

LL.B. (3YRS.) IIND SEMESTER
CONSTITUTIONAL LAW OF INDIA-II
UNIT-II

| UNIT-II: | |
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| ✓ Right to life and personal liberty- scope and content. ✓ Preventive detention under constitution- policy and safeguards- judicial review ✓ Right against exploitation- forced labour and child employment. | ✓ Freedom of religion. ✓ Educational and cultural rights. |

QUESTION 1:- “No person shall be deprived of his life and personal liberty except according to the procedure established by law.” Explain.

ANSWER:- Article 21 says that no person shall be deprived of his life and personal liberty except according to the procedure established by law.

Prior Article 21 guarantees the right to life and liberty to citizens only against the arbitrary action of Executive and not from legislature actions. But after *Maneka Gandhi v. Union of India* Article 21 now protects the right of life and personal liberty not only from executive actions but from legislative actions also.

MEANING OF LIFE:

The Supreme Court of India has given broad and liberal interpretation to the term life as is used in Article 21. In *Munn v. Illinois, Field J.* Spoke off of the right to life in the following words, “by term life as here used, something more is meant than Mere animal existence full stop the prohibition against its deprivation extends to all those limits and faculties by which life is enjoyed.”

Supporting this view *Justice PN Bhagwati* in *Freancis Colaris v. Union Territory of Delhi, 1981, SC* observed, “*we think that the right to life includes the right to live with human dignity and all that goes along with it namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing with fellow humans. The protection extends to all those Limbs of body by which life is enjoyed.*”

PERSONAL LIBERTY:

The meaning of the words personal liberty came up for consideration of Supreme Court for the first time in *A K Gopalan v. State of Madras, 1950*. The Supreme Court by majority held that personal liberty in Article 21 means nothing more than the liberty of the physical body, that is, freedom from arrest and detention without the authority of the law.

The majority took the view that Article 21 and 19 deals with different aspects of Liberty. Article 21 is guarantee against deprivation (total loss) of personal liberty while Article 19 affords protection against unreasonable restrictions (which is only partial control) on the right of moment.

But this restrictive interpretation of personal liberty in *AK Gopalan case* was overruled and in *Kharak Singh case, 1963* the Supreme Court held that personal liberty was not only limited to the bodily restraint or confinement to person only but was used as a compendious term including within itself all the variants of the rights which go to make up the personal liberty of a man other than those dealt in Article 19(1). In other words while Article 19(1) deals with particular species of freedom or attributes personal liberty in Article 21 takes in and comprises the Residue.

Finally in *Maneka Gandhi case* in *1978* the Supreme Court has not only overruled the AK Gopalan case but has widened the scope of the words personal liberty considerable e as-

“The expression personal liberty in Article 21 is of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and some of them have raised the status of distinct fundamental rights and given additional protection under Article 19.”

The court in this case laid down great stress on procedural safeguards. The procedure must satisfy the requirement of natural justice that is it must be just fair and reasonable.

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QUESTION 2:- Explain in detail the fundamental rights given to the detained persons.

ANSWER:- Article 22 is the complementary part of article 21, which provides those procedural requirements which must be adopted and included in any procedure enacted by the legislature for arrest and detention Article 22 has 7 clauses. Clauses (1) & (2) of Article 22 guarantee four rights to the person arrested for any offence under an ordinary law-

- (a) Right to be informed of ground of arrest.
- (b) Right to be defended by a lawyer of his own choice.

Clause (3) of Article 22 provides two exceptions to the rule contained in clause (1) & (2). These are-

- (1) An alien enemy
- (2) A person arrested and detained under preventive detention law.

Preventive Laws are those which are enacted to prevent the commencement of any offence. The object of arrest under such laws is to prevent the commission of an offence not to punish the accused. The sole justification of such arrest is the suspicion or reasonable probability of the offender committing some act likely to cause harm to the society or danger to the security of Government **for example-** Terrorism, Seditious Activities, Naxalism. Etc.

CONSTITUTIONAL SAFEGUARDS AGAINST PREVENTIVE DETENTION LAWS:

Although the need of preventive detention laws is admitted under the constitution yet there are some safeguards in such laws and such safeguards curtail the arbitrary use of such preventive detention laws. Clauses (4) to (7) of Article 22 provide the procedure which is under the law of "preventive detention."

These safeguards are-

1) REVIEW BY ADVISORY BOARD:

AFTER THE 44TH AMENDMENT ACT, 1978:

The 44th Amendment Act, 1978 has substituted a new clause for clause (4) which now reduces the maximum period for which a person may be detained without obtaining the opinion of Advisory Board from 3 months to 2 months. The detention for a longer period than 2 months can only be made after obtaining the opinion of advisory Board.

