

Redemption of Article 21 of the Constitution from the IX Schedule black hole

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*The God who gave us life, gave us  
liberty at the same time - Thomas Jefferson*

Article 21 of the Constitution is undoubtedly Godly for it secures to all natural persons<sup>1</sup> including foreigners<sup>2</sup> two rights- right to life and right to personal liberty by prohibiting the deprivation of these rights except according to procedure established by law. The right to life includes the right to live with dignity and all that goes along with it...<sup>3</sup> Personal liberty is a compendious term to include within itself all the varieties of rights which go to make up the personal liberty other than those dealt with in the several clauses of Article 19 (1)...Article 21 takes in and comprises the residue.<sup>4</sup> The deprivation of the rights under Article 21 shall be unauthorized unless there is a fair, just and reasonable procedure<sup>5</sup> prescribed by a valid statute. No executive fiat would do.<sup>6</sup>

Article 21 has perhaps enjoyed the widest and most creative interpretation than any other provision. *Menaka Gandhi v UOI*<sup>7</sup> has brought life to article 21<sup>8</sup>. Described as the procedural magna carta protective of life and liberty<sup>9</sup> Article 21 has produced several fundamental rights over

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1. Article 21 doesnot apply to corporate bodies: Seethapathi Nageshwara Rao v State of A.P., AIR 1978 AP 121
  2. NHRC v State of Arunachal Pradesh, AIR 1996 SC 1234
  3. Francis Coralie v Delhi, AIR 1981 SC 746 at 753
  4. Kharak Singh v State of UP, AIR 1963 SC 1295 at 1302
  5. Maneka Gandhi v UOI, AIR 1978 SC 597
  6. Supra n. 4. See also D.B.M. Patnaik v State of A.P., AIR 1974 SC 2092
  7. Supra n. 5
  8. M.P. Jain, Indian Constitutional Law, Wadhwa, 2007 p.1087
  9. Iyer J. in PSR Sadhananthan v Arunachalam, AIR 1980 SC 856

and above those expressly guaranteed under Part III of the Constitution<sup>10</sup>. The exploration continues and depends on the judicial efforts within the matrix determined by the social, economic and political forces.

Article 21 has provoked a lot of research and continues to attract researchers. The object of this paper is to study the impact of Schedule IX on Article 21.

Life and liberty are absolutely sacred<sup>11</sup> and are recognized as human rights in all UN and regional conventions.<sup>12</sup> ICCPR permits states to derogate from responsibilities in respect of a few human rights during national emergencies. But no derogation from right to life is permitted although right to liberty may be derogated from.<sup>13</sup> The lone dissenting voice of Justice Khanna in *ADM Jabalpur v Shivkant Shukla*<sup>14</sup> evoked a constitutional amendment guaranteeing that the enforcement of Articles 20 & 21 shall not be suspended even during emergency.<sup>15</sup> Article 21 applies to the area of legislative privileges also<sup>16</sup>

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10. Examples : Right to livelihood : Olga Tellis, AIR 1986 SC 180

: Right to Privacy : n .4

: Right to speedy trial: Hussainara Khatoon, AIR 1979 SC 1360

: Right to legal aid: M. H. Hoskot, AIR 1978 SC 1548

: Right to environment: M.C.Mehta v UOI, AIR 2001 SC 1948

: Right to information: Indian Express, AIR 1989 SC 190

: Right against custodial violence : D K Basu AIR 1997 SC 610

: Right to compensation for violation : Rudul Shah, AIR 1983 SC 1086;

Nilabati Behera, AIR 1993 SC 1960

: Right against honour killing : Sujit Kumar v UP, AIR 2002 All 265

11. CAD, Vol-I

12. UDHR, ICCPR, European Convention 1950, American Convention 1969, African charter

13. Article 4, ICCPR

14. AIR 1976 SC 1207

15. 44<sup>th</sup> amendment, 1978 Article 359

16. M.S.M. Sharma, AIR 1959 SC 395

## **The IX Schedule black hole**

Added by the First Constitutional Amendment in 1951, Article 31B brought along the IX Schedule. Article 31B safeguards legislations and regulations mentioned in the IX schedule from being challenged as violating fundamental rights. Further it is retrospective: a statute declared unconstitutional for non conformity with fundamental rights norms if and when included under the IX schedule will be deemed to have been valid from the date of legislation notwithstanding any judicial decision to the contrary. Special majority in the Parliament can immune laws from being scrutinized for violation of fundamental rights. IX schedule thus creates a black hole into which all important human rights disappear. Agrarian reforms were sought to be given a shot in the arm by short circuiting the judicial process as the delay due to litigation frustrated the social and economic reforms initiated by the government.

