



FACULTY OF JURIDICAL SCIENCES

Course : BALLB , 3rd Semester

Subject : CONSTITUTIONAL LAW I

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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 21

ARTICLE 21

ARTICLE 21 OF THE CONSTITUTION OF INDIA DUE PROCESS OF LAW:

2.1 The origin of the "Due Process of Law" can be traced from the English common law - it was stressed first during the reigns of Henry I (1100-1135) and Henry II (1154-1189) due process has its basis also in Magna Carta of 1215. This is confirmed from the following proposition : "No man shall be taken or imprisoned, disseized or in any way destroyed, save by the lawful judgement of his peers and by the law of the land. "

2.2 In England the Parliament is supreme and the law made by the Parliament is the law of the land. This aspect has been treated as interchangeable with due process of law. This is corroborated from the observation made by Professor Dick Howard in his commentary on Magna Carta. He observed: " as early as 1354 the words 'due process' were used in English statute interpreting the Magna Carta, and by the end of fourteenth century 'due process of law' and 'law of the land' were interchangeable . The English colonists who established our courts brought the expression 'due process of law' with them. As it developed, 'due process of law' restrained a head of the Government from arbitrarily depriving a member of his realm of life , liberty or property. ." Thus the framers of the American Constitution appear to have borrowed the phrase from the English common law.

2.3 Due process of law is a unique clause of the American Constitution. It is a very broad and flexible concept and it is difficult to give a precise definition of due process. The literal meaning of due process is the 'guarantee of fair procedure'. In the words of Justice Frankfurter due process can be described as under : " due process, unlike some legal rules, is not a technical conception with a fixed content Due process is not a mechanical instrument. It is not a yardstick . It is a process. It is a delicate (2) process of adjustment " 2A Due process of law has two aspects. Both these aspects together constitute due process in its entirety. But these two aspects of due process sometimes overlap each other and it becomes virtually difficult to demarcate them independently. The two aspects of due process are : Substantive Due Process and Procedural Due Process. These two aspects cannot be defined and they are not separable from one another, they overlap each other.

2.5 Substantive due process refers to the content or subject matter of a law or an ordinance, whereas procedural due process refers to the manner in which a law, an ordinance, an

administrative practice or a judicial task is carried out. In both the substantive and procedural due process concepts the judicial test of constitutionality or legality is the same

2.6 The Constitution of United States twice promises the individual that the Government will not deprive him of life, liberty or property without due process of law. The Fifth Amendment ratified on December 15, 1791 declares : "No person shall be deprived of his life , liberty or property, without due process of law." The Fourteenth Amendment ratified on July 23, 1868 imposes similar limitation on the State authorities : "No State shall deprive any person of life , liberty or property without due process of law."

2.7 Neither of these guarantees protects absolutely against loss of life, liberty or property. They simply assure the individual that this deprivation will occur only after the Government has adhered to certain standard approved procedures. One basic requirement of the concept of due process of law is that Government may not act in an "arbitrary", "capricious" or "unreasonable" manner in performing its task.

2.8 In England there is no constitutional guarantee safeguarding the freedom of the individual, it is safeguarded by the common law and it is also not open to a Court to invalidate a law on the ground that it seeks to deprive a person of his life or liberty contrary to due process clause; whereas in American law made by the Congress can be declared as bad by the judiciary if it is not in accordance with "due process".

2.9 This was illustrated by the Court in the year 1856 in Murray's Lessee case in the following words : " That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law' ? It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as on the executive and judicial powers of the government and cannot be construed as to have Congress free to make any process due process of law' by its mere will."

2.10 The United States Constitution does not define "due process" and the Courts have tried to interpret the concept of due process in a liberal manner depending on the facts and circumstances of each case. The contents of due process are not fixed and they vary from case to case.

2.11 In the year 1857 Justice John Marshall Harlan has tried to give a brief definition of the due process of law in the following words. "Government should be confined within the limits of those fundamental principles of liberty and justice lying at the foundation of our civil and political institutions that no State can violate consistently with that due process of law required by the Fourteenth Amendment in proceedings involving life , liberty or property. "

2.12 The above opinion which was given by Justice Harlan was a minority judgement but in a later case of Palko v. Connecticut it became majority judgement in which due process clause was accepted, clarified and further refined by Justice Cardozo.

2.13 Many landmark due process judgements have been given by Supreme Court but the definition of due process still remains incomplete and that was the observation made by Justice Felix Frankfurter further in Wolf v. Colorado in the following words: "Due process of law conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the Courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal varieties. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." Justice Frankfurter gave the above judgement in the year 1949 and since then the U.S. Supreme Court has expanded the meaning of due process to a considerable extent and now it virtually encompasses all specific guarantees of Bill of Rights.

