



## **FACULTY OF JURIDICAL SCIENCES**

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

**Subject : CONSTITUTIONAL LAW I**

**Subject code : BBL304**

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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 (Act. 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 23

2.58 Following Mithu's case the Andhra Pradesh High Court in T. Sareetha V. Venkata Subbiah invalidated section 9 of the Hindu Marriage Act, 1955 which provides matrimonial remedy of restitution of conjugal rights. Mithu's case enabled the Andhra Pradesh High Court to describe the decree of restitution of conjugal rights as a 'savage' and 'barbarous' remedy violating the right to marital privacy implicit in Article 21.

2.59 Similar pronouncements of the Supreme Court in the recent past 3 t have amply demonstrated that by extending the concomitants and contours of Article 21, the highest Court of the land has shown immense judicial creativity in energising the dormant due process jurisprudence in the Indian Constitution. It still remains to be seen whether this view will prevail in the judgements to follow. INTER-RELATIONSHIP BETWEEN ARTICLE 11, 19 AND 21;

2.60 Article 21 of our Constitution is very much in the limelight and its frequent use in Supreme Court cases fully convinces us that it is probably the key organ in the body of our democracy as the central nervous system in the organic human body. If Article 21 represents the nervous system, Article 11 playing the role of heart represents the circulatory system. Article 19 similarly represents the senses with the only difference that whereas human body has five senses, Article 19 has six senses. Article 20 acts as a defence mechanism. Hence Fundamental Right embodied in our Constitution form a composite body in which survival of democracy has become possible.

2.61 In the past the survival of democracy had become dubious on account of the thinking of Supreme Court to treat different Articles of the Fundamental Rights Chapter without any correlation between them. The question of interrelationship of Articles first arose in A.K. Gopalan's case where he as the leader of undivided Communist Party of India was detained under the law of Preventive Detention. The Supreme Court said in this case that Article 22 being a complete code relating to Preventive Detention, the validity of an order of detention must be determined strictly according to the terms and within the four corners of that Article. Article 22 of the Constitution provides that a person can be preventively detained without charge-sheet and trial. Such a detention may deprive an individual of rights such as freedom to move freeJy through-out the territory of India guaranteed by Article 19(I)(d). This freedom can be restricted only on two counts - either in the interest of general public or for the protection of any scheduled tribe as provided under Article 19(5). But the Supreme Court ruled that Articles 22 and 19 were exclusive to each other. An act of preventive detention should be judged on the basis of the form and object of the State action and not on the basis of its impact on the various fundamental rights of the detune.

2.62 Therefore, alaw of preventive detention did not have to satisfy the requirements of Articles 19, and 21 so long as the law of preventive detention satisfies the requirements of Article 22, it would be within the ambit of Article 21 and it would not be required to meet the challenge of

Article 19. This view proceeded on the assumption that certain articles in the Constitution exclusively deal with specific matters and where the requirements of an article dealing with the particular matter in question are satisfied and there is no infringement of the fundamental rights guaranteed by that article, no recourse can be had to a fundamental right conferred by another article.

2.63 In his famous book, "Liberty in the Modern State", Harold Laski the greatest political thinker of our times has stated: "Law must take account of the totality of experience and this can only be known to it as that experience is unfettered in its opportunity of expression". He has clarified his view by stating; "No State for instance, could rightly legislate about the hours of labour if only businessmen were free to offer their opinion upon industrial conditions. We could not develop an adequate law of divorce if only those happily married were entitled to express an opinion upon its terms" (56). For this reason it was not right on the part of the Supreme Court to exclude totality of experience from which each article under the Fundamental Rights Chapter has emanated. This folly, however, was corrected after 1970 when the Supreme Court very rightly recognised the interrelationship of Articles and started deciding the cases from those directions. (57)

2.65 In Bank Nationalisation case Mr. R.C. Cooper, a rich banker in India, complained before the Supreme Court that his rights under Articles 19 and 31 amongst other rights, were being violated by the nationalisation of banks. The test applied in this case was: what were the direct and inevitable consequences or effects of the impugned State action on the fundamental rights of the petitioners.

