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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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PROTECTION AGAINST ARBITRARY ARREST AND DETENTION IN INDIA-A LEGAL ANALYSIS

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Abstract:

Arrest and detention are the powers granted to the state in India. India is a democratic country and having obligation to protect fundamental rights of the individual. The individuals are granted with right to personnel liberty in India. The state while invoking the above powers is expected to ensure that the arrest and detention is not arbitrary and according to the law. To ensure protection against the arbitrary arrest the state need to follow the Constitutional, statutory and guidelines issued by the judiciary. This article deals about the protection available against the arbitrary arrest and detention in detail to ensure the fundamental right of personnel liberty to the individuals in India.

Introduction:

In India, right to life and personnel liberty is granted to all the persons under Article 21² of the Constitution of India. It is not an absolute right and it can be curtailed by the procedure established by law. The law enforcement agencies have been given power to arrest and detain a person but they have to adhere to the safeguards provided under Article 22³, which provides protection against arbitrary arrest and detention. Even though there are constitutional safeguards against the arbitrary arrest and detention the law enforcement agencies are accused of violating the safeguards. The nature of the protection provided against the arbitrary arrest and detention in India are analyzed in this paper.

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²Article 21. Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

³ The Constitution of India 1950.

Protection against arbitrary arrest and detention under Indian Constitution:

All countries are confronted by the practice of arbitrary arrest and detention. Since detention in itself is not a violation of human rights, In India, The Constitution of India 1950 has progressively endeavoured to define the limits beyond which a detention, whether administrative or judicial, would become arbitrary under Article 22, which is comprised of the right to freedom against arbitrary arrest in punitive and preventive detention. This article is divided into two main sections, protections against preventive detention and protection and rights granted in case of arbitrary arrest, often known as punitive detention. The major distinction is whether or not a person is accused of a crime. A person is limited on a reasonable suspicion in the case of preventative detention rather than being charged with a crime, which happens in the case of a punitive arrest.

A. Protection against Punitive Arrest and detention:

Punitive detention means detention as a punishment for a criminal offence. It occurs after an offence is actually committed, or an attempt has been made towards the commission of that crime. The person may get arrested on suspicion that he or she had committed a crime or attempt to commit a crime and subject to trial before the court of law. Article 22(1) and (2) of the Constitution of India 1950 provides protection against punitive arbitrary arrest and detention.

1. Right to be informed of the grounds of arrest:

[Article 22\(1\)](#)⁴ states that any person who is arrested, cannot be detained in custody without being informed of the grounds of any such arrest as soon as possible. Section 50 of Cr.P.C. states that it is the duty of every police officer or any other person authorized to arrest any person without a warrant, to let the person being arrested know the grounds of arrest immediately. Both these laws clearly portray that no arrest can be made because it is lawful for the police to do so. Every arrest requires reason and justification, apart and distinct from the power to arrest. In view of this, it was held in the case of *Joginder Kumar v. State of U.P.*⁵ that a detained person should know the cause of his detention and is entitled to let any third person know the location of his detention. Non-compliance with this

⁴ The Constitution of India 1950.

⁵ AIR 1994 SC 1349.

provision renders the arrest illegal.

2. Right to be defended by a lawyer of his own choice:

Article 22(1)⁶ also states that any person who is arrested has the right to consult at all times and be defended by a lawyer of his own choice. The right of the accused to be defended by a lawyer of his own choice was violated in the case of *A.S. Mohammed Rafi v. State of Tamil Nadu*⁷, where the Bar Association of Coimbatore passed a resolution that none of its members would defend the policemen who had allegedly assaulted some lawyers. Such resolutions stood illegal as the court observed that every person, regardless of the type of accusations on him, had a right to be defended in a court of law. It was held that this resolution contradicted with the right of the accused and was also against the professional ethics of lawyers which require that a lawyer cannot refuse a brief if the client is willing to pay him and the lawyer is not engaged.

