
A STUDY OF THE JUDICIAL TREND OF FUNDAMENTAL RIGHT TO LIFE AND PERSONAL LIBERTY AND PREVENTIVE DETENTION VIS-À-VIS FRANCIS CORALIE CASE

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ABSTRACT

The Article is a study of the development of the constitutional aspects of the fundamental right to life and personal liberty as stated under Article 21 of the Constitution of India and preventive detention vis-à-vis case of Francis Coralie Mullin v Union Territory of Delhi and Others¹. By said case, the Hon'ble Supreme Court of India had dealt with various issues such as whether any of the fundamental rights of the detainee are violated by of the conditions of Detention Order so as to result in their invalidation wholly or in part, what is the true scope and ambit of the right to life guaranteed under Article 21, whether right to life is limited only to protection of limb or faculty or does it go further, whether a person preventively detained in a prison has any fundamental rights which he can enforce in a court of law? Thereafter, the Hon'ble Supreme Court of India by various cases further interpreted said issues vis-à-vis the provisions of the Constitution of India. This Article studies the issues raised, arguments advanced, decision of the Francis Coralie case, its legal interpretation in cases thereafter and the ambit of just, fair and reasonable approach while interpreting Article 14 and 21 of the Constitution of India. ”

¹ Francis Coralie Mullin v. Administrator, Union Territory of Delhi And Others (1981) 1 SCC 608

1. Introduction

“The background of the Francis Coralie case is that it is a case filed under Article 32 of the Constitution raising issue with regard to the right of a detainee under the Conservation of Forest Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as ‘COFEPOSA’) to have interview with a lawyer and members of her family.”

The COFEPOSA is an Act of the Parliament passed in 1974 during administration of Indira Gandhi, trying to retain foreign currency and prevent smuggling. This can be ascertained by referring to the Preamble of the said Act.² It was an economic adjunct to the controversial “Maintenance of Internal Security Act (‘hereinafter referred to as MISA’)” enacted in 1971. With passing of COFEPOSA, the Maintenance of Internal Security (Ordinance) Act 1974 stood repealed.³ As per the Commentary on the Constitution of India by DD Basu, while the Janata Government repealed the MISA, they refused to repeal the COFEPOSA because while the former related to political detention, the latter was aimed at social offences which required extra power to check when inflation, black marketing, smuggling, were rampant.⁴

2. Factual analysis of Francis Coralie case

“Under an Order dated 23rd November 1979, issued under Section 3 of the COFEPOSA, the petitioner, a British national, was arrested and detained in the Central Jail, Tihar. On 27th February 1980 her petition in the Supreme Court for a writ of habeas corpus challenging her detention was rejected with the result that she continued to remain under detention in the Central Jail, Tihar.”

² An Act to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith.

Whereas violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy and thereby a serious adverse effect on the security of the State; And whereas having regard to the persons by whom and the manner in which such activities or violations are organised and carried on, and having regard to the fact that in certain areas which are highly vulnerable to smuggling, smuggling activities of a considerable magnitude are clandestinely organised and carried on, it is necessary for the effective prevention of such activities and violations to provide for detention of persons concerned in any manner therewith; Be it enacted by Parliament in the Twenty-fifth Year of the Republic of India as follows:

³ Section 14 Repeal: The Maintenance of Internal Security (Amendment) Ordinance, 1974 (11 of 1974) shall, on the commencement of this Act, stand repealed and accordingly the amendments made in the Maintenance of Internal Security Act, 1971 (26 of 1971), by the said Ordinance shall, on such commencement, cease to have effect.

⁴ DD Basu, Commentary on the Constitution of India, 2008

Whilst under detention, the petitioner experienced difficulty in having interview with her lawyer and the members of her family. Her daughter aged about five years and her sister, who was looking after the daughter, were permitted to have interview with her only once in a month and she was not allowed to meet her daughter more often, though a child of very tender age.