The amendment has also changed the composition of Advisory Board. The advisory Board shall now be constituted in accordance with the recommendations of the Chief Justice of appropriate High Court. It shall consist of a chairman and not less than two other members. The chairman of an Advisory Board shall be a sitting judge of High Court and the other members shall be sitting or retired judges of High Court. Thus an advisory Board as constituted under the Amendment Act 1978 shall now be an independent & impartial body & shall be free from executive control.

The Amendment has thus abolished the provision for preventive detention without reference to an advisory Board as provided in un-amended sub-clause (a) of clause (7) of Article 22. The amendment, therefore, deletes sub-clause (a) of clause 7 of Article 22. Under Article 22 (7) (a) Parliament was empowered to make law for preventive detention without obtaining the opinion of an advisory Board beyond the period of 3 months. After 44th Amendment Act 1978 No person can be detained beyond the period of two months except the opinion of Advisory Board.

The amendment thus provides for two categories of preventive detention:-

- (1) Detention for maximum period of two months under a law made by a legislature &
- (2) Detention for period longer than two months provided the advisory Board gives its opinion in favour of it.

It is a safeguard against executive arbitrariness. If the advisory board reports that the detention was not justified, the detained person must be released. Parliament is empowered to prescribe the procedure to be followed by advisory Board in an enquiry under clause (4). Parliament may prescribe by a Law for the maximum period of preventive detention for any class under clause 7 and the reference of advisory board is not necessary to be obtained but the condition is that such period shall be definite.

However it is interesting to note that even after signed by the President of India, the provisions of 44th amendment act are not implemented and the Advisory Board is still constituted according to un-amended provision of Article 22.

2) RIGHT OF DETENUE OF COMMUNICATION OF GROUNDS OF DETENTION:

The clause (5) imposes an obligation on detaining authority to furnish to detainee the grounds for detention as soon as possible. The grounds of detention should be very clear and easily understandable by the detainee. The grounds of detention must be in existence at the time of making the order. The grounds supplied to the detainee must not be 'vague, irrelevant' and non-existent'. If the grounds are vague or irrelevant to the object of the legislation the detention will be held void.

3) RIGHT OF REPRESENTATION: The other right given to detainee is that he should be given earliest opportunity of making a representation against detention order; it means detainee must be furnished with sufficient particulars of ground of his detention to enable him to make a representation as soon as possible.

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QUESTION 3: Secularism is many a times was taken as non religious. Explain-

ANSWER: Secularism is the principle of separation of government institutions and person mandate to represent the State free from religious institution and religious dignitaries. The attainment of such is termed as secularity. One manifestation of secularism is exiting the right to be free from rule and teachings or imposition of government of religion or religious practices upon people. In large sense it means a State is declared to be neutral in the matters of belief. Another manifestation of secularism is that the view that public activities and decisions especially political ones should not be influenced by religious belief or practices.

The term secularism was first used by British writer **George Jacob Holyoake** in **1851**. He invented the term secularism to describe his views of promoting a social order separate from religion, without actively dismissing or criticising religious belief. He also agreed that secularism is not an argument against God, it is one independent of it.

Secularism in Indian constitution means equal treatment of all religions by the State. The concept of secularism is implicit in the Preamble of the constitution which declares the resolve of State to secure to all its citizens 'Liberty of thought, belief, faith and worship.' The 42nd amendment act 1976 inserted the word 'secular' in the Preamble. This amendment is intended merely to spell out clearly the concept of secularism in constitution. However neither constitution nor any law in force in India describes the term secularism.

In India a secular State was never considered as a non-religious or atheistic State. It only means that in matter of religion the State is neutral. It is an ancient thrive in India that is State protects all religions but interferes with none.

Explaining the secular character of the Indian constitution the Supreme Court in **Saint Xavier College v. State of Gujarat, 1974, SC** held that there is no mysticism in secular character of State. Secular is neither anti God nor Pro God, it treats like a devout, the antagonistic and atheist. It eliminates God from the matter of State and ensures that no one shall be discriminated against on the ground of religion. The State has no religion of its own, it should treat it all religions equally. In secular State, the State is only concerned with the relation between man and man and relation of man with god is left to individual conscience.

In **S.R. Bommai v. Union of India, 1994, SC** the Supreme Court held that secularism is the basic structure of Indian Constitution. The State treats equal all religions and religious institutions. Religion is the matter of individual's faith and cannot be mixed with the secular activities. **Justice Ramaswamy** observed that secularism is not anti God. In Indian context secularism has positive content and it does not accept American doctrine of secularism that is concept of erecting a Wall of separation between religion and State. Therefore the concept of positive secularism separates spiritualism and individual faith. The State is not non-religious but in the matter of religion it is neutral and treats every religion equally.

