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1. **Purpose and object of study.**

Democracy in order to survive requires that the people living in such a society must be given certain basic minimum rights which are physical, moral, spiritual, and intellectual in nature. Unless these minimum fundamental rights are guaranteed, individual human beings cannot develop their personality to the fullest extent. Neither the Government nor any public authorities are entitled to interfere with such rights of the individuals. As Justice Jackson observed in a landmark decision of United States Supreme Court in 1928\(^1\) that the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy and to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. Once’s Right to life, liberty and property to free speech, a free press, to freedom of worship and assembly and other fundamental rights may not be submitted to vote and they depend on the outcome of no elections.

Our Constitution also confers basic fundamental rights on the citizens of this country. In the very preamble itself, we find, interalia,

\(^1\) West Virginia state Board of Education-Vs-Barnet 319US624:87 Led 1928
liberty of thought, expressions belief faith, and worship as one basic sacrosanct privilege of the people of India. The Constitution specifically embodies the fundamental rights of the people in part-III and Collective fundamental rights in part-IV of this majestic document. Of these rights the fundamental right to life and liberty of the people is of paramount importance. The Security of life and personal liberty is secured by the Constitution of India by two fold guarantee.

i) That no person shall be deprived of his life or personal liberty except according to the procedure established by law.

ii) Arrest or incarceration of a person must not be arbitrary or illegal or without grounds. Originally it was understood by our apex court that the safeguard of article 21 applies only to the action of the executive and it does not apply against legislative acts or actions. Life as it is understood does not merely mean bare animal existence. It implies a life worth living with dignity honour, humanity and reputation. Personal liberty comprises within its fold all the rights which accompanies a person from his birth and the term personal liberty is of wide magnitude.

With the advent of the Constitution great responsibilities were bestowed upon the Supreme Court to interpret the Constitution in a
welfare state, but as most of the Supreme Court judges were brought up in British Tradition they followed the black letter law tradition in interpreting the provisions of the Constitution, which ignores the justness, justifiability reasonableness or fairness or non arbitrary-ness of the law which the judges are called upon to explain and interpret. This sort of judicial reasoning we come across in Supreme Court's decision in A.K.Gopalan -VS- State of Madras. In that particular case Supreme Court decided that a law which deprives a person of his liberty and which is enacted under article 21 of the Constitution is only limited to executive action and does not apply to legislative actions because our Constitution has adopted the British principles of legislative Supremacy compared to the doctrine of due process of Law as embodied in the U.S. Constitution which empowers the American Supreme Court to invalidate any legislative enactment which in the opinion of the American Supreme Court is in contravention of Court's notion of due process i.e. reasonableness and fairness.

Following the mandate of the Supreme Court handed down in A.K.Gopalan -Vs- State of Madras the notion of personal liberty seems to have been protected under article 21 of the constitution

2. AIR 1950 S.C.
3. AIR 1950 S C 27
only against Executive Acts and it further seems that there remained no safe-guard for personal liberty on any other law such as natural Law or common Law, and right to life & personal liberty remained in India subjected to procedure established by Law.

On the whole supreme Court's reasoning was confined within the parameters of enacted Law and the concepts of natural justice and due process were absolutely rejected by the Supreme Court in so far as the provision of article 21 of the Constitution of India was concerned.

But from 1977 onwards we find a change in the Supreme Court's attitude in the task of interpretation of the notion of right to life and personal liberty. Judicial activism crept in and the Supreme Court became an activist court articulating counter majoritarian checks on democracy from a passive positive court. Such change in the attitude of the Supreme Court may be examined from the following standpoint.

The Supreme Court's narrow interpretation of the Constitution in A.K. Gopalan's case was due to fact that the Supreme Court was at that time under the spell of agony of political upheavals which were endangering the life of infant democracy. Subsequently we notice that attempts were made by the Supreme Court to take out the right of
personal liberty from its narrow hole. But the fear psychosis emerging from the proclamation of internal emergency blurred the vision of the Supreme Court and the Concept of personal liberty suffered and eclipsed. But as soon as the emergency ended we find Supreme Court exhibiting greater vigour and enthusiasm in interpreting the right personal liberty not only by reasserting this right but also enhancing the limits of such right. The due process clause which died thrice in the Constituent Assembly, in Gopalan's case and in Shivakanta Sukla⁴ was re-surfaced in Maneka Gandhi’s case⁵ and since then the Supreme Court did not brook any resistance or impediment in running with the flag of the right to personal-liberty.

The Supreme Court's attempts in this directions were quite successful as we find that the due process continued to have appropriate nourishment to bloom into a handsome youth capable of safe-guarding every right which was necessary for the full enjoyment of life and personal liberty. Maneka Gandhi case distinguished itself by articulating the notions of justness, fairness, reasonableness and non arbitrariness. Hardly, a person can ignore these notions except at the risk of being struck by the judiciary.

