

Constitutional Law and Public Administration in India

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Article 21A and Article 22

The Constitution of India has brought about public administration in this country over the past 75 years of independence. The contribution of the Supreme Court and the High Courts, which are considered as Constitutional courts, which are also considered the custodians of the principles of the Constitution in this regard are highly appreciable. The courts, through what we call judicial activism, have been able to protect the right to life in India. A look at judicial activism, vis-a-vis article 21, one judge who stands out in terms of delivering the aspects of what right to life should mean, was none other than Justice P N Bhagwati. Justice P N Bhagwati always wanted to expand the horizons of human rights. He believed that human rights cannot be static but must be dynamic. He also said that human rights must advance as growth, development, and the country progress forward. He also believed in the moral and legal obligation of the judiciary to contribute to legal enlightenment and to remove the darkness that can be there in democracies and to light the lamp of justice. And for this, Justice P N Bhagwati always believed that the law of precedent, which means the law which are judicial verdicts of the apex or Supreme court must be respected and followed by all the High Courts.

The High Court is to be followed by all the lower courts. The law of precedent and the common law, which is a law based on common sense, is based on basic human rights tenets. These two namely, the precedent and the common law can be the basis of judges to mould the legal system and to give it shape and direction because the legal system requires a direction to progress forward. Legal systems only nurture that kind of growth over a period. The responsibility of the judiciary has been significant in the country, especially in terms of trying to look at how law should progress forward and what should be the reading of law and what kind of limits to public administration can be imposed by the judiciary.

The Supreme Court and the High Courts have an inherent Constitutional power of what is called the power of judicial review. Judicial review means, the judiciary in the exercise of its Constitutional power as the custodian of the principles of the Constitution shall ensure that the organs of the government viz the executive and the legislature are within the

confines and limits of what the Constitution empowers them. So judicial review has been the touchstone of Indian democracy. And the judiciary has always been the protector of human rights. Hence, the judicial attitude in the country in terms of human rights can very well be understood vis-a-vis how the judiciary has drawn the scope of Article 21, which assumes a very positive right of right to life.

It is understood that the Parliament is supreme, no doubt in terms of laying the law, but it is a judiciary that is supreme in terms of interpreting the law and in upholding the validity of the legislative actions. The Constitutionality of every legislative and administrative action is to be tested by judicial review as is the case. The fundamental rights have a special kind of protection under the Constitution and that is why they are called fundamental, and not merely rights. Suppose the courts looked at the right of delayed execution. In India, there is still the practice of the death penalty, and there has been a lot of debate to take this away. The courts in the rarest of rare circumstances, where the nature of the crime is so heinous that it shocks the conscience of the society would grant a death sentence. In India, the death penalty is given by hanging. There are jurisdictions where death penalty is given by a lethal injection and in which other practices of death penalty are there, but the British practice of giving death penalty by hanging is continued.

Now in India, the courts have said that if a man is under the death penalty, there is a chance for the convict who has been sentenced to death to always file a mercy petition before the President of India. And the President of India will decide whether to accept the mercy petition. In case of acceptance the death penalty will be commuted to life imprisonment, that means to spend the entire life or rest of your life in jail. So sometimes because of executive inaction, there is an inordinate delay in deciding these mercy petitions. In those cases, the Supreme Court has found that it was most appropriate that such delay in deciding execution petitions must be protected under right to life. And hence, the death penalty that is pronounced to a convict must be commuted to life imprisonment. That also is a case that has been decided under right to life, which means right to life under Article 21 is available not only to free citizens but can also be exercised by accused and convicts. Right to travel abroad, as seen in the *Maneka Gandhi v. Union of India* case, also lays down the meaning of the right to life. That is the right to move freely across the territories of India as well as beyond the territories of India.

This kind of right is subject to restrictions under the Constitution, but unless they are reasonable and laid down by procedure of law, the right to travel abroad cannot be refrained or restricted. There are many nations where this right is not there like China or North Korea. The value of the Constitutional principle and Indian judiciary can only be realized if we look at some of these rights and a lot of Indians are migrating to other countries to study for work. There is a huge Indian diaspora in almost all countries across the world. Indians abroad are assuming political and judicial offices in many of these countries, solely owing to the decision of the Supreme Court in *Maneka Gandhi v. Union of India*, that one cannot

be stopped from going abroad, unless the principles of natural justice are followed and wherein it was held that a person's passport cannot be impounded except according to the procedure established by law. The philosophy of judicial decision has been very clear that there can be very less restriction or restraint on the right to life. And this is something that can be positively enjoyed by Indian citizens under the principles of the Constitution.

