An overview of protection against arbitrary arrest and detention

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Introduction

Given that India is the largest democracy in the world, it is crucial that its Constitution upholds the fundamental principles of democracy as a whole. By enshrining fundamental rights in Part III of the Indian Constitution, the Constitution aims to safeguard the fundamental civil and human liberties of its citizens. One such fundamental right is Article 22 of the Indian Constitution, which guarantees protection against being detained or arrested in certain circumstances. Both citizens and non-citizens are entitled to exercise this fundamental right in opposition to any arrest or detention that is imposed against them as a result of a capricious or arbitrary use of authority.

Due to its conflict with the freedom given by Article 21, which deals with the right to life and liberty, Article 22 has long been the subject of discussions. Originally intended to protect society from undermining the sanctity of the Constitution, the provision instead restricted the freedom of the general public. It is challenging for this article to achieve absolute stability within the constitutional framework because its subject matter has always remained highly arbitrary and open to interpretation. It has been criticised numerous times throughout India's history, with references to the greatest excesses of the emergency in 1975 as an illustration of the abuse that Article 22 permits. Article 9(1) of the International Covenant on Civil and Political Rights and Article 9 of the Universal Declaration of Human Rights protect individuals from arbitrary arrest and detention by execution authorities, demonstrating the significance of Article 22 as an indispensable component of fundamental rights. The present article is an overview of the protection against arbitrary arrest and detention under the Indian Constitution.

Right to freedom from arbitrary detention under International Law

1. Nobody "should be subjected to arbitrary arrest, detention, or exile," according to Article 9 of the *Universal Declaration of Human Rights*.
2. The *International Covenant on Civil and Political Rights (ICCPR)*, which states in Article 9 that "Everyone has the right to liberty and security of person," has also recognized this right. No person shall be arbitrarily detained or arrested and nobody's freedom may be taken away unless certain conditions are met and legal procedures are followed.
3. The Human Rights Committee, a Treaty Body tasked with ensuring that States are abiding by the ICCPR, has additionally stated that *"Any substantive basis for arrest or detention shall be provided by law and shall be specified so as to avoid an arbitrary or unduly wide construction or application. Without such a valid justification, it is illegal to restrict someone's freedom. Additionally illegal is continued incarceration despite a legitimate amnesty or an operative judicial order of release."*

Laws on preventive detention

Article 22(4) to (7) spells out the steps that must be taken when a person is arrested and detained under any law that allows for preventive detention. In Indian laws, there is no official definition of preventive detention, but it is defined as an opposite of the word "punitive." Preventive detention is sometimes called a "necessary evil" of the Constitution because it can be used in many different ways, not all of which are fair and reasonable. People were put in jail to keep them from undermining the sanctity of the Constitution, putting the security of the state at risk, upsetting India's relationships with other countries, or making it harder to keep the peace.

1. **The Preventive Detention Act of 1950**: The Act was passed as a temporary measure to give the central and state governments the power to detain a person who poses a risk to India's security, defence, relations with other countries, public order, and the continuation of services and essentials that the community needs.
2. **Maintenance of Internal Security Act, 1971:** The Preventive Detention Law was brought back to life in the form of the Maintenance of Internal Security Act, 1971.
3. **Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980:** In less than two years, the preventive detention law was brought back in the form of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980.
4. **National Security Act, 1982:** In 1980, the President signed the National Security Ordinance, which was later replaced by the Act. It allowed for the preventive detention of people who were responsible for starting communal or caste riots that were a serious threat to the security of the state. In the case of *A.K. Roy v. Union of India* (1981), the legality of this Act and rejected the idea that it was unclear or arbitrary.
5. **Terrorist and Disruptive Activities (Prevention) Act of 1987**: The act was passed to stop terrorism in the country, and in order to do that, the state governments were given a lot of power. There was a lot of misusing of these powers, so in *Kartar Singh v. State of Punjab* (1994), the Apex Court put limits on how it could be used.

India uses preventive detention even when the country is at peace and there is no threat to the national security of the State. This is one of the main reasons why preventive detention laws and rules are put in place and followed. During peacetime, this is something that no other civilised country does.

Article 22 : protection against preventive detention laws in the Constitution

Before the Constitution (44th amendment) Act of 1978, Article 22(4)(a) stated that no person could be detained for longer than 3 months under preventive detention law unless an advisory board made up of individuals who are or have previously been qualified to serve as high court judges has given their opinion that the cause of the detention is justified before expired month.

1. The government is required to remove the order if the advisory board finds the detention to be unwarranted. In a similar situation, the detaining authority is free to choose the length of the imprisonment.
2. However, in the second scenario, the detention may only last for the maximum amount of time allowed by any statute established by the parliament for that class of detainees, as specified in sub clause (b) of paragraph (7).
3. Any statute that permits detention for a period longer than 3 months without the advisory board's previous permission must explain the class or classes of detainees it applies to as well as the conditions surrounding its applicability, according to clause 7(a).
4. Conclusively, the aforementioned clauses remain in effect because the modification hasn't yet gone into effect. The amendment sought to reduce the maximum period of detention without the advisory board's reference from three to two months, change the advisory board's membership to a chairman and two members chosen on the advice of the Chief Justice of the relevant high court, and repeal clause 7(a), which gave the parliament the authority to enact laws allowing for detention longer than three months without the advisory board's reference.

In the case of *Huidrom Konungjao Singh v. State of Manipur* (2012), it was determined that the State also has the power to issue a detention order against a person who is already in custody, but only if the State can demonstrate that it was fully aware that the detainee was already in custody and that there are good reasons to suspect prejudice when the order is challenged.

