

ROLE AND RELEVANCE OF RIGHT TO PERSONAL LIBERTY IN DISTRICT COURTS

Bhanwar Singh, H.J. S.

District Judge

धर्म एव हतो हन्ति धर्मो रक्षति रक्षितः ।
तस्माद्धर्मो न हन्तव्यो मा नो धर्मो हतो वधीत ॥

Destruction of law and justice brings about the destruction of society; the protection of law and justice has a protective influence. Therefore, law and justice should not be destroyed.

The ideals and aspirations of the people of India have been enshrined in the preamble of our Constitution. It receives to all its citizens, justice, liberty, equality and fraternity. There are three functions of the State namely executive, the legislative and the judicial. The principle of separation of powers has been accepted in our Constitution. The legislative function consists in the enactment of laws which regulates the conduct of the members of the society. The working of the machinery of the government in accordance with these laws falls within the province of the executive. The judicial function consists in determining whether the conduct of the various members of the society and state authorities conform to the law of the land or not. The primary object of the administration of justice is to establish a Rule of law and to create a sense of security among the people by assuring them that the wrong doer will not go unpunished and all just grievances will be redressed so that they may not be tempted to self-help. In order to maintain peace and tranquillity in the society the law established or prescribed by the state has be to followed only then the justice can be imparted to everyone in the society. Equality and fairness are the pillars of the justice.

The principal theme of the Book 'Law, Judges and Justice' written by Hon'ble Mr. Justice S.M.N. Raina (Retd. Judge of High Court of M.P.) is 'Life of law is justice and it is for the judge to breathe the life into law'. While dealing with the spirit of Constitution, Hon'ble Mr. Justice Raina opined that if we carefully examine the various provisions of the Constitution to discover its true spirit, we shall notice distinct aspirations of the people and one for liberty, another for justice and the third for socialism. According to Palkhiwala, civil liberty is the very stone of the Constitution. In my view, justice is the key-stone, Justice for the individual as well as justice for the masses, that is social justice. It assures justice to individual by declaring the basic human rights as fundamental in Part III and justice for the masses by giving directives regarding the policies of the State.

Articles 19, 20, 21 and 22 form one group entitled Right to Freedom. Article 21 guarantees the most essential of all rights the right to life and personal liberty. It runs as follow :

Art. 21 PROTECTION OF LIFE AND PERSONAL LIBERTY

No person shall be deprived of his life or personal liberty except according to procedure established by law.

The object of Article 21 is to prevent encroachment upon a personal liberty by the Executive save in accordance with law. Right to life means something more than survival or animal existence (*State of Maharashtra v. Chandrabhan*, AIR 1983 Supreme Court 803, para 1, 20). It would include the right to live with human dignity (*Olga v Bombay Corporation*, AIR 1986 Supreme Court 180 paras 33, 34). It would include all those aspects of life which go to make man's life meaningful complete and worth living (*Maneka v Union of India*, AIR 1978 Supreme Court 597). Prior to the decision of *Maneka Gandhi's* case, Article 21 was construed narrowly only as a guarantee against executive action unsupported by law. But *Maneka's* case opened up a new dimension and laid down that it imposed a limitation upon law making as well namely that while prescribing a procedure for providing a person of his life or personal liberty, it must prescribe a procedure which is reasonable, fair and just (*Frances v Union Territory*, AIR 1981 Supreme Court 746, para 3).

Personal Liberty

In *Unni Krishnana v. State of A.P.* [1993 (1) Supreme Court Cases 1234] the Hon'ble Supreme Court has stated that several un-enumerated rights fall within Article 21 since the expression 'personal liberty' is of the widest amplitude. The Hon'ble Court gave the following list —

(1) Right to go abroad, (2) Right to privacy, (3) Right against solitary confinement, (4) Right against Bar Flatters, (5) Legal aid, (6) Speedy trial, (7) Right against hand-cuffing, (8) Right against delayed execution, (9) Right against custodial violence, (10) Right against public hanging, (11) Doctors' assistance and (12) Shelter.

Public interest petitions have also expanded the scope of Article 21. They touch diverse aspects such as children in jail, being entitled to special treatment, health hazard due to pollution, beggars interest in housing, health hazards from harmful drugs, immediate medical aid to injured persons, starvation deaths right to know, right to open trial, inhuman conditions in after care-homes etc.

