

RIGHTS OF ACCUSED: THE CONSTITUTIONAL ASPECT

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INTRODUCTION

“The creation of constitutional government is a most significant mark of the distrust of human beings in human nature. It signalizes a profound conviction, born of experience, that human beings vested with authority must be restrained by something more potent than their own discretion.” -Raymond Moley

The Constitution of India under Article 21 that is Right to Life & Personal liberty lays down that, life and personal liberty of an individual can be deprived by a reasonable, fair and just procedure established by law. Since the beginning of civilised society, human race has always been conscious of justice and has frowned at efforts to interfere with individual Liberty and dignity. Therefore to safeguard the rights of the person who are deprived of their life and personal liberty and suffer an irreparable loss due to accusation or conviction are constitutionally recognized under Article 20 of the Constitution. A person in custody of the police, an under-trial or a convicted individual does not lose his human and fundamental rights by virtue of incarceration. And these rights are so

elemental in the imparting of justice that almost all developed countries’ in world whether it is Constitution of USA, UK or Australia have given recognition to certain rights constitutionally.

As recognized internationally Article 15 Para 1 of International Covenant on Civil and Political Rights says “No person shall be held guilty of any criminal offence which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall there be any imposition of greater penalty or punishment than that was there when the offence was committed.”¹

ARTICLE 20 AND THE PROTECTION IT GRANTS TO ARRESTED PERSON.

Article 20 gives protection to convicted persons under its different clauses. Article 20(1) provides protection against ex post facto laws, 20(2) provides protection against double jeopardy and 20(3) provide protection against self-incrimination.

I. ARTICLE 20(1) PROTECTION AGAINST EX-POST-FACTO LAWS.

The literal meaning of ex post facto law is retrospective law. According to me ex post facto law is a law which criminalizes an act which when committed wasn’t a criminal act or law which imposes greater penalties than the penalty which was there when the act was committed. As early as in 1798

¹The International Covenant on Civil and Political Rights.



in case of **Calder v. Bull**² justice Samuel Chase defined ex-post-facto law as:

- “1. Every law that makes a non-criminal action done before the passing of the law criminal; and punishes such action.
2. Every law that aggravates a crime, or makes it greater than it was, when committed.
3. Every law that inflicts a greater punishment, than the law enforced at the time of commission of crime.
4. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.”

But in India Supreme Court through several of its judgement has deviated from the definition given by Justice Chase.

Article 20(1) provides protection to convicts in two ways

1. It prohibits conviction under any law which has retrospective affect.
2. It prohibits greater penalties under any retrospective law.

Under part one of 20(1) a person can't be convicted for an offence which was not a crime when it was committed the conviction can only be done for violation of any law which was in force

at the time of such act. Any law enacted later which criminalizes any act done in past cant punish a person for the same. Immunity is thus provided to a person from being tried for an act, under a law enacted subsequently, which makes the act unlawful.³

Exceptions to Article 20(1):

- Preventive detention.⁴
- Civil Liabilities.⁵
- Tax.⁶

Article 20(1) only prohibits conviction not the trial under such laws. The change in procedure or change in courts of proceeding is not unconstitutional and can't be quashed by Article 20(1). In *Union of India v. Sukumar*⁷ Supreme court held that law which changes the venue of trial is not hit by Article 20(1). In *Sajjan Singh v. State of Punjab*⁸ the court held a change in procedural law is not hit by Article 20(1). Thus a law prescribing new rules of evidence can be made applicable on offence committed earlier.

Furthermore the law passed now but through legislative declaration deemed to have been enacted on an earlier date cannot be said to be law in force if any act committed earlier becomes an offence by such declaration and is hit by Article 20(1).

The second protection under Article 20(1) is protection of the convicts

²Dall.(3 U.S) 386.

³State of Maharashtra v. K.K SubramaniamRamaswamy, AIR 1977 SC 2091.

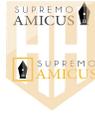
⁴Prahlad v. State of Bomaby, AIR 1952 Bom 1.

⁵Hastising Mfg. Co. v. Union of India, AIR 1960 SC 923.

