



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

Individual Liberty - A moulded weapon to erode the rule of law in India

Archie Garg^a

^aSymbiosis International University, Pune, India

Received 29 September 2022; Accepted 12 October 2022; Published 21 October 2022

The immediate shielding of individual liberty must be the usual act of a democratic society and not something to be appropriated on a selective basis. If the latter would prevail, this basic element will end up eroding the rule of law in its true spirit. The underlying factor of liberty present under Articles, 20, 21, and 22, has been under constant threat in recent years. The phrase “procedure established by law” provided by Article 21, holds no ground in several incidents of arrest today. The purpose of this study is to encircle the lacunae in the execution of the procedure and the methodology used would be the theoretical data from secondary sources. The final goal of this study would be to put forth an effective framework to preserve the rule of law in Indian society.

Keywords: *liberty, weapon, law, rule of law.*

INTRODUCTION

Article 19¹ is the tip of the concept of liberty whereas the three Articles, 20² (security with respect to arrest for offences), 21³ (right to life and individual liberty), and 22⁴ (security against arrest

¹ Constitution of India 1950, art. 19

² Constitution of India 1950, art. 20

³ Constitution of India 1950, art. 21

⁴ Constitution of India 1950, art. 22

and detention in several cases), focuses on individual liberty. Focussing on the latter, one can say that these three articles revolve around a concept of “procedure established by law.”⁵ At the time of the drafting of the Indian Constitution, it was recommended that the “due process” provision, like one laid down in American Constitution, be inserted in the Indian Constitution. Earlier, in Clause 9, the phrase, “without due process of law” was laid down, which was later replaced by “except according to procedure established by law” with the reason for the latter being more specific.⁶ Hence the present Article 21 of the Indian Constitution comprises this latter phrase. The concept of “due process of law” was also determined by the apex court in the judgement of *A.K. Gopalan vs State of Madras*⁷. The court stated that the phrase, “procedure established by law” appears to be taken from Article 31 of the Japanese Constitution. The elimination of the term “due”, the restriction put by the word, “procedure” and the introduction of the word “established” thus put forth properly the concept of legislative directions in the phrase employed in Article 21. By inserting the term “procedure established by law” the Constitution provided the law-making authority the final power to formulate the law.

Altogether, the Indian Constitution provides a mechanism of just procedure for the denial of life and individual liberty and the procedural security provided by it can be witnessed through the following statements -

Article 21, if examined individually, gives complete safety against administrative irregularities.

Article 21 when read collectively with Articles 20 and 22, imposes considerable limitations on law-making authority.

⁵ Nirmalendu Bikash Rakshit, ‘Mutilated Liberty and the Constitution’ (2003) 38(16) Economic and Political Weekly <<https://www.epw.in/journal/2003/16/commentary/mutilated-liberty-and-constitution.html>> accessed 28 September 2022

⁶ KK Nigam, ‘Due process of law: A comparative study of procedural guarantees against deprivation of personal liberty in the United States and India’ (1962) 4 IIL <<http://14.139.60.116:8080/jspui/handle/123456789/15052>> 28 September 2022

⁷ *A.K. Gopalan v The State of Madras* [1950] AIR 27 (SC)

JUDICIAL PRONOUNCEMENT

Article 21 of the Indian Constitution which particularly comprises the phrase “procedure established by law” is an essential fundamental right, which safeguards against any act depriving life and personal liberty, unless authorised by law. Thus, the State legally depriving any individual (even non-citizen) of his life or personal freedom must be sanctioned by legal means to do it and must act exactly as per the procedure that he has been sanctioned by law to comply with (law here implies law judiciously approved by a qualified legislature- Union or State). In the *Makhan Singh vs State of Punjab* case⁸, where the detention decree was given in the original order itself without any examination by the Advisory Board (as required under the legal procedure) (Section 9), this detention was held to be void as it was inconsistent with the law. In the case of *Ram Narayan Singh v State of Delhi*⁹, the apex court held that any official who attempts to deprive other individuals of his life and individual liberty in the effect of what they consider to be their responsibility must precisely and cautiously understand the structures and rules of law. Hence this article puts forth the regulation that the executive power of the Government cannot be employed without explicit sanction of the law and must be executed precisely as per law¹⁰, endorses the “rule of law” and authorises a rule of order of the people, an objective of “due process” concept provided under the American Constitution.