It seems that some criminal proceeding was pending against the petitioner for attempting to smuggle hashish out of the country and for the purpose of her defence in such criminal proceeding, it was necessary for her to consult her lawyer, but even her lawyer found it difficult to obtain an interview with her because in order to arrange an interview, he was required to obtain prior appointment from the District Magistrate, Delhi and the interview could take place only in the presence of a Customs Officer nominated by the Collector of Customs. This procedure for obtaining interview caused considerable hardship and inconvenience and there were occasions when, even after obtaining prior appointment from the District Magistrate, Delhi, her lawyer could not have an interview with her since no Customs Officer nominated by the Collector of Customs remained present at the appointed time.

The restriction on interview was imposed under clause 3(b)(i) and (ii) of the Conditions of Detention Order laid down by the Delhi Administration under an order dated 23rd August 1975 issued in exercise of powers under section 5⁵ of the COFEPOSA.

Clause 3(b) (i) prescribed that a detainee can have interview with a legal adviser only after obtaining prior permission of the District Magistrate, Delhi and the interview has to take place in the presence of an officer of Customs/Central Excise/Enforcement to be nominated by the local Collector of Customs/Central Excise or Deputy Director of Enforcement who has sponsored the case for detention.

Clause 3(b) (ii) stated that a monthly interview may be permitted for members of the family consisting of wife, children or parents of the detainee.

⁵ 5. Power to regulate place and conditions of detention:

Every person in respect of whom a detention order has been made shall be liable -

(a) to be detained in such place and under such conditions including conditions as to maintenance, interviews or communication with the appropriate Government may, by general or special order, specify; and (b) to be removed from one place of detention to another place of detention, whether within the same State or in another State by order of the appropriate Government: Provided that no order shall be made by a State Government under clause (b) for the removal of a person from one State to another State except with the consent of the Government of that other State.

The Petitioner therefore under Article 32 challenged the constitutional validity of clause 3(b) (i) & (ii) of the Conditions of Detention Order with prayer that the Administrator of the Union Territory of Delhi and the Superintendent of Tihar Central Jail be directed to permit her to have interview with her lawyer and the members of her family without complying with the restriction in those subclauses.”

3. Issues Involved in francis coralie case“

The inter alia issues raised in the Francis Coralie case were as such:

1. Whether any of the fundamental rights of the detainee are violated by Clause 3(b)(i) & (ii) of the Detention Order so as to result in their invalidation wholly or in part?
2. What is the true scope and ambit of the right to life guaranteed under Article 21?
3. Whether right to life is limited only to protection of limb or faculty or does it go further?
4. Whether a person preventively detained in a prison has any fundamental rights which he can enforce in a court of law?”

4. Arguments advanced in francis coralie case

“Controversy arising from rival contentions was as such:

The petitioner contended that allowing interview with the members of the family only once in a month was discriminatory and unreasonable, particularly when undertrial prisoners were granted the facility of interview with relatives and friends twice in a week under Rule 559A and convicted prisoners were permitted to have interview with their relatives and friends once in a week under Rule 550 of the Rules set out in the Manual for the Superintendence and Management of Jails in the Punjab.

The petitioner also urged that a detainee was entitled under Article 22 of the Constitution to consult and be defended by a legal practitioner of his choice and he was, therefore entitled to the facility of interview with a lawyer whom he wanted to consult or appear for him in a legal proceeding and the requirement of prior appointment for interview and of the presence of a Customs or Excise Officer at the interview was arbitrary and unreasonable and therefore violative of Articles 14 and 21.

The respondents resisted the contentions of the petitioner and submitted that Clause 3(b)(i) & (ii) were not violative of Articles 14 and 21, since the restrictions imposed by them were reasonable, fair and just, but stated that they would have no objection if instead of a monthly interview, the petitioner was granted the facility of interview with her daughter and sister twice in a week as in the case of undertrial prisoners and so far as interview with the lawyer is concerned, they would not insist on the presence of a customs or excise officer at the interview.”

5. The francis coralie Decision

“The writ petition under Article 32 was been allowed by the Hon’ble Supreme Court on 13.1.1981, by a division bench consisting of P.N. Bhagwati and S. Murtaza Fazal Ali JJ.