2.15 The due process clause of the American Constitution has been working as an instrument of check and balance. This check sometimes has been strictly construed by the American Supreme Court and sometimes it is very liberally construed. The effect of this interpretation reflects no consistency or certainty as to the norms of due process under the American Constitution. The field is wide open before the Supreme Court of America to construe it strictly or to construe it liberally and ultimately it is the Court, which has to put the limitations on its own jurisdiction.

LEGISLATIVE HISTORY OF ARTICLE 21:

2.16 Draft Article 15 (now Article 21) as originally passed by the Constituent Assembly provided that: "No person shall be deprived of his life or liberty without due process of law." The Drafting Committee introduced two changes in this Article: "(i) the addition of the word 'personal' before the word 'liberty', and (ii) the substitution of the expression 'except according to procedure established by law' for the words 'without due process of law'."

2.17 The reason given for the first change was that "otherwise (liberty) might be construed very widely so as to include even the freedoms already dealt with in Article 13" (now Article 19). The reason given for the second change was that "the (substituted) expression was more specific. They followed (8) the Japanese Constitution." The reason given for the first change was clearly right, for Draft Article 13 (now Article 19) conferred certain freedoms only on citizens, whereas Article 15 (now Article 21) applied to citizens and non-citizens alike, and it was wise to foreclose the argument that the word "liberty" included the freedoms which had been denied to non-citizens by Draft Article 13. (9)

2.18 According to H.M. Seervai, the reason given for the second change may be literally correct but was not candid. Both substantive and procedural "due process" were well established in the United States, and though the concept of "due process" was vague and flexible or (imprecise) it was used to enforce certain standards to which according to majority of Judges of the U.S. Supreme Court substantive and procedural laws had to conform. However, abuse of substantive due process by the U.S. Supreme Court produced second thoughts and 'due process' was replaced by 'procedure established by law.'(10)

2.19 It is interesting to note that when the Constitution was in the process of being framed, B.N. Rau, who was the Constitutional Adviser had gone to the United States in order to have discussions with leading jurists in that country and he was advised by Justice Frankfurter of the Supreme Court of the United States not to include the due process clause in the Indian Constitution. 21 The Constitution of the United States contains the due process clause and it is by virtue of this clause that the U.S. Supreme Court is empowered to question and adjudicate upon procedural as well as substantive reasonableness of Congressional and State legislation. The due process clause has vested the U.S. Supreme Court with a vast power of judicial review and that is why it has come in for criticism at the hands of Judges and jurists who believe in judicial restraint as against judicial activism.

2.20 On the question whether the expression 'due process of law' should be resorted in place of the words 'procedure established by law' there was a sharp difference of opinion in the Constituent Assembly amongst the members of the Drafting Committee. Shri K.M. Munshi expressed the view in favour of 'due process' as under: " if the clause stood as it is, it would have no meaning at all, because if the procedure prescribed by law were not followed by the Courts, there would be the appeal Court in every case, to set things right. This clause would only have meaning if the Courts could examine not merely that the conviction has been according to law or according to proper procedure, but that the procedure as well as the substantive part of the law are such as would be proper and justified by the circumstances of the case. We want to set up a democracy and the essence of democracy is that a balance must be struck between individual liberty on the one hand and social control on the other. We must not forget that the majority in the legislature is more anxious to establish social control than to serve individual liberty the amendment would enable the Courts to examine not only the procedural part but also the substantive law. When a law had been passed which entitled Government to take away the personal liberty of 22 an individual, the Court will consider whether the law which has been passed is such as is required by the exigencies of the case and, therefore, the balance will be struck between individual liberty (12) and social control."

2.21 The views of Shri K.M. Munshi have been further substantiated by Pandit Thakur Das Bhargava in the following words : " This is only victory for the Judiciary over the autocracy of

the legislature. In fact we want two bulwarks for our liberties. One is the Legislature and the other is the Judiciary. But even if the legislature is carried away by party spirit and is sometimes panicky the judiciary will save us from the tyranny of the legislatures and the executive. In a Democracy, the Courts are the ultimate refuge of the citizens for the vindication of their rights and liberties. I want the judiciary to be exalted to its right position of palladium of justice and the people to be secure in their rights and liberties A • . ^ .- 1.(13) under its protecting wings.