Moreover, the same Article 21 also provides safety even against the legislative powers in that an individual may only be deprived of his personal liberty as per the procedure which must meet the essentials of Article 22. The Article enlists several procedural safeguards when an individual is deprived of his life and personal liberty. However, they differ on a case-to-case basis, i.e., no safeguards provided to an enemy alien, and limited safeguards to an individual charged under preventive detention. The exact nature of these safeguards was well settled in the case of *State of Punjab v Ajaib Singh*.¹¹In this case, it was concluded that the procedural safeguards given under Article 22 can be invoked when arrest and detention are for punishable reasons. They

⁸ *Makhan Singh v State of Punjab* [1964] AIR 381

⁹ *Ram Narayan Singh v The State of Delhi & Ors* [1953] AIR 277

¹⁰ *KK Nigam* (n6)

¹¹ *The State of Punjab v Ajaib Singh & Anr* [1953] AIR 10

won't be applicable when deprivation of one's personal liberty is an outcome of the rational execution of a favourable statute or in issues related to land proceeds restoration or restoration of income tax cases (most of the cases are related to civil debt).

Moreover, as per Article 22 (1)¹², an individual must be communicated his grounds of arrest as soon as possible, i.e., within a reasonable time of the arrest. The case of *Janardhan v Hyderabad*¹³ reveals its underlying features appropriately.¹⁴ Here, the accused was charged with a monetary offence and he held enough resources to appoint a counsel but he avoided legal representation. Here the court stated that trial in such cases would not be inefficient, but it provided itself the authority to interfere (and put aside the arrest order) in the case where complete unfairness occurs to the accused. This only displays the attentiveness of the apex court in a democratic set-up to reject any arrest order where the trial has not occurred in a just manner, notwithstanding whether it approves or disapproves one doctrine or another. Furthermore, the procedural entitlement to employ one's own personal counsel is a restriction on the functioning of all three organs- Legislature, executive, and judiciary. The law-making body cannot pass any legislation taking away this right, the executive cannot imprison any convicted individual without giving him a chance to seek advice from his lawyer and the judiciary should likewise give a chance to appoint and seek advice from his lawyer. In the case of *Inderjeet Singh v State of Delhi*¹⁵, it was stated that the right to seek advice from an individual's own counsel could not be conditioned on the option of the judge in charge, and any State legislation so mentioned, was held to be void as being violative of this clause. In the landmark judgement of *Motibai vs State*¹⁶, it was held that Article 22 provides a convicted individual, a right to seek advice from a legal counsel of his own requirement and to be protected by him from the moment of his conviction and even holding a discussion with the lawyer outside the police attention though it might take place within its availability.

¹² Constitution of India 1950, art. 22(1)

¹³ *Janardhan Reddy & Ors v The State of Hyderabad and Others* [1951] AIR 217

¹⁴ *KK Nigam* (n6)

¹⁵ *Inderjit Singh v The State of Delhi and Ors* [1953] AIR 52 (PH)

¹⁶ *Moti Bai v The State* [1954] CriLJ 1591

Clause (2) under Article 22¹⁷, as emphasised in the case of *Swami Hariharanand Saraswati vs The Jailor*¹⁸, is associated with the right to produce the arrested individual before the Magistrate within the time mentioned in this Article. In this case, the petitioners were convicted by a Magistrate as per section 64, Cr P.C., for having prevented the Harijans from accessing the temple of Shri Vishwanathji of Banaras through the main gate and thus carried out an offence prohibited under Section 6, UP Removal of Social Disabilities Act, 1947 and the Magistrate on the same day, detained the accused into jail, it was stated by the Allahabad High Court, following the apex court judgement in *State of Punjab vs Ajaib Singh* that as per the facts of the case there was no appropriate introduction of the petitioners before the qualified magistrate within 24 hours of their conviction without a warrant and as a consequence, there additional confinement in jail was against the law and unconstitutional.