The word 'law' has been used in the sense of state made or enacted law. The expression procedure established by law means the procedure prescribed by law.

Although the Constitution of India or any other law thereunder does not authorise a district court to implement a law of personal liberty as envisaged under Articles 21 and 22 yet indirectly all the district courts are under a bounden constitutional obligation to see and ensure that the principles of personal liberty are followed in day to day trial of the persons/criminals appearing before the district court.

The subject of study in this Article is to throw light on the relevance and reference to this Article 21 in the day to day working of the trial court. The trial court form the base of judiciary and the bulk judicial work is handled by them. In the application of law and procedure we travel in the arena of Article 21 which can broadly be discussed under following heads :-

1. Fair trial
- 2.. Speedy trial
3. Bail
4. Legal Aid
5. Prisoners
6. Civil prison
7. Hand-cuffing

1. Fair trial

The procedure as established by law under Article 21 of the Constitution must stand the test of 'reasonableness'. The mandate of Article 21 of the Constitution is whether it is an investigation or trial for criminal offence, it should be an open affair. Reasonable and fair procedure is to be followed by the courts. Fairness is ingredient of Article 21 of the Constitution.

Article 22(1) of the Constitution contemplates that no arrested person shall be detained in custody without being informed of the grounds for such arrest. So the Section 50 of Criminal Procedure Code contemplates about the communication of full particulars of the offence for which he is arrested or other grounds for such arrest.

Article 22(1) of the Constitution provides further that a detained person shall not be denied the right to consult and to be defended by a legal practitioner

of his choice. Section 303 of Criminal Procedure Code provides for the right of an accused person to be defended by a pleader of his choice. Section 304 of Cr. P.C. provides for assigning a pleader to an accused person at State expenses where the accused has no sufficient means to engage a pleader. Thus in fact they are analogous and ensures a fair trial as contemplated in Articles 21 and 22(1) of the Constitution.

Pre-sentence hearing is an important part of procedural fairness. Under Sections 235(2) and 248(2) Cr. P.C. it is mandatory for the Sessions Judge or trial Magistrate to hear the accused on the question of sentence and then pass a sentence on him according to law. Thus this procedure established by Criminal Procedure Code is a part of constitutional guarantee under Article 21 of the Constitution.

There has been a bar of taking cognizance of an offence specified under sub-section (2) of Section 468 Cr. P.C. after the expiry of period of limitation. It is in consonance with the concept of fairness of trial as enshrined in Article 21 of the Constitution.

No person can be detained in custody without a proper order of remand under Sections 167(2), 209(b) and 309(2) Cr. P.C. as the case may be. If there is no proper remand order his custody becomes illegal and accused is entitled to bail.

Article 21 guarantees fairness of trial by adopting reasonable procedure established by law and it is evident from the day to day working of Criminal courts at district level where the procedure prescribed by Code of Criminal Procedure is followed by great care and caution so that the person may not be deprived of his right of personal liberty as enshrined in Article 21 of the Constitution.

2. Speedy trial

Speedy trial is an integral and essential part of the fundamental rights to life and liberty enshrined in Article 21. It is a basic human right and by binding precedent it is implicit in the broad sweep and content of Article 21. Hon'ble Supreme Court in *Supreme Court Advocates v. Union of India*, AIR 1994 Supreme Court 277 (paras 505, 507) has advanced step further and held that the provision of speedy justice is an obligation of state, for otherwise the operation of legal system would not promote 'Justice which is assured in the Preamble'.

Procedure established by law in Article 21 means a procedure which is just, fair and reasonable, therefore, any circumstance which renders the sentence harsh, unjust or unfair offends Article 21 (*Sher Singh v. State of Punjab*,

AIR 1983 Supreme Court 465 (para 11). An undue delay in the execution of sentence of death after its confirmation (413 and 415 Cr. P.C.) for which the accused himself is not responsible, renders the sentence of death harsh and unjust as it causes additional torture and inhuman treatment. It violates Article 21 and accused may approach Hon'ble Supreme Court under Article 32 (Javed v. State of Maharashtra, AIR 1985 Supreme Court 231). If the Hon'ble Supreme Court finds the delay to be undue the Hon'ble Court would quash the sentence of death and substitute for it the sentence of imprisonment for life to that accused (Triveni Ben v. State of Gujarat, AIR 1989 Supreme Court 870). The District Courts follow in letter and spirit these guidelines to ensure the right of personal liberty.