So, any kind of restraint must be in public interest. And this would give rise to a new dimension of rights, because the three words right to life means so many other things. Right against bonded labour or the cruel and inhuman practice which unfortunately continues in some parts of the country. Whenever such an issue has come before the courts, they have abolished bonded labour, prohibited the same, and they have taken criminal actions. There are legislations that make it a crime. But again, you can work out of your own free will and choice, and you cannot be subject or forced to do some kind of labour.

Right against custodial harassment is important, which states that even if a person is in jail or prison, he has the right to dignity, as an accused, against any kind of custodial harassment which lead to a writ of habeas corpus and the courts can intervene in these matters. In many cases, victims or aggrieved individuals have approached the courts for protection and recognition of their rights. But in many other cases, many of these rights have been proclaimed by public interest litigations, or the concept of a PIL, where you are not seeking anything for yourself, but you are seeking something for a person who cannot access justice. Public interest litigation also is called a social interest litigation because you have a social cause, you do not have a private cause, it is not for something that you are doing. And public-spirited individuals can now approach the court for protecting someone else's right under Article 21 as well. Right to emergency medical aid was a landmark intervention of the Supreme Court. Before this right was proclaimed, suppose there is a road accident and an individual is injured, it was considered as a police case or a case that must be reported to the police immediately. The police may have to record the statement of the victim, and only then the doctors were allowed to give emergency aid. Now, whenever the doctors responded by giving first aid, emergency aid, trying to stabilize the patient, because his life must be protected first, these doctors were called to the court as witnesses, because they would have seen the patient, they would have seen the wound, and the status etc. of the injured person.

So to induce evidence about the gravity of the accident, before pinning of liability, the doctors would be called upon to the courts, and leave them feeling harassed by the system, because courts are not easy, it takes a lot of time, the doctor may be called once or twice and he has to spend the entire for having done a noble cause of saving life, facing the rigour of the legal system. These were times when the judiciary decided to step in, and they proclaimed that there is a right to emergency medical aid. And when such emergency medical aid is being provided, not in government hospitals, they have the duty of giving treatment to every citizen. This is about emergency aid being given even by private

hospitals in *Paschim Bengal Khet Mazdoor Samity v. State of West Bengal*, in 1996 and *Parmanand Katara v. Union of India*, in 1989 by the Supreme Court.

These were two cases that clearly established the fact that doctors have taken an oath, which is called the Hippocratic oath to save lives. And hence, they must save their lives and the legal system should not harass them, nor should they be called to the court to be a witness. They should save lives first, and then the police can go about their investigation. These two cases changed the dimension of the way life was being treated by doctors, hospitals, and emergency aid workers. This was a very significant turning point about how the right to life was protected in the Indian democratic system.

Right not to be driven out of a state is yet another important right because, the state in which one is born, that is the state of birth need not be the state where he is employed. And where one is employed is not the necessary place where he will depart from this material world. So, states in India should not create issues of driving away non-state individuals. The territory of India is one Union called Bharat. And anyone can stay anywhere, vis-a-vis the rules that are laid down, though there may be some kind of restriction in certain tribal areas, in certain hilly areas about whether you can buy land or not, is a different issue. No one can be driven out of a state he is employed in.

Right to fair trial assumes importance because trial, even to a person who has been found guilty, just before the trial also, as you can't pronounce someone guilty before it. In the Kasab case, where Kasab was found with an AK47 killing people, there were videos that were taken of him. It was quite evident that he must be held guilty for having caused the death of many innocent individuals. Even then Kasab was entitled to fair trial. After the trial, he was pronounced guilty and then executed through the death penalty process.

