



## Article 22 of the Indian Constitution: Scheme to balance between personal liberty and maintenance of internal/ national security

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### Abstract

Personal liberty is one of the forms of human rights. Personal liberty belongs to the second generation of human rights, which are Civil and Political Rights. The modern democratic countries in their legal systems have incorporated the personal liberty of individuals through a written Constitution. Personal liberty is one of the principles of constitutionalism. Thus, it has become a feature of the Constitution containing the principles of constitutionalism.

Maintenance of law and order is one of the sovereign functions of the state. Maintenance of law and order includes maintenance of internal national security. The balance between personal liberty and maintenance of internal, national security through investigative agencies is a delicate one. That's why Indian Constitutional Law under Article 22 carries an independent scheme for maintaining the balance between personal liberty and maintenance of internal and national security by the investigating agency.

**Keywords:** Personal liberty – maintenance of internal/ national security – relationship between Article 21 & 22 of the Constitution – preventive detention of laws – role of higher judiciary

### Introduction

Meaning of the terms Personal Liberty (Interrelationship between Article 19 & 21), Meaning of Internal /National Security: No state is recognised as governed by the rule of law unless it secures individual freedom in the form of personal liberty based on human rights. It also includes the duty of the state to prescribe these individual freedoms with written constitutional provisions and secure their protection through an independent and impartial judiciary.

In *A. K. Gopalan v. Union of India* AIR 1950 SC 27, the Hon'ble Supreme Court laid down the meaning of the term personal liberty. It had been opined that personal liberty in Article 21 of the Constitution means nothing more than the liberty of the physical body, that is, freedom from arrest and detention without the authority of law. This was the definition of the phrase personal liberty given by Prof. A. V. Dicey, according to whom personal liberty means freedom from physical restraint and coercion which is not authorised by law. The Court held that Articles 19 and 21 deal with different aspects of liberty. Article 21 is a guarantee against total deprivation or loss of personal liberty, while Article 19 offers protection against unreasonable restrictions, which is only partial control on the right of movement. Thus in this case most restrictive interpretation of the term personal liberty was given by the Supreme Court.

However, in *Kharaksingh v. State of U.P.* AIR 1963 SC 1295, Supreme Court reversed its position and held that personal liberty was not limited only to bodily strength or confinement to prisons, but was used as a compendious term including within itself all the variety of rights which go to make up the personal liberty of a man other than those dealt with in Article 19(1). The Court further held that in other words, while Article 19(1) deals with particular species or attributes of fundamental freedom, personal liberty in Article 21 takes in and comprises the residue.

In *Maneka Gandhi v. Union of India* AIR 1978 SC 597, the Supreme Court again overruled the ratio of *Gopalan's* case and held that Article 21 is controlled by Article 19, and that

it must satisfy the requirement of Article 19 also. Law depriving a person of personal liberty has not only to stand the test of Article 21, but it must stand the test of Article 19 and Article 14 of the Constitution. Thus, the Court concluded that the procedure established by law should be just, fair, reasonable, non-arbitrary, and in conformity with the principles of natural justice. The Court here has also clarified that under Article 21, protection from arbitrary executive and legislative acts of the state has been given.

These case laws are important to understand the ambit of the term personal liberty, which not only includes freedom from arbitrary arrest and detention but also the fundamental freedoms and other residual aspects of life. The powers of the investigating agency as to maintenance of law and order have an impact upon the term personal liberty of an individual. Hence, it is necessary to discuss those powers along with the concepts of internal and national secretary.

National Security, by dictionary meaning, means the safety of the state and the nation against espionage and external threats, other damages and dangers. The term nation etymologically means a group of people coming from a common state brought together by an emotional and political force known as nationalism, which is the product of various cultural, religious and psychological factors. When we speak of the Indian nation, we mean the Indian people organised in one nation-state and acting spontaneously as a unit. Security means the preservation of liberty, life, property, a person's honour and culture of the individual and nation as a whole and the environment of peace and tranquillity in the society.