The principle of speedy trial is no less important in disposal of mercy petitions. Inordinate delay in disposing of mercy petitions by President of India attracts Article 21 (AIR 1989 SC 2299(2304)).

The principle of speedy trial is not only applicable to the trials but it equally applies to police investigation (AIR 1987 Supreme Court 149). The Sessions and Magisterial Courts from time to time issue instructions in this regard to the investigating agency.

In cases against children for offences punishable with less than 7 years imprisonment the investigation should be completed within three months and trial within six months and when these limits are exceeded the trial is liable to be quashed (1990 (1) Aliahabad Criminal Law Journal 178, 179 P & H]. The Courts are always alive of this legal position so as to extend its advantage to the beneficiaries.

3. Bail

The protection of Article 21 is available to all persons arrested or detained, be he a citizen or a non-citizen. Such freedom is also extended even to persons convicted only to the limitations imposed by his conviction under the law. The new Code of Criminal Procedure, 1973 including the provisions of bail have been enacted regard being had to the new dimensions which the Hon'ble Supreme Court has given to the expressions 'Deprived', 'Personal Liberty', and 'procedure established by law' in Article 21 of the Constitution. Article 22(2) of the Constitution requires a person arrested and detained, to be produced before nearest Magistrate within a period of 24 hrs. of such arrest and no such person shall be detained in custody beyond the said period without any authority of the Magistrate. Section 57 of Cr. PC contemplates that a person arrested, cannot be detained for more than 24 hrs. without a special order of the Magistrate under

Section 167 Cr. P.C. Section 167(1) and (2) prescribe the mode of exercise to detain the arrested person beyond 24 hrs. for term not exceeding 15 days but in no case beyond 90 days where the investigation relates to an offence punishable with death, imprisonment for life, or for a term not less than 10 years, and beyond 60 days where investigation relates to any other offence. Sections 209(b) and 309(2) deal with the detention pending enquiry or trial. If there is no valid order of detention under Section 167(2), 209(b) and 309(2), his detention would be in contravention of Articles 21 and 22(2) of the Constitution and accused would be entitled to be released on bail. In bailable offences the accused has a right to be released on bail under Section 436 Cr PC but in non-bailable offences under Section 437 Cr PC, it is the discretion of the court to grant bail. Bail would ordinarily be refused if it appears that there are reasonable grounds for believing that the *person has been guilty of an offence punishable with death or life imprisonment*. But in such cases also the court has discretion to grant bail to a person under 16 years woman, sick or infirm person for any other special reason. Section 438 Cr PC deals with the anticipatory bails but it has not been applicable in State of Uttar Pradesh. This provision of anticipatory bail has not been made applicable in certain special Acts like Terrorist and Disruptive Activities (Prevention) Act, 1985 and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

As regards the children, the Juvenile Justice Act, 1986 was passed to achieve a uniform juvenile justice system throughout the country as the judicial system available for adults was not considered suitable to them. Under this Act it has been ensured that no child in any circumstance is lodged in jail or police lock-up by establishing juvenile welfare boards and juvenile courts. The provisions of Article 21 of the Constitution have been invoked as regards the bail and custody of juveniles. Section 18 of the Act provides that when a juvenile is arrested and detained in a bailable and non-bailable offence he shall be released on bail with or without surety. He shall not be so released if his release is likely to bring him into association with any known criminal or expose him to moral danger or that his release would defeat the ends of justice. In case the bail is not granted then he shall be sent to observation home instead of being sent to jail.

Keeping in view the age and circumstances of Juvenile, a special protection has been given to them under the Juvenile Justice Act, such as not awarding them death sentence, or imprisonment or committing to prison in default of payment of fine or in default of furnishing security (Section 22) not proceeding against them under Chapter VIII of Criminal Procedure Code (Section 23) or not charging or trying them for any offence together with a person who is not a juvenile. (Section 24). The District Courts, the Juvenile Courts in particular keep

a strict vigil to carry out these fundamental principles.

