

National security, public order and the rule of law: Analysis of the role of the higher judiciary in context of article 14, 19 and 21 of the constitution

Umesh Shrikrishnarao Aswar

Assistant Professor Law, Government of Maharashtra's Government Law College, Churchgate, Mumbai, Maharashtra, India

Abstract

Rule of law is the base of true democratic systems. Concepts of national security and public order have also gained significance in democratic countries. The rule of law includes the 'predominance of the legal spirit' which has made this concept vibrant and dynamic. Apart from the fundamental rights inclusive of the concept of liberty; it has also literally encompassed the concept of human right within its sphere. Thus implementation of the doctrine of the rule of law operates as the parameter of the existence of the Constitutionalism in the true democratic countries.

With the growth of the nation state system at international level the national security and the public order has become matter of concern for all states including democratic countries. On the background of the First World War, Second World War followed by the Cold War democratic countries are keen to protect their sovereignty by paying special attention towards maintenance of public order and national security.

Protection of national security and maintenance of public order results into expansion of the powers of the state and its agencies. Therefore its impact on upholding the rule of law is the matter of concern in the democratic countries. Judicial organ of the state is expected to maintain the balance on one hand between national security, public order and on the other hand with the rule of law.

Keywords: significance of the national security– public order– rule of law – predominance of legal spirit – fundamental rights and human rights – relationship between national security, public order and the rule of law– role of judiciary

Introduction

True democratic systems of the globe mainly include democracy of UK, USA, Canada, Australia, India and Democratic states in the Europe. True democracies are the stern believer of the Constitutionalism which includes fundamental rights, liberty, rule of law and other sublime principles. These countries do also believe in the nation state system along with the concept of sovereignty and the statehood under international order. Democratic countries are always concerned about the issue of the public order and national security protecting their sovereignty and national interest. Any threat to the public order/national security is possible to be resulted into the disintegration of the state. In modern time many states are suffering with the problem of terrorist and disruptive activities which are organized at local and global level. It has underlined the significance of the maintenance of public order and national security.

The maintenance of the public order and national security by the state involves imposition of the restrictions on liberty and on other fundamental rights. At the same time the concept of the Constitutionalism has also been protected by the true democratic countries which include commitment for the maintenance of the rule of law. On this background judicial organ of state in these countries is expected to maintain balance between above-mentioned rival concepts i.e. protection of the public order, national security while maintaining rule of law. Thus it is imperative for the researcher to find out the exact content of the rule of law.

Doctrine of Rule of Law

Prof. A.V. Dicey in his famous writing on the British Constitutional law in the year of 1885 propounded the

doctrine of rule of law. Since then it has gained the attraction of the contemporary legal scholars for its utility in the functioning of the democratic system in the fair manner. Doctrine of rule of law has been described by laying down the following three sub principles which are implicit in it.

Supremacy of the law: It means no person is above the law. Every individual may be a king or peon will be subject to the same rules; set of laws enacted by legislative organ of the state.

Absence of arbitrary power on the part of a state: No person will be punished except for the breach of the law by the court which will be responsible for the administration of such law.

Predominance of the legal spirit: In British context it includes upholding the fundamental rights and individual liberty of the British citizens. Fundamental rights have not been originated at the instance of the provisions of British Constitution but same is the creation of the judiciary by making liberal interpretation of the existing laws in different decided cases. The concept of the predominance of the legal spirit is wide, its contents are varying. These contents are required to be explored and interpreted by the various units of the legal system in such a manner that the changing needs of the society with the changing time will be complied with. Therefore not only the fundamental rights, individual liberty but also all human rights are possible to be brought within the ambit of the concept of predominance of the legal spirit accordingly under rule of law.

Hence even though the concepts of public order and national security are vital for the protection of national interest and sovereignty of state still they are subjected to the principles of the rule of law which is the main component of the

concept of Constitutionalism.

National Security Public Order and Rule of Law Indian Position

India is true democracy having written Constitution wherein concept of the Constitutionalism has been reposed in systematic manner.

Preamble of the Indian Constitution has declared India as the sovereign state moreover Indians have been assured with the territorial unity and integrity of the country. Fundamental rights have been conferred on the Indian citizens in the written manner under part three of the Constitution. It also includes right to liberty same has exclusively been conferred on Indian citizens at the instance of preamble, Article 19 and Article 21 of the Constitution. In the Preamble of the Constitution liberty of thought, expression, belief, faith and worship has been given to the citizens. Under Article 19(1) six important fundamental freedoms as a part of liberty have been assured to the citizens. Under Article 21 of the Constitution right to life and personal liberty has been extended in favour of individuals. It specifies that, "No person shall be deprived of his right to life and personal liberty except according to the procedure established by law".