**Article 22 of the Indian Constitution:** According to Article 21 of the Indian Constitution, no person shall be deprived of his right to life and personal liberty except according to the procedure established by law. In other words, it means that a person may be deprived of their right to life and personal liberty with the procedure established by law. Article 21 is silent about this procedure, which has

been laid down in Article 22. Hence, these two Articles are required to be studied not in isolation but in a conjoint manner. Under Article 22, there exists the clause (1) to (6). Under clauses (1) and (2), the following four rights have been conferred upon the detainee

- a. The right to be informed about the grounds of arrest.
- b. Right to consult and to be represented by a lawyer of his own choice.
- c. Right to be produced before the Judicial Magistrate within 24 hours.
- d. The freedom from detention beyond the said period except by the order of a Magistrate.

These rights are supplementary to each other. The person who is under arrest has conferred upon right to consult with the advocate of his own choice; for the better defence, it is always required that the detainee is aware of the grounds of arrest. That's why the right to be informed about the grounds of arrest has been conferred upon the detainee. In case of arrest, there is an obvious need to determine the facts that whether the state detention is legal; here comes into the picture the authority to be called as a Judicial Magistrate. Accordingly, Article 22 speaks about the right of the detainee to be produced before the Magistrate within the span of 24 hours from the time of arrest. Then the Magistrate determines the validity of the arrest. He passes the order of release of the person arrested or further detention in conformity with the provisions of the Indian Penal Code 1860 (hereinafter to be called as IPC) and Criminal Procedure Code 1973 (hereinafter to be called as Cr.P.C.) Under clauses (1) and (2) of Article 22 of the Constitution, due care has been taken for the sake of the protection of personal liberty and maintenance of law and order as well. The investigating agency is at liberty to curtail the personal liberty of an individual by virtue of arrest for the maintenance of law and order, but only with the compliance of clauses (1) and (2) of Article 22 of the Constitution. The person arrested is getting the full opportunity of his release if he is innocent. At the same time, the investigating agency may succeed in convincing the Magistrate concerned of the further detention of the person arrested. Cr.P.C.1973 under section 167, 50 contained a detailed scheme as to the implementation of the rights of detainees under clauses of (1), (2) of Article 22 of the Constitution. The rights under Article 22 clauses (1) and (2) are available to citizens as well as noncitizens. These clauses give due opportunity to the investigating agency for the sake of maintenance of law and order and internal security. In case of commission of a crime under ordinary laws, for example, IPC, police register the offence under the relevant sections, and accordingly, the accused may be detained for a maximum of 15 days in police custody. He may further be detained in magisterial custody for 60 to 90 days and beyond that as well if the situation warrants. Likewise, at the relevant stages, for example, at the stage of arrest, production of the accused before a Judicial Magistrate and at the time of extension of magisterial custody, a person arrested gets a fair opportunity of release from detention. This entire scheme of maintenance of personal liberty and the need of maintenance of internal security, law and order warranted by clause (1) and (2) of Article 22 of the Constitution has been adopted by virtue of Cr.P.C.1973. Thus, under Article 22, there exists a balance

between personal liberty of the individual and the need for the maintenance of law and order, internal security.