In India, a Secular State was never considered as an irreligious or atheistic state.

In **Santosh Kumar v. Secy. Ministry of Human Resources Development, 1995** Supreme Court has held that introduction of Sanskrit Language as a subject in CBSE is not against secularism as it is the mother of all Aryan Languages.

FREEDOM OF RELIGION: - The Analysis of Article 25-28 and that of judicial decisions brings out a clear picture that the following rights are protected under the head of "Freedom of Religion".

- (a) State shall neither establish nor develop any religion.
- (b) No person shall be compelled of which are specially appropriated in the payment of expenses for promotion or maintenance of any particular religion or religious denomination. (Article 27)
- (c) These rights are available to all person and shall not be limited only to the citizen. (unlike to it the rights under Article 19 are available only to citizens of India)
- (d) No religious instruction shall be provided in any educational institution wholly maintained out of State Funds. (Art 28(1)).
- (e) Religious instruction may be provided in any educational institution recognized by state or receiving aid out state funds but no person attending such institution shall be compelled to take part in any religious instruction or to attend any religious worship (Article 28 (3)).
- (f) All persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. (Article 25(1)).
- (g) Every religious denomination or any section thereof shall have the right-
 - I. to establish & maintain institution for religious & charitable purpose/
 - II. To manage its own affairs in matter of religion.
 - III. To own & acquire movable & immovable property.
 - IV. To administer such property in accordance with Law.
- (h) Secularism is the Basic Structure of Indian Constitution. (**S.R. Bommai v. Union of India, 1994, S.C.**)

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QUESTION 4: Explain in brief the educational and cultural rights conferred by the Constitution of India?

ANSWER: ARTICLE 29: PROTECTION OF INTERESTS OF MINORITIES:- Any section of citizen residing in territory of India or any part thereof having distinct language, script or culture of its own shall have the right to conserve the same.

No citizen shall be denied admission into any education institution maintained by state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them.

ARTICLE 30- RIGHT OF MINORITIES TO ESTABLISH & ADMINISTER EDUCATIONAL INSTITUTIONS:- Clause (1) of Article 30 provides that, all minorities whether based on religion or language shall have the right to establish and administer educational institutions of their choice.

Clause (1-A) provides that in making any Law, providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause(1), the state shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate. The right guaranteed under clause (1).

The state shall not in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

DIFFERENCE BETWEEN ARTICLE 29 & 30:-

- (1) While Article 29(1) confers right on any sections of citizens which will include the majority sections, Article 30(1) confers the rights only on minority based on religion or language.
- (2) While Article 29(1) is concerned with the right to conserve language, script or culture, Article 30(1) deals with the rights of minorities to establish and administer educational institutions of their choice.
- (3) While Article 29(1) does not with education as such, Article 30(1) deals only with the establishment and administration of educational institutions. Thus conservation of language, script or culture under Article 29(1) may be means wholly unconnected with educational institutions and similarly, establishment and administration of educational institutions by majority under Article 30(1) may be unconnected with any motive to conserve language script or culture.

In *Azeez Basha v. Union of India, 1968* Supreme Court held that under Article 30(1) minorities do not have right to claim administration of an educational institution which is not established by them. Thus the word “Establishment & Administration” is cumulative words and should be looked in single sense. On the same basis Aligarh Muslim university was not held minority institution because it was established by the Law made by parliament. (**Dr. Naresh Agrawal v. Union of India, 2006, S.C.**)

In *Re Kerala Education Bill, 1958* Supreme Court held that right of management of Institution does not include right of mis-management. Thus state may interfere in administration of any minority educational institution to ensure transparency. (**Lily Kurian v. st. Lewina, 1979, S.C.**)

In *St. Xaviers college v. State, 1975* Supreme Court held that there is no fundamental right of minority to affiliation to university.

In *T.M.A. Pai Foundation v. State of Karnataka, 2003*, the Supreme Court held by majority that state government and universities cannot regulate the admission policies of unaided educational institutions run by linguistic and religious minorities.

NOTE:- As regards, the question “Who is minority” the court held that minority status would be determined on the basis of demographic composition of states i.e. in proportion of their position in population in different states and not on all India basis. In *P.A. Inamdar v. State of Maharashtra, 2005*, ‘A 7 judge bench of Supreme Court held that private unaided professional institutions, whether minority or non-minority, cannot be forced to accept Reservation policy of state. Unaided institutions can have their own admissions provided it is fair, transparent and non-exploitive and based on merit.