⁴ A.D.M. Jabalpur, -Vs- Shivakanta Shukla AIR 1976 S.C. 1207
⁵ Maneka Gandhi -Vs- Union of India AIR 1978 S.C. 597
This is an endeavour (on my part) to highlight how under the Judicial activism the Hon’ble Supreme Court of India has been adding wide new dimensions to this right (personal liberty), which covers various aspects of Human freedom which the Constitution makers might or might not have envisaged, for example, right to travel abroad, right to privacy, right of surrogate mother, right against property, right to livelihood, right of prisoner right to free legal aid, right against environmental pollution, remedial right to compensation right to live a disease free life etc.

The Supreme Court's efforts in this direction are nothing but attempt to keep the flag of Human Right flying atop everything in a man's life by inducting Human Rights jurisprudence into our legal system.

2. CONCEPT OF PERSONAL LIBERTY AND HUMAN RIGHTS

A. CONCEPT OF PERSONAL LIBERTY

Among all the possession of men liberty or freedom is considered to be the greatest possession of a man. Liberty means in other words freedom from restraint, even the lower animals desire to live a unrestricted and unhindered life. And among human beings we find from times immemorial an urge to acquire freedom from restraint
artificially imposed to be the greatest feature of the history of the human race.

The great philosopher Rousseau observed that man is born free, everywhere he is in chains. From such observation of this great thinker (Rousseau) it is apparent what a man sees in the World. The internal inclination of a human being is freedom which is unbounded in all directions.

In modern times we consider liberty to be the most essential requirement of the modern man. It is said to be the delicate fruit of a mature civilization.

From an analysis of the causes and factors of all hitherto revolutions liberty seems to be the life-breath of all upheavals which aims at not only freedom from arbitrary restraint but also at securing of those conditions which are essential for the fullest development of human personality. We may view liberty not only in regard to the external situations in which there are attempts on the part of man to realise himself but also in the areas of internal, mental, moral and spiritual aspects of his personality.

Mind is the greatest factor and liberty can not prevail in a situation where there is no freedom of mind. Black-stone observed that the personal liberty consist in the power of locomotion of changing situation or moving one's person to whatsoever place one's own
inclination may direct, without imprisonment or restraint unless by due process of law.

Personal liberty as considered in Dicey's legal parlance is understood particularly in England in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification.

According to Professor Gledhill, the term personal liberty means and includes not only the right to move one's person at one's own inclination but also several freedom, and in addition, other rights not specifically mentioned in the Constitution, such as the rights to eat and drink, the right to sleep and the right to leisure.

Turning our attention to India the Hon’ble Supreme Court had the opportunity to define the term Personal Liberty for the first time in A.K.Gopalan Vs. State of Madras. According to the Hon’ble Supreme Court the expression ‘Personal Liberty’ is endowed with a wider and narrow meaning as well. If we consider it in the wider sense it signifies not only immunity from arrest and detention but also freedom of speech, association etc. But from the stand point of narrow meaning, it indicates freedom from arrest and detention. The juristic conception of personal liberty, when used in the latter sense, it signifies freedom of movement and locomotion.

According to Justice Mukherjee, the term personal liberty indicated to him liberty concerning the person or body of the individual and it is in this sense, antithesis of physical restraint or coercion. The term personal liberty signifies a purely personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. The essence of personal liberty pervades this negative aspects.

According to Justice Patanjali Sastri, it appears that whatever may be the generally accepted connotation of the expression personal liberty Article 21 of the Constitution used it in a sense which excludes the freedoms dealt with in Art. 19.

We therefore had had a narrow interpretation of the term personal liberty, from the Hon’ble Supreme Court from its mandate handed down in A.K.Gopalan Vs. State of Madras. And the Hon’ble Supreme Court endeavoured to excludes several kinds of rights as separately included in Art. 19, from the purview of ‘personal liberty’ guaranteed by Art. 21.

Yet we had another occasion to get another interpretation of personal liberty in Kharak Singh Vs. State of U.P. where justice Subbha Kao, defined ‘personal liberty’ as a right of an individual to

7. A.I.R. 1963 S.C.1295
be free from restrictions or encroachment on his person whether these are directly imposed or indirectly brought about by calculated measure. And according to the mandate of the Supreme Court given in this case *Kharak Singh. Vs. State of U.P.* Art 21 used the terms personal liberty as incorporating all varieties of freedoms except those embodied in Art.19.

But judicial exploration of personal liberty attained higher degrees of maturity in *Maneka Gandhi Vs. Union of India*\(^8\) wherein the Hon'ble Supreme Court observed that the term 'personal liberty' is of wide magnitude and it must be so interpreted so as to avoid any overlapping between Art. 21 and Art. 19(1). And the phrase personal liberty is very wide and includes all possible rights which go to constitute personal liberty, including those which are mentioned in Art.19.