But at many times, the issue may be of protection of national security rather than merely maintaining a law and order situation. Sometimes, maintenance of internal security may involve the issue of maintenance of the national secretary at-large. The problem of the Naxalite movement, the problem of cross-border terrorism having indigenous roots, are the vital aspects of internal security having a direct nexus with national security. In such situations, protection under clauses (1) and (2) of Article 22 is not always required strictly. Hence, under Article 22 itself, an exception to the above-mentioned four rights of detainees has been specified, that these rights will not be available to the persons arrested and detained under any law providing for preventative detention. Clause 3 of Article 22 provides two exceptions to the rights contained in clauses (1) and (2). It speaks that these rights will not be available to the following persons: (a) an enemy alien (b) a person arrested and detained under preventive detention law. The law of preventive detention is authorised by our Constitution presumably because it was foreseen by the Constitution makers that there may arise occasions in the life of the nation when the need to prevent citizens from acting in ways which unlawfully subvert or disrupt the basis of an established order may outweigh the claims of personal liberty (Reference V.N. Shukla's Constitution of India, Mahindra P. Singh, 11th Edition, Eastern Book Company Lucknow, P. 218#\_ftn1). Clauses 4 to 7 of Article 22 provide the procedure which is to be followed if a person is arrested under the law of preventive detention. This procedure is nothing but the following safeguards to a person arrested under the preventive detention law:

1. **A review by the Advisory Board:** No person shall be detained under the preventive detention law for a longer period than two months, except after obtaining the opinion of the Advisory Board.
2. **Communication of grounds of detention to detainee:** It is mandatory for the detaining authority to communicate with a person detained, as soon as may be, the grounds of his arrest and the grounds which led to the subjective satisfaction of the detaining authority about it.
3. **Detainee's right of representation:** Preventive detention law must contain a provision in favour of the detainee of a right of representation against his detention.

**Important Preventive Detention Laws:** The following are important preventive detention laws which were enacted by the Union of India.

1. **Preventive Detention Act 1950:** The object of this Act was to provide detention of persons who is acting in a prejudicial manner against the defence of India or the relation of India with foreign powers or the security of India /state or maintenance of public order or for the maintenance of supplies and services essential to the community. This Act was enacted temporarily, and it was extended from time to time till it lapsed on December 31, 1969.

2. **Maintenance of Internal Security Act 1971:** – This Act was in line with the ‘Preventive Detention Act 1950’ itself and continued till 1977.
3. **Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act:** In 1979, this Act was enacted with the object of preventing of black-marketing of essential commodities.
4. **National Security Act 1980:** – It provides preventive detention of persons responsible for communal and caste riots and other activities prejudicial to the country's security.
5. **Terrorist and Disruptive Activities Prevention Act 1987 (TADA):** The object of the Act was to deal with specific situations of terrorism in Punjab, Kashmir and some parts of the North East. It had conferred powers on the police of the state Governments for the detention of persons suspected of having links with terrorism.
6. **Conservation of Foreign Exchange, Prevention of Smuggling Activities Act 1974:** The object of this Act was to provide for preventive detention for preventing smuggling and conserving foreign exchange.

All these special legislations of preventive detention were enacted by virtue of clauses 4 to 7 of Article 22 of the Constitution. Out of these preventive detention laws, right now, the National Security Act 1980, Conservation of Foreign Exchange, Prevention of Smuggling Activities Act 1974, and Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act only exist. All these legislations were constitutionally valid. They were having provisions for the sake of detention of an individual beyond the period of 15 days, which is the maximum quantum of detention provided in the CR.P.C. 1973. These were the Acts even containing the mechanism securing the rights of detenu which includes the right of review of detention by the Advisory Board, right to be informed about the grounds of detention and right to legal representation against detention. The decision of the Government of India to repeal these Acts was on the grounds of alleged misuse of their provisions by investigating agency/state Governments. Otherwise, it is a matter of fact that in peculiar circumstances these laws had contributed lot for the sake of maintenance of internal /national security. In fact preventive detention is resorted to in such circumstances that the evidence in possession of the authority is not sufficient to make a charge or to secure the conviction of the detenu by legal proofs but may still be sufficient to justify his detention on the suspicion that he would commit a wrongful act unless he is detained. (Reference: Dr. Durga Das Basu, Introduction to the Constitution of India, 20th Edition (Reprint 2009), Lexis Nexis Butterworths & Wadhwa Nagpur, P.115).

