rights at the prison gate, and I fully support the Courts holding that the interests of inmates in freedom from imposition of serious discipline is a 'liberty' entitled to due process protection" (quoted) Sunil Batra (1978) .The Supreme Court's ruling in Sunil Batra Vrs. Delhi Administration¹⁵ marks the beginning of new era in the annals of history of prison Administration. In this case the appeal court came forward to safeguard the human rights of man behind the bars, to act as true sentinel on the qui vive. The protagonistic, catalytic role of the Supreme Court in relation to fundamental rights of man (prisoner) could seen when the Court applied the very sanctified rights of life and liberty inside the prison honouring the dignity of the prisoners, as they too are human beings endowed by the nature all the natural rights as that of free man, as the mere incarceration does not reduce their quality of humanness.

Right to Education

In Unni Krishnan Vrs. State of A. P.¹⁶ the Supreme Court agreed with Mohini Jain decision and held that the right to education is a fundamental right under Article 21, as it directly flows from the right to life, although the Court differed as to the content of the Mohini Jain decision and held that the right to free education is available only to children until they complete the age of 24 years.

¹⁴ AIR1978 SC 1675

¹⁵ AIR 1978 SC 1675

¹⁶ AIR 1993 SC 2178

Again in T. M. A. Pai Foundation Vrs. State of Karnataka¹⁷ the Supreme Court upheld the right to education up to the age of 14 yrs, as declared in Unni Krishnan Case started above as sound and valid although overruled several after aspects of the decision .

Right to a wholesome environment

In the first case of its kind the Supreme Court, in Rural Litigation and Entitlement Kendra ,Dehradun Vrs. State of U. P.¹⁸ (Popularly known as Poon Valley case) entertained a letter as a writ petition under Art.32 on the allegation that the operations at limestone quarries in the Himalayan range of Mussoories resulted in the degradation of the environment affecting ecological balance.

Establishing relationship between meaning of life under Art.21 and protection of environment the Andhra Pradesh High Court in T. Damodhar Rao Vrs. S. Q. Municipal Corporation, Hyderabad¹⁹ observed: "It would be reasonable to hold that the enjoyment of life and its attainment and fulfillment guaranteed by Art. 21 of the Constitution embraces the protection and preservation of nature's gifts without(which) life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Art. 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environment pollution and spoliation should also be regarded as amounting to violation of Article 21 of the Constitution".²⁰

By entertaining a petition under article 32 for compensation for the enforcement of fundamental right to life under Art.21 for the victims of Oleum gas in M. C.Mehta Vrs. Union of India²¹ (popularly known as Oleum gas leakage case), the Supreme Court again impliedly treated the right live in a pollution - free environment as a part of fundamental right to life under Article 21 of the Constitution".

¹⁷ AIR 2003 SC 358

¹⁸ . AIR 1985 SC 652

¹⁹ AIR.1987 AP171

²⁰ AIR.1987 AP171

²¹ AIR 1987 SC 1086 (1089)

Highlighting the gravity of the problem affecting humanity and urgent need to tackle it soon and the role of Court, the Supreme Court in Saehindra Pandey Vrs. State of W. B.²² observed: Today's society's interaction with nature is so extensive that the environmental question has assumed proportion affecting all humanity. Industrialisation, urbanisation, explosion of population, over-exploitation of resources, depletion of traditional sources of energy and raw materials, the disruption of natural ecological balances, the destruction of a multitude of animal and plant species for economic reasons and sometimes for no good reasons at all are factors which have contributed to environmental deterioration. While the scientific and technological progress of man has invested him with immense power over nature, it has also resulted in the unthinking use of the power, encroaching endlessly on nature. If man is able to transform deserts into oases, he is also leaving behind deserts in the place of oases, In India, as elsewhere in the world, uncontrolled growth and consequent environmental deterioration are fast assuming menacing proportions and all Indian cities are afflicted with this problem”²³.

In Narmada Bacho Andolan Vrs. Union of India²⁴ The Court held that the right to water is a fundamental right under Article 21 of the Constitution. Water is the basic need for the survival of human beings and is part of right to life and human rights as enshrined Constitution of India and can be served only by providing source of water where there is none."

In Vellore Citizen's Welfare Forum Vrs. Union of India ²⁵ , a writ petition by way of Public Interest Litigation drew the attention of the Court how the tanneries and other industries are discharging untreated affluent into agricultural fields, waterways, open lands and Rivers rendering the river water unfit for human consumption, contaminating the subsoil water and had spoiled the physico-chemical properties of the soil making it unfit for agricultural purposes.

Contact Details: Ashish kaushik

ashishkaushiknlsiu@gmail.com

9458835435

²² AIR 1987 SC 1109

²³ Ibid. p. 1114

²⁴ AIR 1999 SC 3345

²⁵ AIR 1996 SC 2715