3. Right to be produced before a Magistrate:

Article 22(2)⁸ ensures the right of the accused to be produced before a magistrate. When a person is arrested, the person or police officer making the arrest should bring the arrested person before a magistrate or judicial officer without any unnecessary delay. This is also supported by Section 56 of the Cr.P.C. The right available to the accused at the first stage of production before the Magistrate is not stated directly in Article 22. It is rooted in [Section 167 of the Cr.P.C](#) and states that no magistrate can authorize the detention of the accused in police custody unless the accused is produced in person before the magistrate. This right protects the accused from being detained on wrong or irrelevant grounds.

4. No detention beyond 24 hours except by order of the Magistrate:

Article 22(2)⁹ states that no person who is arrested should be detained for more than 24 hours without being produced before a magistrate or judicial authority and getting the detention authorized. The mentioned 24 hours exclude the time of travel from the place of arrest to the magistrate's court. This provision helps to keep a check on the investigation of the police regarding the matter at hand. It

⁶ The Constitution of India 1950.

⁷ AIR 2011 SC 308.

⁸ The Constitution of India 1950.

⁹ The Constitution of India 1950.

protects the accused from being trapped into wrongful detention.

In the case of [*State of Punjab v. Ajaib Singh*](#)¹⁰, this right was infringed and thus the victim was provided compensation as constitutional remedy. It was held that cases of arrest without warrant require greater protection and production of the accused within 24 hours ensures the legality of the arrest, not complying with which would deem the arrest unlawful.

There are a few rights which are not explicitly mentioned but are interpreted by the Supreme Court in certain cases. In the case of *Hussainara Khatoon & Ors vs Home Secretary, State of Bihar*¹¹, the courts observed that a large number of people were arrested awaiting their trial in a court of law. The arrests were made irrespective of the charge and its graveness. The accused were under arrest, deprived of their freedom even before the commencement of their trial and the charge actually being proved which stands unreasonable. The Supreme Court showing concern over the matter interpreted that speedy trial is a constitutional right although it is nowhere explicitly mentioned. It was held that an investigation should be held as soon as possible and in no case is the state permitted to deny speedy trial on any grounds. It was also stated that in cases of arrest for trivial charges the trial must be completed within six months. It was also declared that the right to free legal aid is a fundamental right which was later expressly mentioned through amendments. It was also observed that the Supreme Court had powers to enact a DPSP into a fundamental right. Further, the court also holds a constitutional obligation to provide free legal aid to every indigent person under trial. Although this right is not mentioned under the purview of Article 22, it still witnesses a direct mention under Article 39(A) and is implicit in Article 21 of our constitution.

Despite the above protection still the arbitrary arrest and detention is used as tool for the police authorities to violate human rights of the people. The Supreme Court of India in the case of [*D K Basu v. State of West Bengal*](#)¹², enumerate 11 guidelines and requirements for arrests and detentions. These guidelines are an addition to constitutional and statutory safeguards which did not contradict any of them.

¹⁰ AIR 1953 SC 10.

¹¹ AIR 1979 SC 1369.

¹² AIR 1997 SC 610.

The guidelines read as follows:

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name clear identification and name tags with their designations. The particulars of all such police personnel who handle the interrogation of the arrestee must be recorded in a register.
2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up shall be entitled to have one friend or relative or other person know to him or have interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.
5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or detained.
6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee and the police officer effecting the arrest and copy provided to the arrestee.

8. The arrestee should be subjected to a medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by the Director, of Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.
9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.
10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.
11. A police control room could be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.”

The court also opined that failure to comply with the above requirements, apart from rendering the official concerned liable for departmental action, would also render him liable to be punished for contempt of court and the proceedings for contempt of court could be instituted in any High Court of country, having territorial jurisdiction over the matter.

The decisions emanating from this case also led to the incorporation of Section 50A of Cr.P.C. which imposes a legal obligation on the Police to give information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be nominated by the arrested person for the purpose of giving such information.

Article 22(3)¹³ clearly states that none of the rights mentioned in clause 1 and 2 of the Article 22 would be applicable for a person who is deemed to be an enemy alien and anybody who is arrested or detained under the law providing for preventive detention.