2.66 Article 19(1)(f) entitled all citizens to acquire, hold and dispose of property. The right could be restricted either in the interest of the general public or for protection of the Scheduled Tribes. Article 31(1) assures that no person would be deprived of property save by authority of law. In addition, Article 31(2) specified that no property would be acquired or requisitioned save for a public purpose and then not without compensation the adequacy or inadequacy of which could not be challenged in a Court of law. The form and object of the State action vis-a-vis bank nationalisation related only to Article 31. But one of the challenges in Cooper's case against bank nationalisation was that it did not fulfil the requirement of Article 19.

2.67 Accepting the argument of the petitioners and rejecting the theory of 'pith and substance' adopted in A.K. Gopalan's case, the Supreme Court of India said that all the fundamental rights in the Constitution together weaved a pattern of guarantees on the texture of basic human rights. The pith and substance of the State action may deal with a particular fundamental right, but its direct and inevitable effect may be on another fundamental right. In that case the State action would have to meet the challenge of latter fundamental right. The State action of bank nationalisation had to satisfy not only the requirements of Article 31, but also of Article 19.

2.68 In this case Justice Shah delivering the majority judgement observed that it is not the object of the authority making the law imparting the right of a citizen, nor the form of action taken that determines the claim, it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief. If this be the true view, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislatures, nor by the form of action, but by the direct operation upon the individual right.

2.69 On the termination of the proclamation of emergency, the scope of the meaning of the expression 'personal liberty' enshrined in Article 21 and inter-relationship between Articles 19 and 21 fell to be considered by the Supreme Court in Maneka Gandhi's case. In this case Maneka's passport was impounded in public interest by an order of the Government without furnishing any reasons for such an action. Justice Bhagwati expressed the following view: "The expression 'personal liberty' in Article 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 the status of distinct fundamental rights and given additional protection under Article 19. If a law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 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 Article 14 of the Constitution."

2.70 It was further observed in the same case that it is now well settled by various decisions of the Supreme Court i.e. Cooper's case, Sambhu Nath Sarkar's case, Haradhan Saha's case and Khudiram Das's case that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of personal liberty, and there is consequently no infringement of the fundamental right conferred by Article 21, such law in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that Article. '4

2.74 From the aforesaid discussions with reference to different case laws one thing is certain that consistency is lacking. Though the concept of 'due process' of law is accepted in some cases, it is doubtful whether same would be the position in future. The trend of decisions given by different Courts of the land so far creates this suspicion. In any event whether it is 'due process' of law or 'procedure established by law' both suffer from inherent defects. In the concept 'procedure established by law' the interpretation relates to the law enacted by the Legislature and Legislature is bound to make laws which encroach upon the liberty of the people and in such a situation even personal liberty could be at stake despite Article 21 being on the statute book. In similar manner a situation may arise even in United States where the concept of 'due process of law' i.e. the 'enacted law' exists. 41 Therefore, even if Article 21 were to be suffixed with 'due process of law'

it should not be 'any' law enacted by the Legislature, but it should be a law which is just, fair and reasonable. 2.72 While interpreting the expression 'procedure established by law' initially the highest Court of the land was not prepared to read 'due process of law' in its place in Article 21. As a matter of fact, the distinction sought to be made between the two concepts was meaningless. Subsequently the word 'procedure' used in Article 21 was interpreted to cover entire process by which deprivation was affected and that would include not only the procedural law, but also the substantive part of the law. It is therefore necessary to read the concept of due process of law in Article 21 and that must include every facet of the law, which deprives the person of his life or personal liberty and that must include the test of reasonableness, fairness and also justness. If this is achieved, life and personal liberty as enshrined in Article 21 would be freely available to the people of our country. JUDICIAL EVOLUTION OF ARTICLE 21 - MANEKA GANDHI'S CASE - A POINT OF INCEPTION AND A LANDMARK:

2.73 In Maneka Gandhi's case our Supreme Court has taken 'personal liberty' to that altitude that it would not be possible for the Court to water down the ratio of that case in subsequent cases. In other words, Maneka has expanded and enriched personal liberty. This has also been corroborated by an eminent author. The author while affirming the above proposition stated thus: "This judicial endorsement of authoritarianism in 1975 and 1976 and democratic liberalism in 1978 discredits the tenet of mechanical jurisprudence that the judge and the judicial decision are aloof from politics and political struggle and brings into focus the need to evolve in India also 'political jurisprudence' which regards judges as participants in the political process and the judicial decisions as political events and provides a framework for relating judicial behaviour of the other branches of the government".

