

ROLE OF THE SUPREME COURT WITH REGARD TO THE RIGHT TO LIFE AND PERSONAL LIBERTY (1990). By Nishtha Jaswal. Ashish Publishing House, New Delhi. Pp. xxix + 455. Price Rs.400.00.

PART III of the Indian Constitution enacts a guaranteed Bill of Rights. It was enacted soon after the promulgation of the Universal Declaration of Human Rights of December 10, 1948. It included in it the human rights necessary to enable the people to attain highest development in life free from arbitrary interference by the state. The drafting committee of the Constituent Assembly borrowed heavily from the working of the American Constitution. The constitutional adviser to assembly had placed before the members the relevant precedents on the American Bill of Rights. The members knew how Chief Justice John Marshall had developed the notion of Constitution as higher law and devised the instrument of judicial review of legislation in the celebrated case of *Marbury v. Madison*.¹

The makers of the Indian Constitution accordingly provided in article 13 (2) that “the State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void.” Thus fundamental rights contained in part III operated as limitations on the legislative and executive power of the state. Any legislative or executive action inconsistent with any fundamental right was rendered unconstitutional. The Supreme Court was empowered to declare it *ultra vires* the provisions of the Constitution.

Article 21 of the Constitution contained provision for protection of life and personal liberty. It provided that “no person shall be deprived of his life or personal liberty except according to procedure established by law.” The language used in this article very much resembles the corresponding provision in the American Constitution but for one significant change. The much maligned phrase “due process of law” used in the American Constitution was expressly rejected by the Constituent Assembly and was replaced by the phrase “procedure established by law.” This was done after due deliberation and lengthy debate. It was, therefore, natural that this debate was fresh in the minds of the counsel and judges who handled the early cases on personal liberty. The provision accordingly received literal and narrow construction in early years leaving enough room for the court to make significant contribution in the future.

Though the Indian Constitution was amended so frequently, article 21 till date remains untouched. Yet, the meaning and content of article 21 have undergone a complete transformation. The way to this transformation was paved by the Supreme Court’s decision in the landmark case of *Maneka Gandhi*.² The book under review seeks to analyse the course of this transformation and assess the role of the Supreme Court in this significant task.

The book under review is a revised version of author’s doctoral dissertation

1. *Cranch* 137 (1803).

2. *Maneka Gandhi v. Union of India*, A.I.R. 1978 SC 597.

submitted in the Faculty of Laws of the Punjab University, Chandigarh. *Maneka Gandhi* is a landmark case on the subject and P.N. Bhagwati J. (as he then was) was the author of that judgement. It is, therefore, in fitness of things that Bhagwati J. has contributed an erudite and appreciative foreword to the book.

In the post *Maneka Gandhi* era, the Supreme Court assumed the activist role and ushered in a constitutional revolution. A number of new dimensions of personal liberty were identified and a host of unenumerated human rights were read in article 21. The author attempted to "analytically examine in the totality of the circumstances the real impact of the new judicial approach on the right to life and personal liberty and on the upliftment of the people of the country."³

The author has divided the book into nine chapters and has covered all the new dimensions of the protection to life and personal liberty. Chapter I entitled introduction traces the evolution of the idea of liberty and gives an appraisal thereof by stating that "the pre-independence colonial period proved to be the darkest and most declining period for the concept of personal liberty. The evolution of personal liberty was a part of the independence movement."⁴

Chapter II scans through the debates in the Constituent Assembly to show what led to the adoption of article 21 in its present form. The questions as to why the "due process clause" was rejected and what is the impact of such rejection have been thoroughly examined. The author concludes that "the due process clause could not be adopted due to sheer false fear."⁵ The founding fathers wanted to limit the concept of liberty by prefixing the qualification of personal. The protection was guaranteed only against the executive and not against the legislature. The impact of this approach was stated to be:⁶

In the Assembly, the supremacy of legislature and the supremacy of judiciary was weighed on the balance and unfortunately balance tilted towards the supremacy of the legislature. The word "liberty" was qualified by the word "personal" and the expression "procedure established by law" was used instead of the expression "due process of law". Thus, by the use of the expression "procedure established by law", the Constituent Assembly accepted the English principle of supremacy of law in preference to the American doctrine of judicial review of legislation affecting personal liberty. This expression shows that the procedure laid down by the legislature cannot be tested by the judiciary on the touchstone of justness, fairness and reasonableness.

Chapter III surveys the cases decided by the court during the period from 1950 to 1977 when the court took the literal and narrow view. In *Gopalan*,⁷ the first case

3. Nishtha Jaswal, *Role of the Supreme Court with regard to the Right to Life and Personal Liberty* ix (1990)

4. *Id.* at 14.

5. *Id.* at 44.

6. *Ibid.*

7. *A.K. Gopalan v. State of Madras*, A.I.R. 1950 S.C. 27

on article 21, the concepts of life and personal liberty were given narrow interpretation. *Gopalan* held law as *lex*, that is, enacted law and not *ius*. *Gopalan* held procedure established by law as any procedure laid down by enacted law and the principles of natural justice had no application. The ghost of *Gopalan* continued to haunt the court during the internal emergency of 1975-77. In *Sant Ram*⁸ the court refused to interpret right to life as including right to livelihood. In *Shivkant Shukla*⁹ the court refused to release the persons detained under the most draconian laws passed during the emergency by issuing writ of *habeas corpus* on the ground that the presidential order issued under article 359(1) was the last word in such situations. The dissent by H.R. Khanna J. in this case opened the new line of thought.

