



## **FACULTY OF JURIDICAL SCIENCES**

**Course : BALLB , 3<sup>rd</sup> Semester**

**Subject : CONSTITUTIONAL LAW I**

**Subject code : BAL304**

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## **Constitutional law - I**

**OBJECTIVE:** The objective of this paper is to provide understanding of basic concepts of Indian Constitution and various organs created by the constitution including their functions.

### **UNIT – I**

- **Salient features of the Indian Constitution.**
- **Preamble**
- **Definition of State (Art. 12)**
- **Doctrines of Ultra-vires, severability, eclipse, waiver (Art, 13)**

### **UNIT-II**

- **Right to equality (Art. 14)**
- **Prohibition of discrimination, Rights to equality of opportunity (Art. 15-16)**
- **Right to freedom under Article 19: Freedom of association; Freedom of movement;**
- **Freedom of residence; Freedom of assembly; Freedom of association; Freedom of**
- **movement; Freedom of residence; Freedom of occupation, trade and business;**
- **Right to take out processions; Right of the State to impose reasonable restrictions**

### **UNIT – III**

- **Protection in respect of Conviction under Article 20,**
- **Ex-post-facto law; Double jeopardy; Self-incrimination;**
- **Right of Life and Personal Liberty (Art. 21),**
- **Protection in respect of arrest and detention**
- **Right to freedom of religion (Articles 25-28)**

### **UNIT – IV**

- **Cultural and Education Rights (Articles 29-30)**
- **Enforcement of Fundamental Right, Writ Jurisdiction of the Supreme Court and**
- **High Court (Article 32, 226)**
- **Right to property before and after the Constitution 42nd Amendment Act, 1976**

- **Abolition of Untouchability, Titles (Articles 17-18)**
- **Right against exploitation (Articles 23, 24)**

**Suggested Readings:**

1. **Austin Granville: Constitution of India: Cornerstone of a Nation; and Working A Democratic constitution**
2. **NarenderKumar : Constitutional Law of India.**
3. **Basu D. D : Shorter Constitution of India**
4. **Jain, M.P.: Constitutional Law of India,**
5. **Seervai, H.M. : Constitutional Law of India, Vols. I-III**
6. **Shukla, V.N. : Constitutional of India (ed. M.P.Singh)**
7. **B.R. Sharma : Constitutional Law and judicial Activism**
8. **M.C. Jain Kagzi : The constitution of India**
9. **B. Shiva Rao: The Framing of India's Constitution**

# LECTURE 22

2.25 In Gopalan's case the attention of the Supreme Court was drawn to the legislative history of Article 21 which showed why the expression 'due process of law' was replaced by the expression 'procedure established by law'. However, it is unfortunate that legislative history of Article 22 particularly of clauses (1) and (2), whereby the substance of 'due process' was reintroduced, was not brought to the attention of the Supreme Court. Had this legislative history been brought to the Court's attention, a number of problems which caused the Judges' grave concern in Gopalan's case would have been simplified. The Court would have dealt with two aspects of Article 21, namely, the procedural due process available to every person (not preventively detained) before he was deprived of his life or personal liberty and attenuated procedural safeguards available to a person preventively detained, because Article 22(1) and (2) were expressly excluded in the case of preventive detention **PROCEDURE ESTABLISHED BY LAW:**

2.26 Article 21 of our Constitution lays down that no person shall be deprived of his life or personal liberty except according to procedure established (19) by law. Two expressions are important in Article 21 : (1) life and (2) Personal liberty . They are guaranteed and can be affected only by 'procedure established by law' .

2.27 This article is not intended to be constitutional limitation upon the power of the Legislature. Its object is mainly to serve as a restraint upon the Executive so that it may not proceed against life or personal liberty of an individual except under the authority of some law and in conformity with the procedure laid down therein.

2.28 Before a person is deprived of his life or personal liberty the procedure established by law must be strictly followed and must not be departed from. to the detriment of the person affected. The words 'except according to procedure established by law' suggest that Article 21 does not apply where a person is detained by a private individual and not by or under the authority of the State. By the use of words 'established by law' our Constitution accepts the English principle of the supremacy of law, in preference to American doctrine of judicial review of legislation, so far as personal liberty is concerned Therefore, liberty according to this view is a liberty which is confined and controlled by law. Law in this expression means State made law or enacted law and not the general principles like that of natural justice. The procedure established by law thus means procedure prescribed by Legislature.