2.74 From the above paragraph it transpires that a great transformation has taken place in the judicial attitude towards protection of personal liberty and that can be attributed to the traumatic experience of the emergency which came to be imposed in between the years 1973 to 1977. But this is not wholly correct. The transformation in judicial attitude can never be attributed solely to the political influence existing at that time. The Judiciary whose functions are to protect the rights of people as guaranteed by the various provisions of the Constitution has to act if such rights are violated irrespective of the political situation that may exist. Therefore, it is not possible for this researcher to agree with the author that a need has arisen to evolve 'political jurisprudence' in India. The Judiciary and politics are two different entities having distinct and different subject matter and jurisdiction and they are independent of each other. This is obvious from the fact that the Judges can never become a part of political process and judicial decision can never be the part of political events. It is in this light that American Supreme Court has evolved the concept of 'political question doctrine' whereby the Courts are refrained from interfering in matters which relate to executive or political branch of the Government. The day judiciary makes an attempt to toe the line of the Government it will be impossible for the Judges to give justice to the people rendering the whole system ineffective. The judiciary is expected to



uphold the rights of the people as laid down in the Constitution and it cannot be influenced by the Government in power whosoever they may be.

2.75 In Maneka Gandhi's case an important right i.e. the right of an individual to go abroad, was read in Article 21 as an important aspect of personal liberty . The right to go abroad is not a specifically enumerated fundamental right in our Constitution. However there are some provisions like Article 19(1)(a), 19(1)(d) and Article 21 which have some bearing on the aspect of right to go abroad.

2.76 The significance of the right to go abroad can be seen from Article 13(2) of the Universal Declaration of Human Rights, which proclaims as under: "Every one has the right to leave any country including his own and to return to his own country. " Therefore, every person has a right to go abroad, but an individual can leave his own country provided he has a valid passport.

2.77 A passport is a document which entitles the holder thereof to enter (68) another country. The passports were unknown during the First World War, It was only as a result of international conventions and usages that a country had a right to demand the passport from foreigners wishing to enter their territory . A country may refuse entry to a particular person and such a person had no legal right to enter that country. In India prior to the passing of the Passport Act, 1967 the passports were being issued by the Government in exercise of the executive powers keeping in view the foreign relations. Grant of passport at that time was the sole discretion of the Government as no rules were formulated for its regulation. A passport was then essentially a political document issued in the name of the President to the Government or authorities in foreign country requesting them to afford facilities to the holder thereof mostly for safe travel and ensuring assistance and necessary action.

2.78 Gradually various High Courts in the country encroached upon the sole discretion of Government since according to them the denial of the passport was held nothing short of violation of right of personal liberty to move about in and out of country. It was as a consequence of Satwant Singh's case that the enactment of 1967 came to be passed. The views expressed by different High Courts about the right to go abroad are discussed underneath.

2.79 In V.G. Row v. State of Madras ,the Madras High Court dismissed the petition on the ground that there was no fundamental right vested in the petitioner to passport and the law of the State did not prevent a person from leaving any country on the ground that he did not hold a passport. The refusal of the Government to endorse the petitioner's passport to visit the Soviet Union was challenged on the ground that it violated the fundamental right guaranteed under Articles U and 19(1)(d) which guarantee the right of equality and the right to move freely within the territory of India. 2.80 However, in Francis Manjooran v. Government of India, the Kerala High Court held : " tha t the righ t to travel , except to the extent provided in Article 19(1)(d) of

the Constitution is, within the ambit of the expression "personal liberty " as used in Article 21 of the Constitution and that as a passport is essential for the enjoyment of that right , the denial of a passport amounts to a deprivation of that right . It is true that Article 21 permits a deprivation by procedure established by law. The hurdle in the path of the Union of India is the absence of any such procedure. "

2.81 In *A.G. Kazi v. C.V. Jethwanit* the Bombay High Court again held that the theory of the royal prerogatives in the granting of passport had not been imported into India, therefore, that theory was of no avail and could not be pressed into service in considering the granting of the passports. (73)

2.82 In *Sadashiva Rao v. Union of India* it was held that the right to go abroad must be held to fall within Article 21 a citizen has a fundamental right to go abroad.