**Role of Higher Judiciary:** The higher judiciary at the time of making an interpretation of Article 22 has always been playing a constructive role for the sake of maintenance of personal liberty and the need of maintenance of internal /national security. The courts at the time of making interpretation of Article 22nd have adopted not a mechanical view of their but a purposeful approach to draw

a fine balance between individual freedom and social control (Reference M.P. Jain, Indian constitutional law, Fifth Edition 2003, Wadhwa and Company, Nagpur, P.1362)

In *Joginder Kumer v. State of UP AIR (1994) 4 SCC 260*, the Supreme Court has laid down the detailed guidelines required to be observed by the investigating agency at the time of arrest of a person. The court had specified the following guidelines for police.

1. The person arrested if requested, the fact of his arrest and place of detention should be communicated to his friend, relative or other person who is known to him are likely to take an interest in his welfare.
2. A police officer should inform the person arrested his above-mentioned right.
3. The entry should be made in the police diary of who was informed about the arrest.

The Supreme Court even made it mandatory for the Magistrate concern before which the person arrested will be getting produced to satisfy himself that these requirements have been complied with by the investigating agency.

The ratio laid down in this case shows the interrelationship between Article 19, 21 and 22. It affirms the significance of the protection of personal liberty, and besides the safeguards pertaining to it under Article 22 additional guidelines for the preservation of personal liberty have laid down. The Court equally had given a free hand to the investigating agency to proceed with the arrest and detention, subject to the above-mentioned restrictions.

*Kartar Singh v. State of Punjab AIR (1994) 3 SCC 569* The Hon'ble Supreme Court had specified the scope and ambit of TADA and held that unless the crime alleged against an accused could be classified as a terrorist act in letter and spirit, he should not be charged under the Act and should be tried under ordinary penal laws by the regular courts. Code even had a defined the terrorist act and held that a person becomes a terrorist or is guilty of terrorist activity when his intention, action and consequence all three ingredients are found to exist together. The Court further struck down section 22 of the Act permitting the identification of an accused on the basis of his photo being violative of Article 21. "The court also had reaffirmed the right of the person arrested under TADA to apply for bail in case of failure of police to complete investigation within six months (extendable to a maximum of one year with permission of designated court) and a right of detenu of speedy trial of the offence."

This case again is the classic example of the approach of the higher judiciary as to the maintenance of personal liberty of an individual as well as the need of maintenance of law and order, internal and national security. In this case, the court, though, had validated the TADA but at the same time successfully streamlined it for the preservation of personal liberty of individuals in conformity of the true spirit of Article 22.

## Conclusion

Protection & preservation of personal liberty of an individual is an integral part of the promotion of human rights, and the same is also in conformity with the rule of law. With the liberal interpretation of the term personal liberty by the judiciary in the context of Article 19 and 21, its ambit has widened. Article 22 contains the procedure to

curb personal liberty of an individual for the protection of internal and national security. The Government is competent to do so by enacting preventive detention laws, but at the same time, it is bound to observe the procedure laid down in clauses 4 to 7 of Article 22. Higher judiciary, with the help of the principles of administrative law for the sake of maintaining constitutionalism, has always been controlling the discretionary powers of administration/police regarding preventive detention of an individual. Thus, an accordingly delicate balance between personal liberty and maintenance of internal, national security as contemplated by the forefathers of the Indian Constitution has been secured through Article 22 of the Constitution.

### References

1. DR. Durga Das Basu, Introduction to the Constitution of India, 21<sup>st</sup> Edition, Lexis Nexis Publication India, 2013.
2. Jain MP. Indian Constitutional Law, Lexis Nexis Butterworth Wadhava Publication, 2011, 2.
3. Shukla's Constitution of India by Prof. (Dr.) Mahendra Pal Singh (Revised), Twelfth Edition, Eastern Book Company, 2013.
4. Dr. JN Pandey, Constitutional Law of India, 51<sup>st</sup> Edition, Central Law Agency Allahabad.