Constitutional Law and Public Administration in India

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Article 20

An important case that warrants discussion under Article 19 as well as Article 21 of the Constitution is the landmark judgment of *Maneka Gandhi v. Union of India*. The importance of this case is attributed to the fact that it was decided post-emergency, which was imposed in India. This was at the time when public administration was slowly changing in terms of the perception and in terms of the application it had in the legal system. Post-emergency, the judiciary started asserting its role in protecting constitutional rights of citizens aiming to curtail executive abuse of power, to restrict the legislative arbitrariness. Hence, the judiciary came up with some landmark decisions, which laid down constitutionalism for the coming decades in this country. One such case that changed the dimension of the constitutional structure in this country is the case of *Maneka Gandhi v. Union of India*. Maneka Gandhi who is the daughter- in- law of Mrs. Indira Gandhi and their relationship was strained. In this background the actions were initiated in the *Maneka Gandhi* case.

According to the facts of this case, Maneka Gandhi was asked to surrender her passport under the Passport Act and handover the passport to the regional passport officer in Delhi, through a process called impounding of the passport, stating the reason as one in public interest, without any substantiation of what that public interest was. She was asked to surrender her passport within seven days from the receipt of a letter that was issued by the regional passport office. Mrs. Gandhi challenged the action as being violative of her right to life, but more importantly, violative of the freedom under Article 19, in terms of the freedom of movement and the freedom of trade occupation in business and the freedom of expression which are enshrined under Article 19, the Constitution of India.

While speaking about infringement of the fundamental freedoms that are there under Part III of the Constitution, it is relevant to mention the fundamental freedoms enshrined in Articles, 14, 19 and 21, namely, what is called the Golden Triangle Rule. Now, can someone challenge any curtailment of his or her personal liberty? Personal liberty is enshrined in Article 21. Which has two components, right to life and personal liberty which cannot be taken away except according to the procedure established by law. It must be

noted that the executive in India prior to the emergency was quite powerful; and so was the legislature because the opposition parties were not that very strong, it was almost a single party system in this country.

And this had led to a kind of a black day in the Indian Constitution by the imposition of emergency in 1975. It is important to realize that the Constitution, the democratic and legal system got in a direction about where and how they can proceed. And this case gave the judiciary a very golden opportunity to lay down some ground rules. Hon'ble Justice M.H. Beg, the then Chief Justice of the Supreme Court and a bench consisting of Justice V. R. Krishna Iyer, Justice V. M. Bhagwati and Justice Y. V. Chandrachud were among the other judges who were there in this case. This case was decided by seven judges in total. And they had to decide the following things. First, is whether fundamental rights are absolute in nature and character or conditional under the Constitution of India. Second, check whether the right to travel is protected under Article 21 and if this is a fundamental right. Third issue to be decided was the connection between Articles 14,19 and 21. Fourth, the scope of procedure established by law. Fifthly, whether Section 10, Sub clause 3C of the Passport Act 1967 is violative of the fundamental rights. And lastly, whether a regional passport officer can impound a passport without adhering to the principles of natural justice. It was argued that the fundamental rights are given to every human being as a natural right, meaning entitled to be enjoy by reason of birth.

As a country, it is necessary to ensure these rights to every citizen of this country. And fundamental rights have to be absolute in nature and character, which means they should not be compromised for any reason or purpose. The right to travel is a right that every human being must be entitled to, to explore your intellectual capacity, to explore different countries and continents and, to be part of any territory of one's choice, and it ought to be a kind of right that the Constitution must recognize under Article 21. Any confiscation or revoking of a passport, which is the travel document of a person to work out, ought to be reasonable and lawful. And if it is not, then such an action should be challenged under the Constitution and the citizen must have the right to bring a petition under Article 32 of the Constitution of India, which confers a direct right to approach the apex court or the Supreme Court for the violation of your fundamental rights.

The above case also debated largely on the principles of natural justice; that is a government which is democratic in character and nature, and a public administration that must decide about the rights of citizens. Public administration cannot in any way infringe or take away any right that is guaranteed and protected by the Constitution, unless it follows what is called 'procedure established by law.' Now, every such procedure that is established by law shall adhere to the principles of natural justice. When referring to principles of natural justice, it is also said to be the principle of *audi alteram partem*. *Audi alteram partem* means, one must be heard before he is punished or condemned or before his rights are taken away. Passport, therefore belonging to any person, cannot be seized on

the ground of, public interest or public good, unless the law gives the grounds for impounding the same. There was an interesting argument about what is the role of public administration in such matters. In this case it was very important that the courts realize that in India, the executive was still having a colonial hangover and were not being held accountable as public servants. They were not treating the public reasonably and going about exercising their functions in a democratic process.

That is the reason why the court in this case, very clearly held that public administration ought to be reasonable, a principle which is core to public administration and public function. And, if public administration is not regulated, restricted, or controlled, then to a larger extent, this kind of unrestricted power of any authority, which is vague in nature and character, would be abused. This would result in infringement of the rights of the citizens of India, which the court clearly said will not be permitted under the constitution. So, finally the court while restoring the passport of Maneka Gandhi also stated in clear terms that no one can be deprived of his opinion or voice in the constitution. And hence, the freedom of personal liberty is a guaranteed freedom, and every citizen is entitled to enjoy the same under the constitutional principles.