Right of prisoners to have necessities of life inside a prison and the right of women to be treated with decency and dignity, which is the principal rule of equality, are important rights. Right against public hanging using all these cruel methods was a practice in olden days is also an important right. There is the right to be heard as well. And these were some of the rights that were there in 21. But there are the New Age rights under 21 read with Article 19 and 14. All these rights are in the golden triangle that are required for human existence and human development, and the New Age rights are under the golden triangle. For example, the right to information. Today, we have a law called the Right to Information Act of 2005. It was read under Article 19(1)(a) under the Freedom of Speech and Expression. Then there is the right to reputation, right of ID from a judgment of conviction, right to show some security and protection of family, right to economic and social justice and appropriate life insurance, all of these are basically rights.

You cannot be arrested at midnight and women cannot be arrested after 6 pm unless there is a critical threat that they may escape the provisions of law. Noise pollution, environment,

and electricity are also new rights that have been recognized. Right to electricity now has become a very important right because right to housing also has been recognized as a part of right to life. Right to education is something that is included now under Article 21 A. Right to education has been a matter of various judicial verdicts before this was brought about as a Constitutional amendment.

The right to free education up to 14 years is now a fundamental right which the state government is responsible to provide. But the duty of the state to provide education has always been something that has been laid down by the courts from time to time. They have restricted the so-called business of education to know whether capitation fee management seats can be created. And the state when it provides education, it should provide it with a social welfare purpose. So, on education, the courts have been intervening from time to time and they have been able to support the fact that the right to education can be converted as an explicit right which is now enumerated in the Constitution. The Constitution 86th Amendment Act of 2002 brought Article 21A into the Constitution. As per Article 21A, the right of education is free, compulsory, and safe and shall be quality education without discrimination on the child's economic, social, or cultural backgrounds. The courts have read Article 21A as a fundamental right as well. So bridging the gap between government schools and private schools, the right to education now is something that you have as a compulsory free education, irrespective of whether it is a government or a private school, and such a right shall exist under Article 21.

Article 22 of the Constitution of India gives protection against arrest and detention in certain cases. Article 22(1) says that no person who is arrested shall be detained in custody without being informed as soon as may be, of the grounds of such arrest, nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice. So, these are certain safeguards in Article 22 given to people who are arrested or detained which are as follows. First, they have the right to be informed about the grounds of their arrest as soon as possible. They should have the right to consult a lawyer of their own choice, and they shall be produced, and they shall be produced before the nearest magistrate within a period of 24 hours of such arrest according to Article 22(2).

However, in calculating these 24 hours, the time necessary for the journey from the place of arrest to the court of the magistrate can be excluded and no such person shall be detained in custody beyond the set period of 24 hours without the authority of a magistrate. Article 22 of the Constitution does give a very important safeguard to people who are arrested. And this is an executive action. The Constitution itself speaks of the duties of public administration, especially the policy or the exercise of the powers which must follow the fundamental rights guaranteed to an accused or a convict under Article 22.

These safeguards are based on the principles of natural justice that if there is any kind of action that is going to be taken against you, you must be told and be informed about why

an action against you has been taken. It is the fairness required under the principles of natural justice, that is the right to be informed. It is the duty of the state and its executive officers or the public servants so that they must serve the public first and inform the public if any adverse action is being taken against them. Now, this principle of natural justice is a principle of administrative law, and is a principle of public administration. This must be followed both in civil matters as well as in criminal matters, more so in criminal matters, because unless you follow the procedure established by law, you do not have the right to infringe someone's right to life.

So, informing the grounds of arrest is critical and important and the accused or the convict can make a rightful defence before the court of law, he can try and prove his innocence as well. So, the reasons for the arrest must be clear, and they must be communicated as soon as possible. This will ensure that any kind of arbitrary arrest or detention can be checked through judicial review. And hence, producing someone before a magistrate within 24 hours clearly means that the magistrate will apply his judicial mind through the checks and balance theory. He will check the police power, whether they have exercised the power appropriately and whether it is so very essential to detain someone, or he can be granted bail.

As the Supreme Court has said, and reiterated on numerous occasions, even recently, that right to bail must be granted in all bailable offenses and they cannot be denied and as far as possible. Until someone is held guilty, the police or the state must refrain from arresting them. So, bail is the rule and jail is the exception. The police officer though has discretion in making an arrest, it is not a discretion that should be abused or misused. It can be checked, and the courts can intervene, and judicial mind can be made applicable on whether the arrest was necessary, whether the arrest is right, and whether there was a prima facie case to establish that the accused has committed a crime. So, all of these are important and that is why a person who is arrested shall be produced before a magistrate within 24 hours of arrest.