But there cannot be unlimited liberty and the Constitution itself imposed reasonable restrictions on the exercise of liberties in the interest of the general public, sovereignty and integrity of India, safety of the state, public order, defamation, contempt of court, decency or morality, etc.

\(^8\) A.I.R. 1978 S.C.597
B. Concept of Human Rights

According to the jurists the human rights means those minimum rights which are enjoyable by a human being against the state or other public authorities by virtue of his being a member of the human family irrespective of any other consideration.

If we consider the juristic term right it means a legally protected interest and interest may be viewed as something which is of general advantage to a person.

Human rights therefore may be said to comprise within its fold all the conceivable rights that drives a man to the fulfillment of all human ends, physical, intellectual, moral and spiritual development of a human being to their ultimate extent incorporated in such rights and therefore the universal declaration of human rights, 1943, proclaimed the inalienable, sacrosanct rights of human beings which are common to all people that belongs to the human race. There are all told 30 Articles in the U.N. declarations of human rights, 1948 which covers all aspects of physical, moral, personal, spiritual, intellectual and other aspects of human living.

C. Definition of Human Rights

Human Rights as defined in Section 2(d) of the Protection of Human Rights Act, 1993 means and includes all rights relating to life,
liberty, equality and dignity of the individual, as guaranteed by the Constitution and those rights incorporated in International Covenants enforceable by courts in India.

Therefore, by the enactment of the Protection of Human Rights Act 1993 in India human rights covers all the fundamental rights, embodied in our Constitution both with regard to the individual rights, in part III and collective rights in part IV.

3. Nature and scope of both the aspects (Liberty & Human Rights)

A. General Overview

In discussing the nature and scope of liberty and Human Rights it may be stated that now-a-days personal liberty and human rights are not synonymous particularly after the promulgation of the Protection of Human Rights Act, 1993 in India. In fact Article 21 of Constitution of India stands like a colossus over the functioning of the constitutional democratic system in India. The clause ‘procedure established by law’ appearing in Article 21 of our Constitution has been taken from Japanese Constitution of 1946 (Article XXXI) “No person shall be deprived of life or liberty nor shall any other criminal
penalty be imposed, except according to procedure established by law”. Much debates have taken place since 1950 as to the real meaning and import of the clause’ procedure established by law vis-a-vis the fifth & Fourteenth amendment of the U.S.Constitution which highlights the due process of law.

The due process of law as used in American Constitution comprises two aspects. One is Substantive due process and the other one is Procedural due process.

Substantive due process is defined by Edward S. Corwin as the judicial doctrine that “every species of State legislation; whether dealing with procedural or substantive rights(is) subject to the scrutiny of the (supreme) court when the question of its essential justice is raised9.

Whereas the substantive due process is addressed to what the government can do, procedural due process inquires into the way the government acts and the enforcement mechanism it uses.

Since 1950, the Hon’ble Supreme of the India was concerned about the application of the due process clause of the American Constitution into the Indian Scenario which is subject to the juridical principle of procedure established by law. The nature and scope of

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personal liberty and human rights may be assessed from this perspective.

There is no doubt of it that the word 'life' as appearing in Article 21 of our Constitution includes personal liberty. We may argue that the right to life and personal liberty is the most fundamental of all the Fundamental Human Rights, that are necessary for the complete development of human beings, without personal liberty life is meaningless because the word life encompasses a life worth-living with comfort, dignity and honour, which is nothing but attributes of personal liberty.

It is noteworthy in this context that right to personal liberty had received a very narrow interpretation in A.K. Gopalan Vs. State of Madras case\textsuperscript{10} from the Hon'ble Supreme Court, in as much as the Apex court at that time was under the spell of tribulation of political vicissitudes, which were jeopardising the life of our infant democracy. Later the Hon'ble Supreme Court endeavoured to take it out of the narrow hole but the fear psychosis resulting from the proclamation of internal emergency blinded the judicial vision and the right to life and personal liberty went down to alarming proportions. But, after the end of the emergency we came across a new vigour on the part

\textsuperscript{10} A.I.R. 1950 S.C.27.
of the apex court which not only re-asserted but also expanded the frontiers of this right. The ‘Due process’ (Procedure established by law) which died thrice, we may repeat in the Constituent Assembly, in Gopalan and in Shivakant Shukla, was incarnated in Maneka and since then the apex Court brooked no resistance in increasing the parameters of the right towards unlimited direction.