In the case of *Ramachandra A. Kamat v. Union of India* (1980) it was observed that when the detainee receives the grounds for detention, he has the right to request copies of any comments and documents mentioned in the grounds so that he can effectively represent himself. When the detenu asks for these documents, they should be given to him right away. When the detainee requests copies of these documents, the detaining authority should be able to provide them with reasonable promptness. The specifics of each case will determine what constitutes reasonable expedition.

COFEPOSA, 1974 and Article 22(5)

The Conservation of Foreign Exchange, Prevention of Smuggling Activities Act, 1974 was put into effect in 1974, and it granted the executive broad authority to imprison people if they were suspected of engaging in smuggling activities. Clause 5 of Article 22 read with Section 3 of this Act requires the ground of detention be informed to the detained individual, within a minimum of five and a maximum of fifteen days. It should never be postponed for more than fifteen days and must be completely provided to the detainee, including all the facts, and it cannot only be a summary of the legal justifications. The detention order would be null and void if this clause were to be violated. This law is still in effect.

There is no time limit specified for the disposition of the representation, and the Article offers no guidance on how to deal with or dispose of the detenue's representation. It simply includes granting the right to representation. There is no additional explanation or deadline set for the outcome of the representation made, which can be interpreted as an effort to prolong the current problem and support the illegal detention of the person. In the case of *Icchu Devi Choraria v. Union of India* (1980), the petition questioned detune's imprisonment on various grounds. Since one basis is fatal to detention, it is not essential to list all grounds. The petitioner argued that the detaining authority did not serve copies of the statements, papers, and tapes used to justify custody. This violates Section 3 of the Act of 1974 along with clause (5) of and Article 22. The delay in supplying copies of the statements, documents and tapes was, in the submission of the petitioner wholly unjustified. This infected the continued detention of the detune with the vice of illegality.

Clause (7) : subjective satisfaction of the detaining authority

The most regressive clause in Article 22 is clause 7, which allows the Parliament to specify the conditions and types of cases in which a person's detention may be extended beyond three months without the advisory board's approval. Additionally, it can set limits on how long someone can be held against their will in accordance with statutes that allow for preventive detention. The advisory board's manner of investigating cases of incarceration is likewise under the control of the parliament. This provision allows for detention in situations when the authority feels subjectively satisfied, however "subjective contentment" is a subjective concept that can be unfair and biassed in any circumstance, making it a tool to cover up ethically and legally illegal detentions. Therefore, this clause gives the government complete subjectivity and authority, which is the root of situations of arbitrary and unjustified unlawful detention. There is no remedy for the protection from such anguish, but the authorities are in a position to adjust the facts and circumstances of the case to project it fairly. This particular clause is the main target of criticism and abuse of this clause.

In *A.D.M. Jabalpur v. S. Shukla* (1976), the court of law decided that even if the detainee establishes a prima facie case that the detention was unlawful, the authority's affidavit will serve as the response, and the investigation will be adjudicated. Courts cannot demand the production of the file or maintain that the detainee's case is unassailable due to the failure to disclose the reasons for their arrest. The result of the case was that courts were not allowed to consider whether the order of detention was unlawful or not, depending on the circumstances. This decision was overturned in the case of *A.K. Gopalan v. State of Madras* (1950).

Article 22 is an incomplete as a code

In the case of *Maneka Gandhi v. Union of India* (1978), it was determined that the law governing preventive detention must not only meet the requirements of Article 22 of the Constitution, but also meet the requirements of Article 21. In other words, the mechanism outlined in the law governing preventive detention must be reasonable, just, and fair in accordance with Articles 14, 19, and 21 of the Indian Constitution.

In recent times, approximately, 5558 people were detained in Uttar Pradesh during the CAA protest. While this number varied among states, the scenarios in Kashmir during the time of revocation of Article 370 of the Constitution, should not be shadowed. Further, there were arbitrary arrests of several political personalities who had dissented with the ongoing decision-making concerning Article 370. These arrests not only served as a precedent detrimental for democracy, but also have had severe consequences in terms of how nations across the globe viewed India. Violation of the fundamental right to freedom of speech in the name of reasonable restrictions imposed on the same have been a common sight in such incidents. Several student leaders such as Kanhaiya Kumar, Umar Khalid, Dalit activist Chandrashekhar Azad, Dr. Kafeel Khan were subject to detention by government authorities hereby infringing their fundamental rights and personal liberty guaranteed by the Indian Constitution.

Owing to the scenarios above and many in the past, the existence of Article 22 of the Constitution have often been the subject-matter of debates with contentions both for and against its function. Although we continue to presume the reckless implementation of this law by the controlling authorities, what we can think of is a more governed process in executing this provision.

Conclusion

It is time for legislators to acknowledge the pervasive arbitrariness and corruption in the use and issuance of preventative detention orders. Though the courts recognise the need for the same in the Constitution, it is time to enact stronger and more stable rules for the efficient and effective execution of these laws in the social structure. Article 22 can lead the way, but there is still more ground to cover. Under the current social structure, in which the number of crimes committed behind bars has increased with the inhumane treatment of those arrested and held in police custody, it is necessary to go beyond this article and implement more balanced and effective controls. Consequently, this provision in our Constitution necessitates an effective and in-depth study and survey of the root cause, as well as the drafting of an appropriate law that includes the necessary and efficient check and limitation mechanisms to prevent its unjust and unconstitutional use in any circumstance.