2.83 In *Malik v. The Regional Passport Officer*,<sup>^ ^</sup> the Delhi High Court handed down a contrary decision. Chief Justice Dua in his concurring but separate opinion gave reasons for his view that the right to go abroad and return to India could not be read into the expression 'personal liberty'

. 2.84 Justice Kapur who delivered a separate opinion, was inclined to give the expression personal liberty widest scope but according to him 'personal liberty' does not include the right to travel abroad. He observed as under: "I agreed with the learned counsel for the petitioner that the right of personal liberty guaranteed by Article 21 is not dwarfed into mere freedom from physical restraint of the person of the citizen but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his creator. But it is here that the agreement ends, for I am not prepared to accept the argument that Article 21 also guarantees the (75) right to travel outside the country. "

2.85 Thus from all the above cases we can see that there were conflicting judgements of various High Courts and the matter came up for consideration before the Supreme Court in *Satwant Singh's* case. In this case, the petitioner an Indian citizen, was the proprietor of two business concerns. For the purpose of his business it was necessary for him to travel abroad and for that he was given passport facilities . The said passports were impounded by the Government under certain circumstances. The petitioner alleged that the said action of the Government infringed his fundamental rights under Articles 1<sup>^</sup> and 21 and he filed a writ petition before the Supreme Court for issuance of a writ directing the respondents to forebear from depriving the petitioner of passport. The respondents contested the petition mainly on the ground that the fundamental right had not been infringed, that the petitioner had contravened the conditions of import licence, and investigations were going on against him in relation to offences under the Export and Import Control Act and that the passport authorities were satisfied that if the petitioner was given a passport he was likely to leave India and would not return to face a trial

before a Court and therefore his passports were impounded. It was also alleged that a passport was a document which was issued at the pleasure of the President in exercise of his political

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**Choose the correct option**

1. Which of the following conditions is/are required for the application of sub-clause B of Article 31A of the Indian Constitution?
  - I. The taking over must be for a limited and not be an indefinite period of time or amount to acquisition
  - II. It must be either in the public interest or in order to secure the proper management of the property, which must be objectively established.
  - A. I and II
  - B. Only I
  - C. Only II
  - D. Neither I nor II
2. Which of the following statements regarding the object of Article 3 IB of the Indian Constitution is/are found to be correct?
  - I. Article 3IB has been inserted, by way of abundant caution, to save the particular Acts included in the 9<sup>th</sup> schedule of the constitution, notwithstanding any decision of a court or tribunal that any of those Acts is void for contravention of any fundamental right.
  - II. Article 3 IB is not illustrative of the rule contained in Article 31 A, but stands independent of it, and validates certain Acts specified in the Ninth schedule, though the compensation provided was not real or adequate.
  - A. Only I
  - B. Only II
  - C. Neither I nor II
  - D. Both I and II
3. Which of the following rights is considered as the 'soul of fundamental rights'?
  - A. Right to Equality
  - B. Right to Freedom
  - C. Right to constitutional remedies
  - D. Right against exploitation
4. The Supreme Court shall have power to issue directions or orders or writs according to Right to Constitutional Remedies. Which of the following writs can be issued by the

Supreme Court for the enforcement of any of the fundamental rights?

- A. Habeas Corpus
- B. Mandamus
- C. Quo Warranto
- D. All of them

5. In which of the following situation the Supreme Court will not interfere under Article 32 of the Indian Constitution?

- A. No question other than relating to a fundamental right will be determined in a proceeding under Article 32 of the Indian Constitution
- B. If the validity of other provisions of the statute is challenged on the grounds other than the contravention of fundamental rights, the court would not entertain that challenge in a proceeding under Article 32 of the Indian Constitution
- C. The court will not interfere with the finding of fact where it was based on just and reasonable satisfaction and was not perverse
- D. All of them

6. Which of the following statements regarding 'What the Supreme Court cannot do under Article 32' of the Indian Constitution is/are found to be correct?

- I. The Supreme Court will not give a declaration which will not serve any useful purpose to the petitioner.
  - II. The Supreme Court will not issue damages which are available only in a suit.
  - III. In the absence of adequate materials, the Court would not enter into a political arena which should be properly dealt with by the Government.
- A. All are incorrect
  - B. All are correct
  - C. I and III
  - D. II and III