2.22 On the other side it was Shri Alladi Krishnaswami, who opposed the inclusion of due process clause. He pointed out that the United States Supreme Court had in the past, used such a clause to interfere with social legislation and that its inclusion in the Indian Constitution would be dangerous. He observed : "The expression "due process" itself as interpreted by the English Judges connoted merely the due course of legal proceeding according to the rules and forms established for the protection of rights, and a fair trial in a Court of justice according to modes of proceeding applicable to the case. Possibly if the expression has been understood according 23 to its original content and according to the interpretation of English Judges, there might be no difficulty at all. The expression, however, as developed in the United States Supreme Court, has acquired a different meaning and import in along course of American judicial decisions. Today, according to Professor Willis, the expression means what the Supreme Court says what it means in any particular case. It is just possible, some ardent democrats may have a greater faith in the judiciary than in the conscious will expressed through the enactment of a popular legislature. Three gentlemen or five gentlemen, sitting as a Court of law, and stating what exactly is due process according to them in any particular case, after listening to long discourses and arguments of briefed counsel on either side, may appeal to certain democrats more than the expressed wishes of the legislature or the action of an executive responsible to the legislature. In the development of the doctrine of 'due process', the United States Supreme Court has not adopted a consistent view at all and the decisions are conflicting. One decision very often reversed another decision This clause may serve as a great handicap to all social legislation for the ultimate relationship between employer and labour, for the protection of children, for the protection of women One thing also will have to be taken into account, viz. that the security of the State is far from being so secure as we are • • , ^ ,(14) imagining at present.

2.23 It was Dr. Babasaheb Ambedkar who summed up the two views and left it to the House to decide in any way it likes. The Constituent Assembly adopted the clause as drafted by the Drafting Committee rejecting 'due process'.

2.24 Although the Draft Constitution contained Article 15, it did not 2i in the first instance, contain any Article corresponding to Article 22 of the Constitution. When the proposal to delete "due process" suggested by the drafting Committee was debated in the Constituent Assembly on 6th December 1948^ ^ and then on 13th December, 1948 there was strong opposition to the proposal, nevertheless the Drafting Committee's suggestion was accepted by the Constituent

Assembly. However the Assembly's vote did not finally settle the matter, for dissatisfaction with the deletion of "due process" continued inside and outside the Assembly, On 15th September 19'f9 Dr. Amtekar moved that a new Article 15 A (which was amended corresponds to Article 22 of our Constitution) be adopted. Article 15 A, with certain amendments, was passed as it now stands in Article 22 of our Constitution.

Choose the correct option

1. 'Labour or service exacted by Government or a person in power without giving remuneration for it' is termed as:
 - A. Forced labour
 - B. Beggar
 - C. Unemployed
 - D. None of them

2. **Which of the following Articles of the Indian Constitution states. 'No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment?'**
 - A. Article 22
 - B. Article 22(2)
 - C. Article 23
 - D. Article 24

3. **Right to Freedom of Religion' is contained in which of the following Articles of the Indian Constitution?**
 - A. Article 25-28
 - B. Article 29-30
 - C. Article 32
 - D. Article 19-22

4. **Nothing in Article 25 of the Indian Constitution shall affect the operation of any existing law or prevent the state from making any law:-**
 - I. Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.
 - II. Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Which of the above statements is/are found to correct?

 - A. Both are incorrect
 - B. Both are correct
 - C. Only I
 - D. Only II

5. **The meetings of the State Legislative Council are presided by the _____**
- A. Deputy Speaker
 - B. Speaker
 - C. Chairman
 - D. Governor
6. **Under Article 26 of the Indian Constitution, subject to public order, morality and health every religious denomination or any section thereof shall have the right:**
- A. To establish and maintain institutions for religious and charitable purpose
 - B. To manage its own affairs in matters of religion
 - C. To own and acquire movable and immovable property
 - D. All of them
7. **Which of the following statements regarding Right of religious denomination under is/are found to be correct?**
- I. This Article does not take away the right of the State to acquire property belonging to a religious denomination.
 - II. This Article does not create rights in any denomination or a section which it never had.
 - III. Article 25(1) states that all persons are entitled to freedom of religion.
- A. I and II
 - B. II and III
 - C. I, II and III
 - D. I and III
8. **Which of the following statements regarding clause C of Article 26 of the Indian Constitution i.e. Right to own property is/are found to be correct?**
- I. Under this clause every religious denomination has the right to own and acquire property belonging to a religious body but it does prevent such property from being acquired by authority of law or to be assessed to land revenue.
 - II. The right guaranteed by Article 26 C. cannot be claimed after the ownership of a religious denomination is otherwise validly terminated.
- A. I and II
 - B. Only I
 - C. Only II
 - D. Neither I nor II

9. **Freedom as to attendance at religions instruction or religious worship in certain educational institutions is the essence of which of the following Articles of the Indian Constitution?**
- A. Article 27
 - B. Article 27(1)
 - C. Article 28
 - D. Article 26
10. **Articles 29-30 of the Indian Constitution confers which of the following distinct rights?**
- A. Right of any section of citizens to conserve its own language, script or culture
 - B. Right to all religious or linguistic minorities to establish and administer educational institutions of their choice
 - C. Right of an educational institution not to be discriminated against in the matter of state aid on the ground that it is under management of a minority
 - D. All of them