Moreover doctrine of rule of law with the predominance of the legal spirit has also been adopted under Article 14 of the Constitution. Article 14 lays down that, "State shall not deny any person equality before the law and equal protection of laws within the territory of India." High courts and Supreme Court of India are the guardians of the provisions of Indian Constitution and power to interpret the Constitution / law and power of judicial review has been conferred on them at the instance of Article 13 of the Constitution. Article 22 of the Constitution which is required to be read along with Article 21 has laid the foundation of the harmonization of the concept of national security/public order with the concept of rule of law. Under Article 22 by satisfying the parameter of Article 21 legislative organ of the state can enact special preventive detention law making provision of the arrest and detention of a person for longer period curtailing his liberty for the sake of protection of public order and national security. It is needless to say that higher judiciary will actually effectuate the harmonization as stated above by ensuring that legislative organ follows the spirit of the due process clause implicit under Article 21.

Role of the Higher Judiciary

The High Courts and Supreme Court in exercise of the appellate, original or extraordinary writ jurisdiction under Article 226 and 32 respectively in the relevant cases do exercise the power of judicial review under Article 13 by determining the constitutional validity of the legislative or executive acts of the Government. In the said process judiciary has evolved the ratio for harmonizing the concept of national security/public order with the rule of law. Same can be analyzed in brief with the help of following points.

Article 19(2)

Under it state may by making law impose reasonable restrictions on the exercise of the right conferred by Article 19(1) in the interests of the sovereignty & integrity of India (inserted by the 16th Constitutional Amendment Act 1963), the security of the state, friendly relations with foreign

states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

The High Courts and Supreme Court have expanded the scope of the term liberty which exists under Article 19(1) in form of fundamental freedoms by including the freedom of press and individual's right to avail the platform of electronic media for propagation of views within its ambit.

Courts have also streamlined the concept of reasonable restrictions specified under Article 19 (2):

1. In *Haridas vs Usha Rani Banik* AIR 2007 SC 2688, Supreme Court held that in Article 19 the expression reasonable restrictions is used which is almost at par with American phraseology of 'inherent tendency' or 'reasonable tendency'.
2. In *Papnasam, Veerabrahman v. State*, AIR 1969 AP 572 the Supreme Court has stated that; the following principles and guidelines should be kept in view while considering the constitutionality of a statutory provision imposing restriction on a Fundamental Right (liberty) guaranteed by Art. 19(1) (a) to (g) when challenged on the ground of unreasonableness of the restriction imposed by it:
 - a. The restriction must not be arbitrary or of an excessive nature so as to go beyond the requirement of felt need of the society and object sought to be achieved.
 - b. There must be a direct and proximate *nexus* or a reasonable connection between the restriction imposed and the object sought to be achieved.
 - c. No abstract or fixed principle can be laid down which may have universal application in all cases. Such consideration on the question of quality of reasonableness, therefore, is expected to vary from case to case.
 - d. In interpreting constitutional provisions, the Court should be alive to the felt need of the society and complex issues facing the people which the legislature intends to solve through effective legislation.
 - e. It is imperative that for consideration of reasonableness of restriction imposed by a statute, the Court should examine whether the social control as envisaged in Art. 19 are being effectuated by the restriction imposed on the Fundamental Right.
 - f. The Rights guaranteed to a citizen by Art. 19 do not confer any absolute or unconditional right. Each Right is subject to reasonable restriction which the legislature may impose in public interest. It is therefore necessary to examine whether such restriction is meant to protect social welfare satisfying the need of prevailing social values.
 - g. The reasonableness has got to be tested both from the procedural and substantive aspects.

Article 14 and 21

The high courts and Supreme Court have made dynamic interpretation of the term right to life and personal liberty under Article 21. They have regulated the power of the state to put restrictions on individual liberty under Article 21 and have also declared Article 14 as the mandate against any kind of arbitrariness at the instance of state.

In *Maneka Gandhi v. Union of India* AIR1978 the Supreme Court discarded the ratio laid down in *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 and reiterated the proposition

that Arts. 14, 19 and 21 are not mutually exclusive. A nexus has been established between these three Articles. This means that the procedure established by law in Art. 21 depriving a person of 'personal liberty' has to meet the requirements of Article 19 as well as Article 14.