2.29 The word 'life' in Article 21 can be interpreted in a widest possible manner. It does not simply mean physical life, but also covers other expressions of life. It is something more than a mere biological existence of a human body. The life also includes personality and whatever is reasonably required to give expression to life, its fulfilment and its achievements. The expression 'personal liberty' does not mean merely the liberty of the body, i.e . freedom from physical restraint or freedom from confinement within the bounds of the prison. It does not only

mean freedom from arrest and detention from false Imprisonment or wrongful confinement but means much more than that. Therefore, personal liberty is a compendious term to include within it all the variety of rights of a person, which go to make up the personal liberty of man. The Supreme Court of India has given a very wide interpretation of the expression 'life and personal liberty'^ To illustrate this further it would be proper to refer to some of the case laws.

2.30 In Kharak Singh's case^ our Supreme Court held that the personal liberty which is safeguarded by Article 21 is the freedom from a tangible physical restraint and did not, therefore, include freedom from invasion of privacy or protection of a person's personal sensitiveness. Justice Subba Rao (minority) refused to abide by the Gopalan thesis that personal liberty was the antithesis of merely 'physical restraint or coercion'.

2.31 Even the majority implicitly rejected this narrow interpretation of Gopalan in so far as it came to hold that a domiciliary visit, involving an intrusion into a man's home, constituted an invasion of 'personal liberty', even though there was no 'physical restraint or coercion or interference with his freedom of locomotion. Justice Subba Rao also went beyond the majority view and held that even a secret surveillance of a man's movements interfered with the freedom of his movement, because a man could hardly move 'freely' when all his activities were watched and noted. According to him, personal liberty meant not only absence of physical restraint but also of psychological restraints.

2.32 In yet another case of Govind v. State of Madhya Pradesh it was conceded by the Court that expression 'personal liberty' included 'privacy' involving freedom from psychological restraints.

2.33 In Satwant Singh v. A.P.O. the right to travel abroad was held to be an aspect of 'personal liberty' of an individual. Therefore, a passport for travel cannot be denied to a person except according to procedure established by law.

2.34 In R.M. Malkani v. State of Maharashtra the Supreme Court held that telephonic conversation of innocent citizens would be protected by Courts against wrongful or high handed interference by tapping of the conversation by the police under Article 21 signifies the violation of personal liberty.

2.35 In Francis Coralie MuUin's case the theory propounded by Justice Bhagwati in Maneka Gandhi's case was enlarged. It included the right of a detenu to have interviews with members of his family and friends and it was considered as part and parcel of personal liberty.

2.36 After having dealt with life and liberty, it is now essential to deal the other part of the article , viz. 'procedure established by law.' The expression 'procedure established by law' does not have

the same meaning as the expression 'due process of law' as used in the American Constitution and which expression has wider connotation than the expression used in the Indian Constitution.

2.37 The Due process clause was pressed into service for the first time (27) after our Constitution came into force in A.K. Gopalan's case. It was only \ 28 Justice Fazal Ali (in a minority judgement) who tried to read the "due process" concept in Article 21. But the majority led by Kania C.3. held that law in Article 21 is lex and not jus and pleaded that absence of the word due process in Article 21 precluded the Court to go into the reasonableness of the law enacted by a competent legislation. Not only that the learned Judges refused to read Article 19 along with Articles 21 and 22. It was held by the majority that the 'procedure established by law' means procedure prescribed by the law of the State. These words are to be taken to refer to procedure which has a statutory origin for no procedure is known or can be said to have been established by such vague and uncertain concepts as the immutable and universal principles of natural justice.

2.38 According to Justice Patanjali Sastri the process or procedure in this context connotes both the act and manner of proceeding to take away a man's life and personal liberty. The procedure thus established by valid enactment cannot be challenged on the ground of unreasonableness. It has been unequivocally laid down in Gopalan's case that when a person's liberty is restricted or taken away according to the 'procedure established by law', reasonableness of such restriction would be a different question and has no bearing on the right guaranteed by Article 19(1)(d) read with clause (5) of the Article. It was further stated that Article 21 affords no protection against competent legislative action in the field of substantive criminal law, for there is no provision for judicial review on the ground of reasonableness or otherwise of such laws.

2.39 The Supreme Court in Ram chandra Prasad v. State of Bihar followed the meaning of 'law' in Article 21 as given by the majority of the Judges in Gopalan's case. In defending the constitutionality of section 19 of the Prevention of Corruption Act, 1947 the Court stated that the procedure established by law means procedure established by law made by the State, that is to say, by Union Parliament or the Legislatures of the States. Section 19 of the Prevention of Corruption Act has been enacted by the Parliament and, therefore, it must be held that what it lays down is a procedure established by law.