Now, there are some exceptions in Article 22. It says that Article 22(1) and Article 22(2) shall not apply to a person who for the time being is an enemy alien. So, someone who has been an enemy of the state is an alien and not a citizen. So, it could be a spy from some other country. An Indian citizen who is a spy can claim Article 22 but an enemy alien, meaning a non-citizen from an enemy state, cannot do so. So, Article 22 or the protection under Article 22 will not be applicable to them. Preventive detention law also is an exception under Article 22. So preventive detention law is used in extremely rare circumstances to maintain law and order. The Constitutionality of such law has always been questionable and has been challenged. But the Constitution says that Articles 22(1) and 22(2) shall not apply to any person who has been arrested or detained under any provision providing for preventive detention. Preventive detention is used against notorious rowdies or those who are habitual offenders who are kept detained. So, it's

preventive detention and not arrest; it could be a house arrest or preventive arrest, so it's not necessarily a ground or allegation that you have committed a crime, it is just that you should not be involved in the same.

So, to prevent someone from getting involved in crime, such kind of actions can be exercised against people who have a criminal record. In those circumstances, if the preventive detention law is the basis of your arrest or detention, then the protection under Article 22 is not available. So, Article 22 has seven such clauses. And hence, it gives you an idea of how meaningful and important arrest under the Indian Constitution is and why the grounds of arrest must be informed, because only then you can test and check whether the grounds are fair, reasonable etc. While Article 22 is an independent article, Article 22 is under the provision of right to life. So, it promotes and supplements the right to life. So the right to life of citizens includes the right of life under arrest and detention as well. Sometimes the right of deportation of alien enemies must be exercised. In those circumstances, when deportation of some migrants or aliens are going to take place, then the provisions of Article 22 may not be applicable.

There are a lot of cases and issues that are related to Article 22. For example, one being that suppose you must be informed of the grounds of arrest should documents regarding the grounds of arrest should also be given to you. While you can seek documents, it is not necessary that every document is going to be given to the accused substantiating the grounds of arrest. What is important is many of these documents will be submitted to the magistrate as evidence. And hence, while documents are vital, it is not a rule that every document should be supplied, which is stating the grounds of arrest. However, the warrant in case you have taken a warrant must be issued and the information must be mandatorily provided for which can help someone come out of that kind of detention as well.

The right to be consulted is a very important right and to be defended by a legal practitioner is so very important. This is mandatory and if someone cannot exercise the right to consult on his own, there is established what is known as the legal services authority, that is the National Legal Services Authority, state, and district legal services authority as well. Anyone who has income less than a threshold, for example, in Karnataka, if the annual income is less than one lakh, you are automatically entitled to legal services. You can seek the state's help in getting your representation. Such a right of legal aid is a right to life. The right to legal aid or the right to access to justice is very important to ensure democratic values and to check abuse of the provisions of the Constitution. If one looks at the direct instance of state policy that is Part IV of the Constitution, one will notice that there are certain principles that the states must follow and providing access to justice is one such state duty. The state particularly has this duty casted upon itself. And under Article 39(e) of the Constitution of India.

Article 39(a) talks about equal justice and free legal aid and is a Constitutional mandate right now. It is the duty of the state to provide the same. Currently, the state Legal Services Authority appoints lawyers known as defense counsels. These lawyers must defend those who are arrested and detained. They must provide defense against state action or inactions. That is their primary duty and they are fully paid by the government just like a government pays prosecutors to prosecute offenses. Here you have defense counsels who will argue against the prosecution and defend the arrested person or the detained person. So, Article 39(a) which provides equal justice and free legal aid, was introduced by the Constitution 42nd Amendment in 1976. The 42nd amendment in 1976 happens to be one of the major Constitutional amendments that brought in several reforms, both in the enumeration of how the Constitution is written, and its interpretation, and especially post emergency the judiciary started playing a very active role. Article 39(a) of the Constitution supplements Article 22 and reads as follows: the state shall secure that the operation of the legal system promotes justice on the basis of equal opportunity and shall in particular provide legal aid by suitable legislations or by schemes or in any other way to ensure that the opportunities of securing justice are not denied to any citizen by reason of his or her economic or other disabilities. So, Article 39(a) is part of the Constitution. Someone's access to the court and justice system shall not be deprived because of his economic or other any kind of disability conditions. The question on the *Kesavananda Bharti* case which later came on the basic structure doctrine is one of the landmark judgments in Indian history. It completed 50 years of this doctrine into the Constitution, which means we should consider which are the basic features and structures of the Constitution which cannot be amended at all or taken away. Article 22 is one such basic structure as well.