B. Protection against Preventive Detention:

If a person is deemed likely to commit a crime by the police officials, the executive authority will have the power to issue orders to arrest and detain a person. Even without accused of an offence the

¹³ The Constitution of India 1950.

person will be arrested and detained. The detention arising out of this is preventive detention

Preventive detention is frequently referred to as the "necessary evil" of the constitution because it can be used in a variety of situations, not all of which are fair and rational. It is the most divisive aspect of the basic rights. The clause solely refers to the rights that detainees may exercise; it says nothing about the precise reasons for or conditions of confinement. Thus, it provides the government great latitude to use preventative detention as a tool however and whenever it pleases. The freedom of the masses has been severely restricted and is still being restricted in this way. Article 22 further deals with certain rights which are provided in case of preventive detention.

1. Review by Advisory Board:

Article 22 (4)¹⁴ states that no law framed for preventive detention gives authority to detain any person for more than 3 months unless; an advisory board reports a sufficient cause for such detention. The people on the advisory board should be equally qualified as that of a judge of the high court. The report needs to be submitted before the expiration of said 3 months.

2. Communication of grounds of detention to detenu:

Article 22 (5)¹⁵ states that any authority while detaining any person under law providing for preventive detention shall communicate the grounds of detention to the person as soon as possible. The ground of detention should have a rational connection with the object which the detenu is prevented from attaining. The communication should provide all the material facts related to the ground and should not be a mere statement of facts. The detaining authority is under no obligation to provide the grounds of detention to detenu prior to his arrest, but is advised to do so at the earliest thereby providing an opportunity of representation to the detenu as well. A person already in custody can be detained when there are reasonable and sufficient causes to do so. The focal problem being that in cases of preventive detention there is no way to check whether the cause of detention is just and reasonable until it is presented to the advisory board which is applicable after the stretch of 3 months.

¹⁴*Ibid.*

¹⁵ The Constitution of India 1950.

3. Detenue's Right of representation:

Clause 5 of the article 22¹⁶ also states that the grounds of the detention should be communicated as soon as possible in order to enable the right of representation to the person. The authority providing the detention order shall afford to the person the earliest opportunity of making a representation against the order. The article does not provide any information about the method of dealing or disposing the representation made by the detenue. It just extends to providing the right of representation. There is no further description or time limit assigned for the end result of representation made, which can be inferred as a means to keep lingering the issue at hand and aid in wrongful detention of the person. The Conservation of Foreign Exchange, Prevention of Smuggling Activities Act (COFEPOSA), 1974 gave wide powers to the executive to detain individuals on apprehension of their involvement in smuggling activities. The section 3 of this Act is shared with clause 5 of Article 22 which states that the ground of detention should be communicated to the detenue within minimum five or a maximum of fifteen days. In no case should it be delayed beyond fifteen days. It must be completely furnished to the detenue, including all the facts and should not be only bare recital of the grounds. Any lapse within this provision would render the detention order void.

Article 22(6)¹⁷ states that the detaining authority is not mandatorily required to disclose any such facts which it considers to be against the public interest to disclose. This clause does not mention any other specifications or details within the topic and hence is regarded as the utmost arbitrary and regressive. It has no solid basis or reasoning to resonate with 'against the public interest' phrase and can be arbitrary to any extent.

Article 22 (7)¹⁸ is the most regressive of all clauses; it authorizes the parliament to describe the circumstances and categories of cases where detention of a person may be extended beyond three months without the opinion of the advisory board. It can also regulate the maximum period for which anyone may be detained under laws providing for preventive detention. The parliament also exercises hold on the methodology applied by the advisory board in the enquiry of detention cases. This clause provides for detention in cases of subjective satisfaction of the authority, where the element of 'subjective satisfaction' can be unjust and biased in any and every possible situation thus making it

¹⁶ *Ibid.*

¹⁷ The Constitution of India 1950.