In the case of preventive detention (Article 22 (5))¹⁹, it would be considered if the basis of detention was provided an appropriate chance to make representation was given. In the case of *Dr. Ram Krishna Bhardwaj v State of Delhi*²⁰, it was realised that preventive detention is a grave attack on personal liberty, and such small safeguards as the Constitution has given, against the inappropriate execution of power, must be cautiously examined and enacted by the Court. Such constitutional requirements must be fulfilled with respect to each of the basis informed to the person detained. In another remarkable judgement of *Vimal Kishore v UP*²¹, the court stated that in a habeas corpus case, any interaction following the day of return can't avoid the detention of the petitioner from being held as void, given no grounds were mentioned to him before the recording of return by the State. Thus, the safeguards which ensure just and fair procedure at the time of deprivation of one's liberty, are provided to an individual and he is authorised to invoke Article 32²² or 226²³ of the Indian Constitution (for filing the writ of habeas corpus) in case of their violations.

¹⁷ Constitution of India 1950, art. 22(2)

¹⁸ *Swami Hariharanand Saraswati v The Jailor I/C District Jail* [1954] CriLJ 1317

¹⁹ Constitution of India 1950, art. 22(5)

²⁰ *Dr. Ram Krishan Bhardwaj v The State of Delhi and Others* [1953] AIR 318

²¹ *Vimal Kishore Mehrotra v State of Uttar Pradesh and Anr* [1956] CriLJ 13

²² Constitution of India 1950, art. 32

²³ Constitution of India 1950, art. 226

In addition, to reinstate the fact that acceptability of a criminal hearing of any confession made by the accused before a police official is prohibited because such confession would be assumed to be made under force, Article 20 (3)²⁴ of the Indian Constitution comes into the picture. This particular provision provides a safeguard against self-accusation to an accused individual. The rationale behind the introduction of such a clause highlights the respective assumption to be strongly engraved in the Indian Jurisprudence and signifies the extreme mistrust that individuals in India have of administrative officials. The safeguards guaranteed by the Indian Constitution under Articles 20, 21, and 22, appear to be toothless enactments when such presumptions are confronted with.

ANALYTICAL STUDY

A short analysis of recent events depicts how these three Articles have been often misused and this has raised concerns regarding their existence itself. In the recent Arnab Goswami case where he was accused of aiding the suicide of an interior decorator by refusing the amount due to him, Mr. Goswami went to the Bombay High court even when the Sessions court didn't even hear the matter. The high court was not at fault for denying his bail appeal, as he already had an effective option in the form of a regular bail appeal before the sessions court. But surprisingly, the apex court has given a severe blow to personal liberty, when the petition was recorded instantly for hearing and the temporary bail, lacking a rational decision, was provided on the same day. An inspection as to why this sympathy was not shown to the social protestors in the Bhima Koregaon case who have been in jail beyond two years; with no trial commenced in the matter and several bail appeals being rejected, the issue of journalist Siddique Kappan with three others; being convicted and detained with the habeas corpus petition placed before the apex court being rejected on the grounds that the accused should first approach the High Court. These two instances reflect the two-sided approach of the judiciary to comply with the procedure established by law in Indian democratic society. These judgements are raising apprehensions today with more admiration being felt for its originating concept "due process of law" as extracted from the American Constitution. A remarkable judgement of Janardhan vs

²⁴ Constitution of India 1950, art. 20(3)