Public administration and public policy will be the only determinant factors of deciding whether any kind of an action which is adverse to the citizen's interest can be taken if so, on grounds that are reasonable in nature and character and not without following what is called as the principles of natural justice. This case is important to the extent that it laid down a very important principle of the constitution of India that public administration must fall within the test of the golden triangle rule. The golden triangle rule has on top Article 21 of the constitution, which protects right to life and personal liberty. On the left angle corner, it has article 14, which is equality before law and equal protection of the law and on the right-angle corner side, it has article 19, which enshrines the six essential freedoms that citizens enjoy under the Constitution of India. This prism or the triangle is the test of public administration that any kind of public policy and public administration cannot violate this golden triangle. And if it does, then it is subject to a challenge in the court of law, and the courts will intervene to protect the rights of the citizens. Moving forward from article 19, Article 20 of the constitution is one of those very important provisions of the Indian democratic legal system.

Article 20 speaks about protection against conviction of offences and is a constitutional protection for convicts who have been sentenced to certain kinds of punishment for offences that they have committed against the state. The constitution of India provides safeguards to people who are accused of crimes which also reveals the moral character that is displayed by the constitution of India. It means, part three of the fundamental rights of the constitution are not only there for citizens who are free and who have been on the right side of the law. The constitution also takes care of accused individuals who have committed

crimes which are offences against the state or the society and are of higher degree and gravity to the extent that they are to be punished by law yet have certain constitutional protections.

There are three constitutional protections under article 20 as being safeguards for those who are accused. First Article 20(1), which calls for ex post facto law. The term post facto law, is a Latin expression. It clearly says that ex post facto, means something that is an afterthought, it punishes actions retroactively, and an act which was legal when it was originally done is criminalized by a law covering that action. So, ex post facto law is a law that attempts to impose penalties or convictions on acts that have already happened or are already done. So, when the act happened, the law neither took cognizance of that act, nor treated it as an offence and it also did not prescribe a punishment for the sake. Later, the law wants to take cognizance of such an act and treat it as a crime as well as impose punishments and penalties for the same.

An example in this regard may be the Dowry Prohibition Act of 1961. This law came into force on 20thMay 1961, and on this day if any person is found accepting dowry, he shall be punishable under this Act. If dowry is accepted on the 19th of May, it shall neither be an offence nor a crime, because the purpose of the law is always prospective, especially the purpose of criminal law. On the other hand, it may be noted that civil laws can have a retrospective effect, taxation law can have retrospective effect, but not criminal law because in crime you are taking away the liberty of the individual, you are going to imprison him. It is a serious act of the state and hence there should be a protection against the, taking away of the liberty of an individual in a crime. So, post facto, law is okay, but ex post facto law is definitely not okay. So, the act of accepting dowry is treated to be an offence, a crime for imposition of penalties and punishments. For any act done before such date and year there is a protection under Article 20(1) the person doing such act shall not be prosecuted for the same. *Ex post facto* laws are of three kinds generally under a broad framework. First is a law which declared some act or omission as an offence for the first time. And after commission or completion of the act, the law treats it as an offence. So, once one act is done, immediately the law comes into place and makes that kind of an act or omission correct. So, this is one way in which ex post facto law is attempted to be made. Second, a law which enhances the punishment and the penalty. In ex post facto law, the offence could have already been taken into cognizance.

But now what is being done is bringing in a law that will enhance the punishment and the penalty. Say, at the time the act was committed the punishment was three months. Then later a law is brough in that has increased that punishment and penalty and this happens from time to time when the parliament or the legislature thinks that the current punishment or the penalty is not amounting to enough deterrence. And hence, the announcement of punishment or penalty is very much required and necessary under the constitution and under the criminal procedure code which usually happens from time to time.

Now, the fact is that an act has already been done by a person. It was an offence, no doubt, but attracting only three months of punishment. Now, should the person be entitled to just that three months of punishment or to the enhanced punishment that has been brought about by a new law, which tends to then be made applicable prospectively generally, but should not be made a retrospective. So, that is also one element of *ex post facto* law that can come into place where the punishments and penalties are enhanced after the commission of that kind of an act or an offence.

The third kind of Ex post Facto law is a law which prescribes a new and a different procedure for prosecution of offence. This may be in terms of tilting the burden of proof on the accused instead of assuming that he is guilty, rather, assuming that he is innocent till proven guilty. There is in place a new procedure for trying this kind of offence. For example, it can be on the list of cases to be tried in the fast-track court. The fast-track court is a special court and may not necessarily bring about a new procedure. But in that you not only bring the fast-track court, but also a new procedure for speedy trial, summary trial. Enough time is not given to the accused and his counsels or the defense counsels to put forward their arguments and cases or cross examine individuals or some other new procedure that is brought into, finish cases early.

Those kinds of *ex post facto* procedural laws can also be something that can be brought about under Article 20(1) and can be tested. Among these three, the first two attract Article 20 sub clause 1 and they are prohibited namely, first, the law in which you declare some act or omission as an offence after the completion of the same. This is prohibited under Article 20 sub clause 1.