4. Legal Aid

This is the constitutional obligation of State Government to provide free legal aid to an indigent accused at the very first stage when the accused is produced before the Magistrate or Sessions Judge for trial. The Presiding Officers of criminal courts appoint amicus curiae to represent the accused who are unable to engage a lawyer on account of their poverty. Even if accused pleads guilty, the Magistrate is still under obligation to inform him about free legal services.

Under the new Criminal Procedure Code, 1973, Section 304 provides for legal aids to the accused at State expenses where an accused has no sufficient means to engage a pleader. This fundamental right arises in every case (before a Magistrate or Sessions Judge) that involves a jeopardy to the life of personal liberty of the accused-person, hence it imposes a legal duty upon the court before whom accused appears to inform him that if he is unable to engage the services of a lawyer, on account of poverty, or indigence, he is entitled to obtain free legal service at the cost of the State. This is not dependent upon an application being made by the accused for free legal assistance. This also amounts to fairness of trial as enshrined in Article 21 of the Constitution.

5. Prisoners

Prisoners are also human beings and they do not deserve an inhuman treatment as regards their diet, medical treatment, cleanliness and teaching of useful trade etc. at the hands of jail authorities. The jail inspections are made by the Chief Judicial Magistrate quite often to see the condition of under-trials and prisoners. Prisons are built with stones of law, and so it behoves the court to insist that in the eye of law the prisoners are persons, not animals. They are entitled to human dignity. It is not necessary to take them to court in hand-cuffs or taking back in hand-cuffs unless the prisoner being so dangerous and desperate character and the circumstances being hostile to safe keeping. The prisoner like other person, is entitled to invoke Article 21 for protection of his rights. A convict can make an appeal under Section 383 of Cr. P.C. through Jail authorities. He has a constitutional right to get free legal aid at the expenses of State, denial of such rights will contravene the provisions of Article 21 of the Constitution. An amicus curiae is appointed by Criminal courts where the undertrial goes unrepresented by any Advocate, representing the accused in trial. This is very much in consonance with his right under Article 22 of the Constitution.

The period of detention of an accused is also adjusted with the period of

imprisonment awarded by the courts. Keeping any person in custody beyond legally permitted time violates Article 21 and it entitles him for compensation for such period.

6. Civil Prison

In civil cases where the liberty of the person is curtailed by way of arrest and detention, in execution of decree judgment debtor can be detained in civil prison only for a certain period as specified in Section 58 of C.P.C. and may also be released on the grounds of illness (Section 59). Section 56 C.P.C. provides that the court shall not order the arrest or detention in the civil prison of a woman in execution of decree for payment of money.

An order of arrest and detention of judgment debtor to civil prison, is only made under exceptional circumstances where it is alleged that he is willfully, with malafide intention, refusing to pay the decretal amount in spite of having sufficient means, otherwise as long as there is no dishonesty and malafides on the part of judgment debtor to discharge his obligation committing him to civil prison will amount to violation of Article 21 of the Constitution.

This, in civil matters also, Article 21 is invoked where there is a curtailment of personal liberty by way of arrest and detention of judgment-debtor under C.P.C. in execution matters.

7. Hand-cuffing

The scope of Article 21 is very wide. It is applicable even in cases where the accused person is arrested and produced in the court in custody. The manner in which he is produced in custody before the court is also relevant, whether he be produced hand cuffed or without it. Various decisions of Hon'ble High Court and Hon'ble Supreme Court have condemned the practice of police officer hand cuffing accused when such hand-cuffing is not necessary in the circumstances of case. Any such procedure will be unfair and bad in law under Article 21 of the Constitution of India.

In *Prova Narain v. State of Madhya Pradesh*, 1987, Cr L J 339, (M.P.), the learned Magistrate condemned the police for not producing accused hand-cuffed in the court. However, police thereafter produced them in hand cuffs and then ultimately the learned Magistrate granted their bail in non-bailable offences. This order of Magistrate directing accused persons to be produced hand cuffed was challenged before Hon'ble High Court of Madhya Pradesh. The Hon'ble Court observed that there is nothing in Section 437 Cr. P.C. even remotely to suggest

that unless a person is hand-cuffed he is not entitled to be heard on the question of his release on bail. The learned Judge pointed out rightly that it is fallacious to equate the question of custody or restraint with the hand-cuffing of the person concerned. Section 46 Cr. P.C. provided that unless there may be submission to the custody by words or action, person making arrest may touch or confine the body of the person to be arrested. Section 49 of the Code lays down that a person arrested shall not be subjected to more restraint than is necessary to prevent his escape. A person may himself surrender and this would entitle him to move an application for grant of bail.