Clause 3(b) (i) & (ii) regulating the right of a detainee to have interview with a legal advisor of his choice, as violative of Article 14 and 21, were held unconstitutional and void.

While declaring Clause 3 (b) (i) as constitutionally invalid, the Court observed that it would be reasonable if a detainee were to be entitled to have interview with his legal adviser at any reasonable hour during the day after taking appointment from the Superintendent of the jail, which should be given by the Superintendent without any avoidable delay. The interview need not take place in the presence of a nominated officer of Custom/ Central Excise/ Enforcement but if the presence of such officer can be conveniently secured at the time of interview without involving any postponement of the interview, then such officer and if his presence cannot be secured, then any other jail official may, if though necessary, watch the interview but not as to be within hearing distance of the detainee and the legal adviser.

While declaring Clause 3(b) (ii) as constitutionally invalid, the Court observed that a detainee must be allowed to have atleast two interviews in a week with relatives and friends and it should be possible for a relative or friend to have interview with the detainee at any reasonable hour on obtaining permission from the Superintendent of the Jail and it should not be necessary to seek the permission of the District Magistrate, Delhi, as the latter procedure would be cumbersome and unnecessary from the point of view of security and hence unreasonable.”

6. Reasons for francis coralie decision

“The reasons for deciding the questions of law are as such:

The reasoning behind deciding first issue, i.e. whether any of the fundamental rights of the detainee are violated by Clause 3(b)(i) & (ii) of the Order of Detention so as to result in their invalidation wholly or in part, was as such:

Clause 3(b) (i) & (ii) were held unconstitutional and void, being violative of Article 14 and Article 21 of the Constitution of India for the following reasons:

As per 3(b)(i) Clause, the legal adviser could have interview with a detainee only by prior appointment after obtaining permission of the District Magistrate, Delhi. This would obviously cause great hardship and inconvenience because the legal adviser would have to apply to the District Magistrate, Delhi well in advance and then also the time fixed by the District Magistrate, Delhi may not be suitable to the legal adviser who would ordinarily be a busy practitioner and, in that event, from a practical point of view the right to consult a legal adviser would be rendered illusory.

Moreover, the interview must take place in the presence of an officer of Customs/Central Excise/Enforcement to be nominated by the local Collector of Customs/Central Excise or Deputy Director of Enforcement who has sponsored the detention and this too would seem to be an unreasonable procedural requirement because in order to secure the presence of such officer at the interview, the District Magistrate, Delhi would have to fix the time for the interview in consultation with the Collector of Customs/Central Excise or the Deputy Director of Enforcement and it may become difficult to synchronise the time which suits the legal adviser with the time convenient to the concerned officer and furthermore if the nominated officer does not, for any reason, attend at the appointed time, as seems to have happened on quite a few occasions in the case of the petitioner, the interview cannot be held at all and the legal adviser would have to go back without meeting the detainee and the entire procedure for applying for an appointment to the District Magistrate, Delhi would have to be gone through once again.

As Clause 3(b)(ii) restricts the interview only to once in a month in case of a detainee, can possibly be regarded as reasonable and non-arbitrary, particularly when a detainee stands on a higher pedestal than an undertrial prisoner or a convict.

Article 21 requires that no one shall be deprived of his life and liberty except according to procedure established by law and this procedure must be reasonable, fair and just and not

arbitrary, whimsical or fanciful. A law therefore has to pass the test of both Article 22 and Article 21.

On second issue i.e. what is the true scope and ambit of the right to life guaranteed under Article 21, the reasoning of the Hon'ble Court was as such:

The Court reasoned that Article 21 is a constitutional provision and a fundamental right, and therefore, the attempt should always be to expand the reach and ambit of the fundamental right rather than to attenuate its meaning and content.

Liberal construction: Principle of construction requires that a constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force in relation to the fundamental rights enacted by the Constitution. The fundamental right to life which is most precious human right and which forms ark of all other rights, must therefore be interpreted in a broad and expansive spirit so as to invest with significance and vitality which may endure for years to come and enhance the dignity of an individual and worth of the human person.