Second, is the law in which the punishment and the penalty for acts already being done are enhanced. These two, the Indian Constitution does not permit, and the doctrine of *ex post facto* law will be granted to an accused, and he will be protected against these two actions of the state if they are attempted to be done by the state. The third aspect is about new procedures, but these new procedures are not affecting a person's substantive right. And hence, any kind of a new or a different procedure for prosecution of offense can have retrospectivity. This will ensure speedy trial and thereby a quick disposal of cases, which is to try and finish the trial in a time bound manner. There could be a case management rule in which prescribes the time for how many adjournments can be sought, the times for replies, cross examination, so on and so forth. These are procedures that can be brought and be applied retrospectively and the same cannot be challenged as being violative of Article 20.

So, Article 20 simply says that no person shall be convicted of an offence except for the violation of a law in force at the time of the commission of the Act charged as an offence, nor shall he be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Generally criminal law

tends to have quite strict punishment and the accused must get the benefit of any such law that exists, and he must not be subject to any kind of mistreatment or enhanced punishment from time to time.

Now the second part is the law on double jeopardy which is also a kind of a protection that has been given to an accused. It speaks about the right to an accused in a criminal case or a criminal trial. And is a doctrine which says that no one shall be punished for the same offence twice. The origin of the doctrine of double jeopardy, can be traced to the American jurisprudence, which states that no person should be prosecuted and punished twice for the same offence in any subsequent proceedings. So, Article 20(2) reads as follows'' no one could be convicted and punished more than once for the same offence involving the same set of facts. "There is a guarantee against multiple convictions according to the doctrine. In the case of Venkat Raman v. Union of India, the Supreme Court of India established this doctrine and dealt with it. However, this doctrine applies to only judicial punishments and not to quasi-judicial or departmental punishments.

So, departmental punishments are brought under the purview of what is called parallel proceedings. A departmental enquiry could be entirely different from your judicial enquiry. But the protection of double jeopardy is only in case of judicial proceedings. So, vis-a-vis the judiciary you cannot be prosecuted twice by a judicial authority. Usually all judicial processes should be clubbed together and a convict should be getting a punishment or a penalty only once for the same set of facts. Suppose a person has been caught at the customs authority or at the seaport or at the airport and in violation of the rules of customs, certain gold has been brought from abroad and the person is found in possession of that kind of a gold which is not supposed to be imported into India. The customs authority will confiscate this kind of gold and take it to a proceeding before criminal court. Once it is taken in a criminal court, the person shall be prosecuted under the criminal law and thereafter cannot be prosecuted again for the same offence by the customs authority in the customs court. This is prohibited as the departmental inquiry is quasi-judicial and the criminal proceeding is judicial. For the same set of facts, a person's act amounting to an offence may attract a civil action, and at the same time a criminal action and a departmental action. Now this will not be considered as double jeopardy. But a criminal court punishing a person twice for the same offence is double jeopardy and there is a protection against the same under the Indian law. The double jeopardy concept under Article 20(2) is also understood with reference to Section 300(1) of the Criminal Procedure Code. Section 300(1) of the Criminal Procedure Code says that someone who has been convicted or prosecuted by any competent court for some offence will not be liable to be prosecuted again till the previous conviction remains in force. So, once a person is convicted for the same set of facts and offences, he cannot be tried again in a court of law. So, he has a protection against the conviction for the second time for the same offence for the same set of facts.

Article 20(3) speaks about prohibition against self-incrimination. The protection that is given against self-incrimination says that no one shall be forced to utter or provide any such information or evidence orally or by any documentary proof, which could be used against that individual that will lead to his own conviction. Self-incrimination means trying to incriminate yourself before a court of law before a police officer or investigating agency and you are leading them to your own kind of a crime. There is protection against self-incrimination and is also available to a person who is a witness, both in terms of oral and documentary evidence. That is a person need not help the authorities in finding his guilt or fault, finding it out is their job. So, the burden is on the authorities to prove the crime and the accused need not facilitate such an investigation or collection of evidence. But any person who has decided to give that evidence or information voluntarily, is not necessarily covered under Article 20(3). It is left to the freedom of such a person to give the same. However, if he does not wish to do it, it is not to be treated as a crime and that is what is very clearly stated in Article 20(3).

For example, if one is being tried for murder, and the police are investigating the offense of murder and they come to you asking whether the other man has committed murder, about your presence at the place of murder, whether you were a witness, so on and so forth. In those cases, you have the right to remain silent, and need not necessarily disclose what has happened unless there are certain cases where the third party owes a duty to cooperate and inform the police. But the accused in the case need not help the police, nor give information and evidence that may lead to his own guilt in a case. Whereas, every other citizen is duty bound to help the police and the legal system and the authorities in detecting crimes, and cooperating with them is a duty that is enshrined in the legal system as well. The Fifth Amendment to the Constitution of the United States of America also has a very similar provision that protects accused against self-incrimination. In India, similar protection is incorporated in the Constitution for the accused allowing them to remain silent and they need not actually facilitate their own finding of guilt.