The criminal courts at the district level daily come across with such situation where the accused wanted in any case during investigation or where there is a non-bailable warrant against him pending trial surrenders before the court and is taken into custody and sent to jail. But under these circumstances the court never directs the police to hand cuff them immediately.

In *State of U.P. v. Deonan* AIR 1969 S C 1125, the Hon'ble Supreme Court while considering whether a person may be held in custody of a police officer, without being hand cuffed within the meaning of the expression used in Section 27 of Evidence Act has held that without being in hand-cuffs, a person can be held in custody. Therefore, to be in custody of a police officer, and to be produced before the Magistrate, the hand-cuffing is not necessary.

In *Prem Shankar v. Delhi Administration*, AIR 1980 Supreme Court 1535, the Hon'ble Supreme Court observed that putting of hand-cuffs to the accused are nothing but summary punishment vicariously imposed at police level which is obnoxious and irreversible. Hon'ble Supreme Court further observed that 'Even in cases where in extreme circumstances hand-cuffs had to be put on the prisoner, the escorting authority must record contemporaneously, the reasons for doing so. Otherwise under Article 21, the procedure will be unfair and bad in law . . . Once the court directs that hand-cuffs shall be off, no escorting authority can over-rule judicial direction. This is implicit in Article 21 which insists upon fairness, reasonableness and justice in the procedure which authorises stringent deprivation of life and liberty'. The Hon'ble Supreme Court directed the State government to frame appropriate rules as regards the circumstances in which it will be necessary for the police to hand-cuff on accused while producing him before the court. This direction again came up before Hon'ble Supreme Court in connection with the alleged hand-cuffing of a Delhi Advocate contrary to law, while he was being taken to court of Metropolitan Magistrate of Delhi, after he had been arrested in connection with criminal offence. Hon'ble Supreme Court directed Union of India to frame rules of guidelines as regards the circumstances in which

the hand-cuffing of accused should be resorted to in the light of the directions in Prem Shankar Shukla's case, and circulate them amongst all the State governments and the governments of Union Territories (AIR 1988 Supreme Court 1768 Aeltemesh Rein Advocate Supreme Court of India v. Union of India).

In Delhi Judicial Service Association, Tis Hazari Courts v. State of Gujarat, 1991 Cr LJ 3086, the Hon'ble Supreme Court, on considering the finding recorded by Commissioner appointed by it, held that there was no justification for extraordinary and unusual behaviour of police officer justifying the hand-cuffs and ropes on the body of N.L. Patel, Chief Judicial Magistrate, that the justification given by them is flimsy and preposterous and that they acted in utter disregard of court's direction in Prem Shankar Shukla's case. The Hon'ble Supreme Court has condemned such action of hand-cuffing of a senior judicial officer.

On the basis of above-discussion and decisions of the Hon'ble Supreme Court, it is clear that the criminal courts at District level adhere to the directions of Hon'ble Supreme Court in their daily routine work of hearing bails of accused-persons produced in custody or surrendering themselves before the court. The court further is to see that ordinarily the accused should not be produced in hand-cuffs and only in exceptional cases, it can be permitted where the prisoner is a man of dangerous and desperate character and the circumstances being hostile to safe-keeping. If the prisoner has been produced in hand-cuffs, the escorting authority must record contemporaneously, the reasons for doing so. Under these circumstances, the Magistrate should insist the escorting party producing any accused in hand-cuffs as to whether he has recorded any reason or not.

Thus the courts are the carriers of message of life and personal liberty as enshrined in Article 21 of the Constitution. The Presiding Officers of the Sessions and Magisterial Courts are true torch bearers of personal liberty of human beings - who crave before them for justice in accordance with the principles laid down in our Constitution. In other words while imparting justice Judges and Magistrates of District Courts fulfil their constitutional obligation on the basis of enacted law and prescribed by law and in the words of Woodrow Wilson also 'Justice is rooted and grounded in the fundamental instincts of humanity'.