2.40 In K.K. Kochuni's case it was held that where the State seeks to take away a man's property by a law made under Article 31(1), he may contend that the law is procedurally or substantively unreasonable and hence inconsistent with Article 19. The reason is that the 'law' under Article 31(1) must be a 'valid law' and the conditions of the validity of a law are two-fold - (a) Legislative vires or competence and (b) non-contravention of any of the fundamental rights guaranteed by Part III. Therefore, an attempt was made by Justice Subba Rao to agree with the views of Justice Fazal in Gopalan's case. 2A\ In yet another case of Municipal Committee, Amritsar v. State of Punjab an attempt to recognize due process clause was frustrated and where

Justice Shah reiterated Gopalan and observed as under : "The Courts in India have no authority to declare a statute invalid on the ground that it violates the due process clause of law. Under our Constitution the test of due process of law cannot be applied to statutes enacted by Parliament or the State Legislatures. The Court's attitude in earlier cases showed a marked change in later years. Although it was unequivocally decided by several decisions<sup>30</sup> that if the law is valid, it could not be challenged on the ground of unreasonableness, unless it was in conflict with any of the fundamental rights, the Court came to recognise the sanctity of personal liberty and held in Maneka Gandhi's case, that the audi alteram rule could not be wholly excluded where a person's liberty is affected and he must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relation exercise.

Maneka Gandhi's case and Sunil Batra's case are trend setters and that trend has been maintained by the Supreme Court even in subsequent cases. According to an eminent author : "The post-Maneka cases witnessed an outburst of due process decisions converting most of Article 21 into a regime of positive rights. Right to life and personal liberty soon came to encompass within it, the right to bail, right against solitary confinement, right to humane treatment in prison, the right to human dignity and even the right to get compensation for undergoing torture. The Court innovated the strategy of what is called public interest litigation or social action litigation enabling the public spirited individuals or groups to move the Court to seek redress for the victimised groups. But Article 21 still remained the embodiment of procedural due process and had not matured as a limitation against legislative action." In Sunil Batra's case while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Justice Krishna Iyer said : " True our Constitution did not have a due process clause or the VIII Amendment but, in this branch of law, after Cooper and Maneka the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary is shot down by Articles 14 and 19 and if inflicted with procedural unfairness falls foul of Article 21."

In the same case Justice Desai observed : "The word 'law' in the expression 'procedure prescribed by law' in Article 21 has been interpreted to mean in Maneka Gandhi's case that the law must be right, just and fair and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and requirement of Article 21 would not be satisfied."^^^

2.46 In Bachan Singh's case the Court relied on the absence of the American due process clause and the Eighth Amendment for upholding death penalty. Speaking for the majority, Justice Sarkaria held that the Courts were not law makers and thus could not sit over the wisdom of Parliament which alone could decide whether to retain or abolish death penalty. Chief Justice Chandrachud was party to Bachan Singh as well as Sunil Batra. In Bachan Singh's case the Court clarified that if Article 21 was understood in accordance with Maneka Gandhi's case, it will read to say : "No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by a valid law." Bachan Singh reaffirmed that all



pervasive omnipresence of reasonableness of Article 14 influenced the interpretation of 'procedure' and not of law.

2.47 In *Jolly George Varghese* Justice Krishna Iyer extended the doctrine of due process through Article 21 for giving social justice. He observed: "Equally meaningful is the import of Article 21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and worth of human person enshrined in Article 21, read with Article 14 and 19 obligate the State not to incarcerate except under law which is fair, (42) just and reasonable in its procedural essence. " And he further observes : "To be poor, in this land of *Daridra Narayan* (land of poverty) is no crime and to recover debts by procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of minimal (43) fairness of his wilful failure to pay "

2.48 In *A.K. Roy's* case the Chief Justice Chandrachud reaffirmed his view taken in *Maneka Gandhi's* case that Article 21 did not permit judicial review of reasonableness of substantive portion of the law. It allowed judicial scrutiny of procedural fairness only. He held that "the power to judge the fairness or justness of procedure established by law for the purpose of Article 21 is one thing, "but" the power to decide upon the justness of the law itself is quite another thing" and "such power springs" from a "due process" provision such as to be found in the Fifth and Fourteenth Amendments of the American (45) Constitution.

2.49 Justice Bhagwati was a party in *A.K. Roy's* case and after this case Justice Bhagwati had delivered the opinion (minority judgment) in *Bachan Singh's* case. He had taken a very peculiar view of Article 21 in which he interpreted procedure as including both substantive and procedural due process. He observed: "The word procedure in Article 21 is wide enough to cover the entire process by which deprivation is affected and that would include not only adjectival but also substantive part of law Every facet of the law which deprives a person of his life or personal liberty would, therefore, have to stand the test of reasonableness, fairness and justness in order to be outside the inhibition of Article 21,

2.50 According to Justice Bhagwati, the substantive and procedural portions of law affecting deprivation are so inseparable that both must stand the test of reasonableness, fairness and justness. He believes that rule of law permits the entire fabric of the Constitution and constitute its basic feature. Rule of law excludes arbitrariness and therefore, law must not be arbitrary or irrational and it must satisfy the test of reason and the democratic form of policy and framers of law are accountable to the people.