The acceptability of IX schedule is assailable on the following grounds-

- 1 .Ensuring an efficient judicial system cannot be excused by subverting judicial review.
2. Article 31B is dangerously silent about the category of legislations or regulations which can be included in the IX schedule. Starting with just 13 state Acts on zamindari abolition the schedule today is inundated with more than 250 Acts.
3. Fundamental rights incorporate important universal human rights some of which cannot be suspended even during national emergencies. India is a member of UN, a party to UDHR and has ratified ICCPR.
4. Socio economic reforms cannot justify exempting vital rights like life. Respect for rights shall not be seen as an obstacle in the path of benevolence or efficiency of the government; rather it is a component of good governance. Fundamental rights compliance humanizes the administration.
5. Basic structure has been declared by the Supreme Court as beyond the amending power of the Parliament.<sup>17</sup> Judicial review has been held to be a basic feature.<sup>18</sup> The harmony and balance between fundamental rights and directive principles of state policy is also a basic feature.<sup>19</sup>

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17. Keshvanandha, AIR 1973 SC 1461

18. L. Chandra Kumar, AIR 1997 SC 1125

19. Minerva Mills, AIR 1980 SC 1789

## Article 21, IX Schedule and the basic structure doctrine

In *Waman Rao v UOI*<sup>20</sup> the First amendment adding Article 31B has been declared constitutional and not damaging the basic structure. The amendments made prior to 24<sup>th</sup> April 1973<sup>21</sup> were held valid and fully protected. But the amendments made on or after that date are open to the challenge that they damage the basic structure. The court said:

...The question whether the basic structure is damaged or destroyed in any given case would depend upon which particular Article of Part III is in issue and whether what is withdrawn is quintessential to the basic structure..<sup>22</sup>

The observation in *Minerva Mills*<sup>23</sup> is pertinent-

It is possible that in a given case, even an abridgement of a fundamental right may involve violation of basic structure. It would all depend on the nature of fundamental right, the extent and the depth of the infringement, the purpose for which the infringement is made and its impact on the basic value of the constitution. Take for example, right to life and personal liberty enshrined in Article 21 . This stands on an altogether different footing from other fundamental rights... if this fundamental right is violated by any legislation, it may be difficult to sustain a constitutional amendment which seeks to protect such legislation against challenge under Article 21.

In 1999, in *I R Coelho v State of Tamil Nadu*<sup>24</sup> the question whether an Act declared unconstitutional vis a vis Articles 14, 91 and 31 can be included in the IX schedule and whether an amendment including Acts in IX schedule if found damaging the basic structure can be struck down was referred to a larger constitutional bench. A nine judge bench with the Chief Justice of India gave its decision on 11.01.2007.<sup>25</sup>

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20. AIR 1981 SC 271

21. The date on which Keshavanandha was decided.

22.Id. at p 282

23.Supra n. 19 p.1832

24.AIR 1999 SC 3179

25.AIR 2007 SC 861

The court has ruled that fundamental rights also form part of basic structure and that ninth schedule laws cannot be conferred with the kind of constitutional immunity created by Article 31B after 24<sup>th</sup> April 1973 because that would allow enlarged amending powers to the parliament contrary to the decision in *Keshavanandha*. The court has invoked the *doctrine of notice* in justifying the power of the court to strike down amendments to include Acts in the IX schedule. The parliament would have no excuse that it did not know that its amending power was limited<sup>26</sup>

The court has held that Article 32 is a basic feature. It ruled that Article 21 is the heart of the Constitution. The golden triangle of Article 21 read with Articles 14 and 19 is a basic feature as it stands for equality and rule of law.<sup>27</sup> The court has laid down that if a ninth schedule law is violative of Part III, a further examination into whether the violation is destructive of the basic structure will have to be done: if the legislation is found destructive the legislation would be invalidated. The basic structure doctrine has redeemed the essence of the vital rights in Article 21 from the IX schedule black hole.

***Declaration: This paper is the author's original and unpublished work.***

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26.Id at p.881

27.Id at p. 892

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