It became crystal clear that the “Due process” baby has received healthy nourishment from the Supreme Court to develop into handsome youth who had strength enough to protect each and every privilege which are essential for the complete enjoyment of life and personal liberty of the human being. The doctrine of justness, fairness and reasonableness which distinguished the decision of the Supreme Court in Maneka Gandhi’s case has since become the criteria yardstick for assailing any act of the Government whether substantive or procedural in nature that goes against the personal liberty of a person.

The nature and scope of the right to personal liberty and human rights have been given such wide dimension by the apex court that today it covers various aspects of human freedom which the founding fathers of the constitution might or might not have visualized e.g. Right to Travel Abroad, Right to Privacy, Right against poverty, Right
to livelihood, Right of Prisoners, Right of Surrogate-mothers, Right to Free legal Aid, Right against Environmental Pollution, Remedial right to compensation etc. etc.

B. Definition of Human Rights / Personal Liberty.


(i) Constitution

(a) Liberty is the offspring of high civilization. It postulates the creation of a climate wherein there is no suppression of the human spirits, wherein there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body. Absence of restraints on liberty is a pointer to the index of maturity of democracy in a society. But there can’t be absolute liberty. It has to be harmonised with duties towards society and the liberty of others. Restrictions are really essential for the preservation of liberty itself. The concept of human rights postulates all these aspects. Because in the very notion of human rights it is clear that human rights are those minimum advantages which a person is allowed to enjoy against the state and its organs by virtue of his being a member of the human society irrespective of any other consideration. With the
advent of the constitution the human rights got enshrined in Part III and part IV of this paramount document (constitution of India). Of course in part IVA Fundamental duties have also been added in the constitution itself as an adjunct to human rights for the people of this country. Human Rights have existed in the civilized world particularly in India from times immemorial. The Constitution of India has only given a manifest declaration to such human rights in the form of fundamental right and directive principle's of state policy. In fact, all the pronouncement of fundamental rights and directive principles of state policy in the constitution are nothing but a declaration of human rights pervading personal liberty of the people in various directions. Specifically Articles 19, 20, 21, 22 of the Constitution are the very repository of personal liberty for the people of India. Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. This particular aspect of life and personal liberty has been analysed/scrutinised from various angles by the Hon'ble Supreme Court. The definition of personal liberty as explained and interpreted by the Supreme Court during the last 50 years may merit our attention. From 1950 to 1977 the Apex Court was guided by the black letter tradition of law and it tried to explain personal liberty from a very narrow stand point. And in such effort, the Apex Court did not take
care of the notions of legality, justness, fairness and reasonableness, which are part and parcel of procedure established by Law vis a vis personal liberty. But from 1977 onwards the Apex Court took a significant turn in defining and explaining the notion of personal liberty and its deprivation. And from Maneka Gandhi’s case onwards the Supreme Court has introduced the concept of American Due Process of law as an inseperable component of the procedure established by law, whenever personal liberty is assailed by the State or its organs. In fact, the term personal liberty, now comprises within its fold all conceivable human rights without which a person’s personality can never be achieved in all their niceties.


This act has been introduced by the parliament with the avowed objective of establishing a National Human Rights Commission at the Centre. State Human Right Commission in the States and Human Rights Courts for better protection of human rights for the people of India. This act defines Human Rights in Section 2(d) as those rights relating to life, liberty, equality and dignity of the individual as guaranteed by the Constitution and those rights incorporated in international Covenants enforceable by the Courts in India. This
definition of Human Rights as given by the Act, referred to above permeates all the incidents of personal liberty, which could be enjoyed by the people of India, for the complete development of manhood.


It may be noted in this context that the term Human Rights has not been defined in the constitution of India of course the Supreme Court has taken pains to interpret Human Rights as fundamental rights which were cherished by the people of India since the Vedic times. (Menoka Gandhi Vs. Union of India, AIR 1978, S.C. 597)

Necessity arose for exclusively defining human rights in our legal jurisprudence by legislating an enactment which will take care of maintenance of human rights, its promotion and advancement. Accordingly the Protection of Human Rights Act, 1993 has been passed by the Parliament to eradicate all confusion in this regard.

The definition of individual human rights as given in the Act referred to above acquires additional importance regarding the Supremacy of such rights in the society particularly in the context of Supreme Court's decision given in Keshababanda Bharati vs. State of Kerala
(AIR 1973 SC 1461). The Apex Court is this case observed inter alia, that the Fundamental rights themselves have no fixed content most of them are mere empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement, curtailment and even abrogation of these rights in circumstances not visualized by the Constitution makers might become necessary, their claim to supremacy or priority is liable to the overborne at particular stages in the history of the nation by the moral claims embodied in part IV.

The National Human Rights commission and the state Human Rights Commissions constituted under the provisions of the protection of Human Rights Act, 1993 are important adjuncts to the already existing control mechanism to counteract and prevent the violation of human rights of the people of India, in order to safeguard the expanding horizon of personal liberty in its various dimensions.