2.51 In *Mithu's* case the Supreme Court went even further where it struck down section 303 of the Indian Penal Code on the ground that, that section violated not only Article 14, but even Article 21. The Supreme Court observed in *Mithu's* case that : "...that these decisions have

expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the Courts to follow it : That it is for the legislature to provide (49) the punishment and for the Courts to impose it. "

2.52 Explaining the scope of expansion, which Article 21 has undergone by reason of Bank Nationalisation case and Maneka Gandhi's case, the Supreme Court in Mithu's case declared : 3 1 "If law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands the law will be bad as violative of Article 21. A savage sentence is anathema to the civilized jurisprudence of Article 21." 2.53 The Court struck down section 303 of Indian Penal Code as violative of Articles 14 and 21 in so far as the subjective law of sentence in the section is held to be unreasonable and unjust and contrary to the text of Article 14. The possibility of all "unreasonable, unfair and unjust" laws is thus thrown open by the Court superseding the majority opinion in A.K. Roy's case, where the power to judge the reasonableness of the law itself in (contradiction to the power to decide the reasonableness of procedure established by law) was held to be absent in the Indian Constitution. 2.54 In Mithu's case the Supreme Court implied that imposition of death sentence even under section 302 I.P.C. would have been held in Bachan Singh's case invalid and ultra vires of the protection guaranteed by Article 21, if the Parliament had not provided for alternative sentence of life imprisonment and death sentence, but provided for only a mandatory death sentence. A mandatory death sentence would then have been shot down by the civilized jurisprudence of Article 21. Now savagery of a death sentence is more an attribute of substantive law. Justice Chinnappa Reddy, ascribed the whole of his concurrence to Article 21.

2.55 After Mithu's case, it is not easy to assert that Article 21 is confined any longer to procedural protection only. Procedure and substance of law now mingle and overlap each other to such a degree rendering that a finding of any law that can completely establish a valid procedure for the enforcement of a savage punishment impossible.

2.56 In Deena's case the Supreme Court upheld the procedure for executing death sentence by hanging a convict by rope. In the majority opinion written by Chief Justice Chandrachud it observed that two fold consideration has to be kept in mind in the area of sentencing. Substantively, the sentence has to meet the Constitutional prescription contained especially in Articles 14 and 21. Procedurally the method by which the sentence is required by law to be executed has to meet the mandate of Article 21.

2.57 The above observation can be interpreted to mean that the substantive provision in the area of sentencing should be fair, just and reasonable under Article 14 which influenced the interpretation of 'law' under Article 21, whereas the procedural provisions relating to the execution of a sentence should satisfy the requirement of procedural fairness which requires that the execution should not be in a 'cruel, barbarous and degrading manner'. The Court in Deena's

case, therefore, upheld the execution of death sentence by hanging by rope, because according to the Court it was not cruel, barbarous and degrading

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**Choose the correct option**

1. **Which of the following conditions for the applications of clause (1) of Article 30 of the Indian Constitution is/are found to be correct?**
  - I. In order to claim the benefit of Article 30 (1), the community must show (i) that it is a religious or linguistic minority and (ii) that the institution was established by it.
  - II. If an institution has been brought into being by a minority community it matters not if the funds have been supplied by a single individual or by the community at large, or whether members outside that community are also taking advantage of the institution.
  - A. Only I
  - B. Only II
  - C. Both I and II
  - D. None of them
  
2. **The right to administrator may be said to consist of which of the following rights?**
  - I. To choose its managing or governing body.
  - II. Not to be compelled to refuse admission to students.
  - III. To use its properties and assets for the benefit of the institution.
  - A. I and II
  - B. I and III
  - C. I and III
  - D. I, II and III
  
3. **Which of the following Articles of the Indian Constitution the right to compulsory acquisition of property was mentioned before its deletion?**
  - A. Article 30(1)
  - B. Article 31
  - C. Article 32
  - D. Article 30(2)

4. **43. In which of the following states of India is Article 31 of the Indian Constitution applicable even after its deletion by the 44<sup>th</sup> Amendment Act?**
- A. Jammu and Kashmir
  - B. Himachal Pradesh
  - C. Sikkim
  - D. Arunachal Pradesh
5. **44. Sub-clause (1) A of Article 31A of the Indian Constitution applies in which of the following contingencies?**
- A. Acquisition of an estate
  - B. Extinguishment of rights in an estate
  - C. Modification of rights in an estate
  - D. All of them