Article 23 of the Constitution of India deals with right against exploitation and looks at prohibition of traffic in human beings and forced labour. So, trafficking in human beings is a major criminal conduct. And trafficking happens across even borders. So, poverty is misused, and is the basic reason why there is so much human migration, human exploitation. And the Constitution of India provides for some kind of protection, it provides for state action against human profiting. Because there are so many forms of bonded labour. They can be quite modern because the older bonded labourers were with chains being attached. Slavery was one such, notorious way of bonded labour. But there are so many other bonded labourers that are created through the debt system. The Zamindari system also created bonded labour. There is a clear prohibition by the Constitution, which makes a statement that you cannot practice bonded labour and you cannot engage in human trafficking. This is kind of a legislative prohibition or regulation. But keeping this in the Constitution clearly emphasizes the importance that the Constitution gives to certain values of respecting human beings and protecting human rights. The right against exploitation is human rights and it means that you cannot be forced to work, and you cannot be a bonded labourer for any reason, be able to have debt or some kind of obligation that you owe towards the individual. And you cannot use human beings for your own selfish interest,

that is you can't employ a beggar to beg for you. That would also amount to some kind of human trafficking. Engaging sex workers and trying to gain a living from the fact of the sex worker is also one form of human trafficking.

The state ought to give equal opportunity of employment to every individual without any discrimination, based on any religion, race, caste or classes as they were. That is very important for the state to practice. Engaging children in labour is prohibited. The Supreme Court has been protecting the rights of the child also there are so many international conventions to which India is a party, the notable ones being the Convention on the Rights of the Child. The Supreme Court has intervened on child labour and done a very noble service in protecting child rights in this country. Through several cases, including the most popular cases called the *Bandhua Mukti Morcha v. Union of India*, in 1997, Supreme Court judgment. The courts have clearly said that the states must enact legislations that prohibit child labour. So, children have only the right to education and employing such children is an offence. The health of the child is the duty of the state. Under some of these legislations, children were not allowed to work in hazardous industries. Anyone less than 18 years old is a child. But a child between 14 and 18, can be employed but in a non-hazardous industry. So, between 14 and 18, under certain conditions, children can work, like in a startup, entrepreneur, he can employ people, work in one's own farm in their own house. But not in a hazardous industry or in a capacity where the health is impacted, or innocence of the is exploited by any chance.

So, the Supreme Court has given a lot of directions on education, health and nutrition of children. Employing children as prostitutes or sex workers has also come to the purview of the Supreme Court through a lot of public interest litigations. Under Article 23, the Supreme Court has very clearly shown the path of, treating this as a very serious and heinous crime of pushing children into sex trade or sex workers. It is not only children of India, but even those who are coming across the border, the Supreme Court has very clearly less patience regarding all of these.

The Devadasi system is practiced in India. In *Vishal Jeet v. Union of India*, a 1990 Supreme Court judgment, the Devadasi system was also reviewed by the Supreme Court. And the Supreme Court did not approve of these kinds of systems that bring down the modesty of women, dignity of women, and don't treat them equal under the justice doctrine or justice idea of the Constitution of India. Article 24 is like Article 23, it's right against exploitation, but it is very specific in terms of saying that there is prohibition on the employment of children in factories, because factories are considered inherently hazardous activity.

So, you cannot employ any child. But the prohibition is up to 14 years. So, after 14, you can work based on certain types of industries. There is a clear prohibition of employing children in mines. For even 14 to 18 year old children, mines as well factories are considered hazardous. The term what is hazardous has been a kind of a challenge because

in some cases, it was asked whether a construction industry is hazardous or not. The Supreme Court has visited this sometimes and has concluded that the construction industry may not be so, but use of cement construction industry can impact safety of the workers. So, state governments have passed regulations on prohibition of children in construction works as well.