Chapter IV attempts to analyse and evaluate the impact of the new approach on interpretation in the post-internal emergency era. This era begins from the case of *Maneka Gandhi*.¹⁰ In *Maneka Gandhi*, Bhagwati J. in his leading judgement for the majority of the court gave widest meaning to the expression personal liberty and added that the procedure established by law must be just, fair and reasonable and must thus meet the test of being just and fair under article 14, and reasonable under article 19.

The author refers to subsequent cases to show fluctuations in the judicial trend after *Maneka* so as to examine the larger question whether the post *Maneka* activist approach can digest the American due process. She concludes by saying that "the case of *Mithu* is a clear cut example of substantive due process adopted by the apex court."¹¹

The activist approach became more significant in the attempt of the court to render justice to the common man through the new innovations of public interest litigation. The section on public interest litigation is well written, documents all the leading cases on the point, refers to relevant writings on the subject and critically examines the case for and against this new trend in judicial activism.

Chapter V analyses all the cases on right to life and legality of capital punishment. After examining the case of retention versus abolition of capital punishment, the author examines the constitutionality of capital punishment with a view to attempt a study of judicial attitude. The author welcomes the judgement in *Mithu v. State of Punjab*¹² on the constitutionality of mandatory death sentence where the court held section 303 of the Indian Penal Code 1861 as unconstitutional being violative of articles 14 and 21 of the Constitution.

The author welcomes the judicial trend on commuting death sentence to life imprisonment for unreasonable delay in execution of death sentence. A reference was also made to cases on the validity of hanging by rope. The ruling in *Lachma Devi*¹³ was highlighted to show that the suggestion of public hanging even in rarest of rare cases was a barbarous one.

8. *In re, Sant Ram*, A.I.R. 1960 S.C. 932.

9. *A.D.M. Jabalpur v. Shiv Kant Shukla*, A.I.R. 1976 S.C. 1207.

10. *Supra* note 2.

11. *Supra* note 3 at 144.

12. A.I.R. 1983 S.C. 473

13. *Attorney General of India v. Lachma Devi*, A.I.R. 1986 S.C. 467.

Chapter VI analyses cases in which the court made significant contribution to render substantial justice to the inmates of prisons and thus paved the way for reform of jail administration. The court interpreted the expressions fair trial, speedy trial and just and fair procedure so as to make legal aid and assistance to the poor a part of fair procedure.

Chapter VII highlights the significance of *Asiad workers' case*¹⁴ with regard to right to human dignity and protection against exploitation. The cases on bonded labour find prominent place in this chapter. This chapter contains a section on protection of children against exploitation and moral and material abandonment.

Chapter VIII evaluates the impact of judicial activism on the right to life and personal liberty. It shows how after some judicial vicissitude right to livelihood becomes a part of right to life in *Olga Tellis*.¹⁵ Right to privacy was held to be part of personal liberty.¹⁶ Right to privacy under article 21 was invoked to question the validity of a statutory remedy under the Hindu Marriage Act for restitution of conjugal rights. The Supreme Court resorted to affirmative action and awarded compensation for the violation of right to life and personal liberty. Right to live in pollution free and healthy environment was held to be part of article 21.

The study concludes by observing that "the judicial activism has created a new jurisprudence by adding soul to article 21 of the Constitution."¹⁷ We may also recall here what the author stated in her preface in the following words¹⁸

The Summit Court has been trying in the post-internal emergency era to prove that it is truly the people's court. The new approach has converted article 21 into the most vital and significant part of the Fundamental Rights Chapter of the Constitution. In fact, it was only in the post-internal emergency era that the Supreme Court of India became the Supreme Court of Indians.

I have enjoyed reading the book for review. At first one gets the impression that the book suffers from the vice of repetitions but on sober reflection it seems the same was inevitable. About the quality of the book I would only quote what Bhagwati J. has said in his foreword. He said:¹⁹

The treatment of this extremely important subject by the author is interesting and fascinating and the book produced by her contains a lucid exposition of various aspects and dimensions of the right to life and personal liberty as developed by the apex court of India. I have no doubt that this work will be of immense use not only to law students but also to judges and lawyers who have to give new meaning and content to the

14. *People's Union for Democratic Rights v. Union of India*, A.I.R. 1982 S.C. 1473

15. *Olga Tellis v. Bombay Municipal Corporation*, A.I.R. 1986 S.C. 180.

16. See M.L. Upadhyaya and Prashant Jayaswal, "Constitutional Control of Right to Privacy, II C.I.L.Q. 39 (1990).

17. *Supra* note 3 at 432.

18. *Id.* at ix.

19. *Id.* at vi.

letter of the law so as to make it vibrant and meaningful for the large masses of people in the country

In the end a word about the price which appears to be on the higher side which puts the book beyond the reach of the students and teachers

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