P.N. Bhagwati J. emphasised that the right to life does not means mere animal existence. The inhibition against its deprivations extends to all those limbs and faculties by which life is enjoyed.

On 3rd issue i.e. whether right to life is limited only to protection of limb or faculty or does it go further, the reasoning of the Hon'ble Court was as such:

'*Right to life*' includes the '*right to live with human dignity*' and all that goes alongwith it - namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

This 'right to live' can concededly be abridged according to procedure established by law and therefore when a person is lawfully imprisoned, he is bound to suffer attenuation to the extent to which it is incapable of enjoyment by reason of incarceration. But under the 'right to live with human dignity', under the right to life, he would be entitled to meet his family and friends

and no prison regulation or procedure laid down by prison regulation regulating the right to have interviews with members of the family and friends can be held as constitutionally valid under Article 21 and Article 14, unless it is reasonable, just and fair.

On the 4th issue i.e. whether a person preventively detained in a prison has any fundamental rights which he can enforce in a court of law, the reasoning of the Hon'ble Court was as such:"

A prisoner or detainee is not stripped of his fundamental or other legal rights, save those which are inconsistent with incarceration and if the constitutional validity of such law is challenged, the court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just. If the law is not fair, just and reasonable, then the court will spring into action and run to the rescue of the detainee."

7. Judicial Trend

"P. N. Bhagwati J. has time and again played an important role in ensuring social justice by his judgments. He played a significant role in the post-Emergency period to uphold the principle of social justice, constitutional propriety and human rights. He played an important role in directing the Indian State to fulfil its welfare goals and implement the Directive Principles of State Policies. He emphasised that the Fundamental Rights and Directive Principles of State Policies are complementary to each other and one is not subordinated to other.⁶

Article 21 guarantees the right to life and personal liberty. The narrowest meaning of life will be to remain alive; a little wider meaning would include even those things that sustain life. But by Francis Coralie case, the Supreme Court included even those aspects which make life liveable. In this case, the Hon'ble Supreme Court rightly applied "judicial creativity" to Article 21 as one of the techniques⁷ of judicial review:

- To the expression 'right to life', by including the right to live with human dignity.
- To the expression 'right to personal liberty', by including in it the right to socialise with members of family and friends.

⁶ Geetanjoy Sahu, *Remembering Justice PN Bhagwati*, 52 ECONOMIC AND POLITICAL WEEKLY 27, 29 (2017)

⁷ Judicial creativity, judicial balancing, judicial deference and judicial activism are few techniques which the Courts generally apply while exercising their power of judicial review.

- To the expression ‘procedure established by law’, by observing that the procedure regulating the right of detainee to interview with lawyer must be just, fair and reasonable. This right is included under the right to live with human dignity under the umbrella of the right to life and personal liberty.

There is separation of powers between the legislature, executive and the judiciary in India. However, if the relevant political department is found to be failing either because of inertia or because of design, and the court intervenes to fill in the void or to correct the situation, it should be considered as judicial activism. Separation of powers is one of its objections.⁸ Judicial activism is a judicial philosophy which motivates judges to depart from the traditional precedents in favour of progress and new social policies. In the Francis Coralie case, the Hon’ble Supreme Court played an activist role by widening the ambit of rights of a detainee, by not restricting the preventive detention law till Article 22 but also interpreting same vis-a-vis Article 21 of the Constitution of India.

As per the Halsbury’s Law of India⁹, sentencing principles must be considered by the court by making distinction between “punitive” and “preventive” detention. Though the element of detention is a common factor in cases of preventive as well as punitive detention,¹⁰ the two are qualitatively different¹¹ and there is a vast difference in their objective.¹² Punitive detention follows a sentence awarded to an offender for proven charges in a trial by way of punishment and has in it the elements of retribution, deterrence, correctional factor and institutional treatment in varying degrees. On the contrary, preventive detention is an extraordinary measure resorted to by the state on account of compulsive factors pertaining to maintenance of public order, safety of public life and the welfare of the economy of the country.¹³