¹⁸ *Ibid.*

an equipment to mask over the legally and morally wrong detentions. Hence, this clause provides complete subjectivity and authority to the government which is the cause of arbitrary and unjust cases of wrongful detention. The authorities are at a position enough to tweak the facts and circumstances of the case to project it fair and there is no antidote for the protection of such a misery. This clause is the focal reason of criticism and misuse of this provision.

In a recent a case *Arnesh Kumar v. State of Bihar*¹⁹ Supreme Court of India reiterated the guidelines laid down by the top court for arrest under Section 498A of the Indian Penal Code, 1860 and for other offences punishable by a maximum jail term of seven years. The Supreme Court referred to the Crime in India Statistics published by National Crime Records Bureau by Ministry of Home Affairs. The data shows that 1, 97,762 persons were arrested in the year 2012 for the offence under Section 498-A of the Indian Penal Code and out of which 47,951 were women which depicts the mother and sister of the husband that are caught in the net of this offence. The rate of filing charge sheet for the offence under section 498-A is 93.6% while the conviction rate is only 15% which may likely states that in pending trial maximum cases would end up in acquittal.

The Supreme Court made observation with regard to arrest that “Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police. There is a battle between the law makers and the police and it seems that police has not learnt its lesson; the lesson implicit and embodied in the code of criminal procedure. It has not come out of its colonial image despite six decades of independence; it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising drastic power of arrest has been emphasized time and again by the courts but has not yielded the desired result. Power of arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officer who lack sensitivity or act with oblique motive”.

The Supreme Court of India under Para 13 of the judgement in order to ensure that police officer do not arrest the accused unnecessarily and magistrate do not authorize detention, the Court giving the

¹⁹AIR 2014 SC 2756.

following directions:

1. All the State Government should instruct its police officers not to automatically arrest a person when an offence under section 498-A of the Indian Penal Code is registered. The necessity of arrest arises when the case falls under the parameter of section 41 of the Code of Criminal Procedure.
2. All police officers be provided with the check list containing specified clauses under Section 41 (1) (b) (ii).
3. The police officer shall forward the check list duly filed and furnished with the reason and material necessitated the arrest while producing accused before the magistrate for further detention.
4. The magistrate while authorizing the order of further detention shall rely upon the report furnished by the police officer and only after recording the reason duly furnished on Police report and on the satisfaction, the Magistrate will authorize further detention.
5. The decision not to arrest an accused be forwarded to Magistrate within two weeks from the date of institution of the case with a copy of Magistrate which may extended by the Superintendent of police of the district for the reason to be recorded in writing.
6. Notice of Appearance in terms of Section 41-A of the Code of Criminal Procedure be served upon the accused within two weeks from the date of institution of case which may be extended by the Superintendent of Police after recording the reason in writing.

Failure to comply with the directions mentioned above shall render the police officer liable to be punished for contempt of court before High Court having jurisdiction. Authorizing detention by the Judicial Magistrate without recording the reason, the concerned Judicial Magistrate shall be liable for Departmental Proceedings by the High Court.

Conclusion:

The punitive arrest and detention is concerned even though there are specific rights guaranteed under the Indian Constitution and specific guidelines from the Supreme Court of India. In a recent incident at Sathankulam Police Station, Thoothukudi District Mr. P. Jeyaraj and his son Mr. J. Beniks were arrested by the police for allegedly keeping their mobile accessories shop open beyond permissible hours on June 19, 2020 and they were assaulted and tortured by the police officials in custody, leading

to their deaths on June 22, 2020 at the Kovilpatti General Hospital. The Central Bureau of Investigation took up the Investigation and filed charge sheet against the police officials stating that there were no violation of lock down rules. A Judicial Inquiry was conducted by the Judicial Magistrate Mr. M. S. Bharathidasan and he submitted a report about the violation of safeguards to be followed during arrest and detention. The law enforcement authorities quite often failed to adhere to the laws it results in infringements of the basic rights of the accused person's. Apart from the departmental actions the authorities who violate the law must be charged with criminal offence. If it happens the authorities will comply with the legal requirements during arrest and detention without fail.