The Court emphasized that the expression 'personal liberty' is of the 'widest amplitude' covering a variety of rights 'which go to constitute the personal liberty of man'. Some of these attributes have been raised to the status of distinct Fundamental Rights and given additional protection under Article 19.

The principle of reasonableness which legally as well as philosophically is an essential element of equality or non-arbitrariness pervades Art. 14, 19 and 21 like a brooding omnipresence. The procedure in Article 21 must be 'right and just and fair' and not arbitrary, fanciful or oppressive, otherwise, it would be no procedure at all and the requirement of Art. 21 would not be satisfied.

The administration of criminal justice and the conditions prevailing in prisons have long been extremely deplorable and sub-human; prisoners are mal-treated; criminal trials are inordinately delayed; police brutality, arbitrary arrest & detention is legendary. Since Maneka Gandhi's case, the Supreme Court has in a number of cases tested various aspects of criminal justice and prison administration on the touchstone of ratio of said case. The protection of Article 21 extends to all persons accused of offences, under trial prisoners, prisoners undergoing jail sentences etc., and, thus, all aspects of criminal justice inclusive of arrest & detention fall under the umbrella of Arts. 14, 19 and 21.

Article 22

It is extension of Article 21. Article 22 provides a limitation upon the power of the Legislature conferred by Article 21 to make any law as to deprivation of personal liberty. Any such law must not contravene the conditions or limits imposed by Article 22.

Under this Article state is at liberty to enact preventive detention law in the interest of public order/ national security securing detention of the person for a period longer than three months as it think fit. However Article 22 has also introduced a scheme for the protection of the liberty of the person arrested and detained; may it be under ordinary criminal laws or under special preventive detention laws. In case of the arrest of the person under ordinary criminal law as a part of protection of liberty of arrestee it is imperative under Article 22 that the grounds of the arrest must be communicated to him. Moreover right of legal assistance at the instance of the advocate and production of the arrestee before the Magistrate within 24 hours from the date and time of arrest are necessary to be complied with. The Detention of the person under preventive detention law beyond three months is not permissible unless approved by the Advisory Board to be constituted under Article 22. Similarly right of the representation of the person arrested and detained under preventive detention law to the detaining authority and a provision for consideration of that representation by the Advisory Board has also been specified in Clause (5) of this Article.

The ratio laid down in the Maneka Gandhi's case now has casted an additional obligation on a state for the implementation of spirit of Article 14, 19 and 21 from the human rights perspective while enacting and implementing the preventive detention laws under Article 22 both at the

substantive and procedural level. In case of the detention under the preventive detention law higher judiciary in *Rekha v State of TN* (2011) 5 SCC 244 has led down the ratio that when the acts alleged against a person can be dealt with under ordinary law of the land, taking recourse to preventive detention is contrary to the constitutional guarantee enshrined in Articles 19 and 21.

Higher judiciary constantly ensures the implementation of the scheme of the protection of liberty of person arrested and detained contained in above-mentioned Articles irrespective of the fact that whether such person is arrested under ordinary criminal law or under preventive detention laws.

Conclusion

On the basis of above mentioned analysis it is advent that under Indian legal system at the instance of the written Constitution the concepts of national security, public order and the rule of law have been adopted. The circumscribing limits of these concepts also have been determined in the Constitution. The High Courts and Supreme Court are playing the role of the arbiter in case of a clash between the national security/ public order and rule of law. Indian higher judiciary has maintained a balance between them. Courts have specified that the concepts of the national security/ public order and rule of law can be reconciled and these concepts can be implemented in a manner supplementary and complementary to each other. The doctrine of rule of law being a touch stone of the Constitutionalism many times has been upheld by the courts particularly against the public order therefore in such cases concept of national security /public order are subjected to the rule of law.

References

1. Silvey Sheetal, Preventive Detention Laws in India- Perishing Human Rights in the Name of Suspicion, Bharat Law House Publication January, 2000.
2. Lal SS. Preventive Detention in India.
3. Jain MP. Indian Constitutional Law (Set of 2 Volumes) Lexis Nexis Butterworth Wadhwa Publication 2011, 2.
4. Jain M.P., & Jain S. N. Principles of the Administrative Law, 7th Edition Lexis Nexis Butterworth Wadhwa Publication, 2011.