Therefore, in the Francis Coralie case the Hon’ble Supreme Court was right in examining the difference and observing that in case of punitive detention, the person detained is given the fullest opportunity to defend himself whereas in a case of preventive detention, it is detention on the basis of suspicion and the opportunity that a detainee has for contesting the executive action is very limited. Having regard to this distinctive character of preventive detention, the

⁸ Uday Raj Rai, Constitutional Law I Structure, (2016)

⁹ HALSBURY LAW OF INDIA (CRIMINAL LAW) (105.353) 2007

¹⁰ Pushpadevi M Jatia v M L Wadhavan (1987) 3 SCC 367

¹¹ Sunil Fulchand Shah v Union of India (2000) 3 SCC 409

¹² Pushpadevi M Jatia v M L Wadhavan (1987) 3 SCC 367

¹³ Pushpadevi M Jatia v M L Wadhavan (1987) 3 SCC 367

restrictions placed on a person preventively detained must, consistently with the effectiveness of detention, be minimal.¹⁴

The observation in this case that a detainee has the right to consult a legal advisor of his choice for any purpose including his release from preventive detention has been left open by the court even in *A.K. Roy v. Union of India*¹⁵ without confirmation or rejection. But it has been held that “if the detaining authority or the government takes the aid of legal practitioner or advisor before the Advisory Board, the detainee must be allowed the facility of appearing before the Board through a legal practitioner, and denial of such facility invalidates detention.”¹⁶

In a decision passed by the Rajasthan High Court, it has been held that the person arrested has a right to consult a legal advisor of his own choice, ever since the moment of his arrest and also to have effective interview with the lawyer out of the hearing of the police, though it may be within their presence.¹⁷ This right extends to any person who is arrested, whether under the general law or a special statute.^{18,19}

In a recent judgement passed on 13th May 2016 in the case of *Subramanian Swamy v Union of India*, the Hon’ble Supreme Court while upholding the constitutional validity of law of defamation under Section 499, 500 of the Indian Penal Code in India, dealt with the spectrum of rights under Article 21 of the Constitution of India. The Hon’ble Supreme Court affirmed the *Francis Coralie Mullin* case²⁰ by observing that “*it has also been laid down in the said decision that the right to life has to be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance dignity of an individual and worth of a human being.*”²¹

In a more recent judgment passed on 24th August 2017, in the case of “*Justice K S Puttaswamy (Retd.) and anr. v. Union of India (Right to privacy case)*”²², a nine judge bench of the Hon’ble Supreme Court while analysing the evolution of privacy doctrine in India, jurisprudence on dignity, India’s commitments under the International Law, affirmed the case of *Francis Coralie*

¹⁴ *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608

¹⁵ *A.K. Roy v. Union of India* (1982) 1 SCC 271

¹⁶ V.N. Shukla, *Constitution of India*, 2016

¹⁷ *Motilal v. State* AIR 1954 Raj 241

¹⁸ *State of MP v. Shobharam* AIR 1966 SC 1910

¹⁹ DD Basu, *Commentary on the Constitution of India*, Volume 3, 2008

²⁰ *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608

²¹ *Subramanian Swamy v. Union of India, Ministry of Law and Others* (2016) 7 SCC 221

²² *Justice K S Puttaswamy (Retd.) and anr. v. Union of India* WRIT PETITION (CIVIL) NO 494 OF 2012

v. Union of India²³ observed that “*Liberty is closely linked to dignity. Privacy is therefore necessary in both its mental and physical aspects as an enabler of guaranteed freedoms.*”

Recently in a case decided on 21.09.2022 by a Division bench of the Hon’ble Madras High Court held that person does not lose fundamental rights on conviction or preventive detention. In same case, while deciding on inter alia issue of compensation, the Hon’ble Court quoted Abraham Lincoln as saying “*Those who deny freedom to others, deserve it not for themselves*”.²⁴

²³ Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) 1 SCC 608

²⁴ Manokaran v State of Tamil Nadu and Others H.C.P. No.297 of 2022