Hyderabad would prove to be effective in drawing an effective comparison between the two concepts.²⁵ In this case, where the accused was convicted for a monetary wrong, there was evidence to consider that the accused had resources and required wit, but it demanded being examined without a lawyer. If the same case had been put forth US Supreme Court after the judgement of a state prosecution, the accused wouldn't have been given any safeguard and the judgement would not have been kept aside. It should be noted that the Indian apex court while disapproving of the "due process doctrine" determined the case in the same manner as the US Supreme Court would have, but it displayed its dissatisfaction at the point that in spite of High Court regulations to provide a State counsel to an impoverished individual in a monetary case, the particular tribunal did not take any constructive initiatives to allocate a lawyer to the accused even when they were wealthy individuals and were given all options to hire a lawyer. The court held that though the decision does not stand ineffective, it held with itself the power to intervene (and put aside the judgement) in situations where severe injustice takes place with the accused. Secondly, as per the US concept, it is difficult to ascertain at what time post-arrest, an accused would have the right to employ a counsel. As in the case of *Carter v Illinois*, the accused who had confessed the wrong before the trial judge had no help of counsel till then but got one only during his sentencing. Comparing it to the law put down by Article 22(1) and Section 340 of the Criminal procedure code, as provided in *Motibai v State*, it appears to guarantee, more than the American concept, the right to counsel even till date.

CRITICAL ANALYSIS

The concept of liberty and "procedure established by law" has gained prominence in recent decades even more. The varied safeguards and the minute characteristics aligned with these Articles (particularly, 20, 21, and 22) hold the potential to be employed in distinct ways. This has given way to disrupting the element of personal liberty, the core component of their creation. As evident, India dropped down two places to 53rd rank in 2020 and later it held 46th position in 2021 in the Democracy index world ranking, published by Economist Intelligence Unit. The major reasons provided for such downfall were weakened democratic authorities and the

²⁵ KK Nigam (n6)

crushing down of civil liberties. This evidence proves to be an eye-opener as to whether we, as a nation are safeguarding and nourishing the basic tenets of the Indian Constitution. In the recent past, the default arrest of Indian citizens who expressed dissent with government functioning, speaks leaps and bounds about the role of the Indian judiciary as the preservers of the Constitutional ideals, today. Though several past judgements kept that role intact while strictly following the procedure established by law. They had added value to this concept of legal procedure and made it significant. But today, when it is getting diluted and even worse, getting threatened, it is not only weakening the democratic structure of the nation but eroding the rule of law in this nation.

CONCLUSION AND SUGGESTIONS

Observing an interesting comparison between Indian and American concepts related to liberty under Article 20(3), it was found that in American Constitution, no completely prohibitive regulation exists for the due process concept or any particular statute, that turns a confession before a police official to be invalid. If the confession was delivered at the time of legally endorsed confinement of the accused, any confession made with free will, before a police official would be valid as per the US constitution (unlike Indian Constitution). This reflects the underlying threats and dangers presumed in the police confinement, to the accused, which puts the Indian legal system in a bad light. In addition, when the bail applications of the accused are delayed for weeks and months, the judicial declarations that a single day devoid of liberty is a day too many lose relevance in the eyes of Indian citizens. To combat its deterioration much further, it is high time, that judiciary starts interpreting these rights to meet the test of the time while at the same time, keeping the uniqueness and magnificence of this concept of Liberty intact in this fundamental document of this nation. The following remedies can be examined and executed to give effect to this revival -

- The nearest Magistrate of the place of arrest should be approached, with all necessary documents, so as to avoid any delay in trials as well as the unnecessary burdening up of cases.

- Precise grounds of arrest should be disclosed at the time of arrest only (with or without a warrant) to the accused so as to avoid any vagueness in the legal proceedings later.
- The sensitivity for the significance of writ petitions must be underscored to make the Indian judiciary realise that by turning a blind eye to this remedy of Indian citizens, it is not only weakening the enforcement of fundamental rights but it is also putting its own existence as the third organ of the State, under existential threat.
- The political opinion of any accused should not be prioritised while accessing his bail application. A neutral but rational approach with strict adherence to the procedure established by law should be the main focus. Moreover, the precedents of different courts on similar issues should be thoroughly considered before giving any final verdict. Only then the rule of law will be upheld on this democratic soil.