⁶Jawala Ram v. Pepsu, AIR 1962 SC 1246.

⁷AIR 1966 SC 1206.

⁸AIR 1964 SC 464.



from the enhanced punishment. If any law is made by legislature and enforced by executive who increases the punishment then such law is hit by Article 20(1) of the constitution. But when there is no minimum penalty prescribed by law then any law preceding the act in question laying down minimum penalty will not be hit by Article 20(1). The same was said by Supreme Court in *K. Satwant Singh v. State of Punjab*⁹ held that an ordinance which lays down the minimum punishment or penalty where no such bar is there is not hit by Article 20(1) because “the minimum penalty prescribed by it could not be greater than what could be inflicted by the law in force at the time of commission of offence”.

An ex post facto law which mollifies the punishment of a criminal offence is not within the prohibition of Article 20. And an accused should have the benefits of such law which reduces the punishment.¹⁰

II. ARTICLE 20 (2) : PROTECTION FROM DOUBLE JEOPARDY

Any person should not be subject for the same offence to be put twice in jeopardy of life or limb. It is one of the doctrines laid down inter alia by the fifth amendment of the U.S. Constitution. This means that when a person has been tried and acquitted or convicted of an offence by a competent court, the conviction

serves as a bar to any further criminal proceedings against him for the same offence. i.e. no person be indicted to punishment and prosecution for same offence more than once and this has been developed into the ‘rule against double jeopardy’.

Ever since the commencement of the constitution of the country the principle of double jeopardy is a constitutional right, but the question arises did it exist prior to the commencement of the constitution of India, the answer is yes, but merely as a statutory right. The scope of the following provision in India is lower than that of the English or American rule, as in India, the rule of autrefois acquit is not incorporated in Art. 20(2) but only of acquit convict. For it to be invoked both prosecution and punishment should co-exist in the first instance.

Article 20(2) can only be invoked when the prosecution and punishment is for the identical offence. The same offence means an offence whose ingredients are the same. The test to ascertain whether the two offences are the same is the identity of the ingredients of the offences.

The Supreme Court explained the following proposition in the case of *State of Bombay v. S.L. Apte*¹¹: The crucial requirement for the Article 20(2) to get triggered is that both the offences should be identical. The two

⁹ AIR 1960 SC 266 : (1960) 2 SCR 89.

¹⁰ Rattan Lal v. State of Punjab, AIR 1965 SC 444 : (1964) 7 SCR 676.

¹¹ AIR 1961 SC 578 : (1961) 3 SCR 107



are analysed to be identical on the basis that ingredients of the two offences should be identical.”

PROSECUTION

The limitation read into Art. 20(2) are that the prosecution and punishment must be before a court of law, or a judicial tribunal.

The court has explained legal proposition under 20(2) as follows: to invoke the Article, the words ‘prosecuted and punished’ are to be taken not distributively. Both the factors must co-exist at the same time.

III. ARTICLE 20(3) : PROTECTIONS AGAINST SELF INCRIMINATION

The fundamental canon of criminal jurisprudence is the privilege against self- incrimination. Article 20(3) provides that no person shall be compelled to be a witness against himself. And the basic postulates of this principle are –

- That the accused is presumed to be innocent
- That it is for the prosecution to establish his guilt
- That the accused need not make any statement against his will.

Thus the privileges ensured against self- incrimination thus enables the maintenance of human privacy and observance of civilized standards in the enforcement of criminal justice. Article 20(3) which embodies this principle reads: no person accused of

any offence shall be shall be compelled to be a witness against himself.” For the protection given under article 20(3) to be claimed the following three ingredients must co-exist which were propounded by the Supreme Court in the case of **M.P. Sharma v. Satish Chandra**¹²:

1. It is a right available to a person accused of an offence
2. It is a protection against ‘compulsion’ ‘to be a witness’
3. It is a protection against such compulsion resulting in his giving evidence ‘against himself’.

TYPE OF INCRIMINATING EVIDENCE COVERED BY ARTICLE 20(3)

The most basic question arises on which the judicial opinion fluctuated was whether Article 20(3) covers something more besides oral evidence.

As held by Supreme Court in the case of **Selvi v. State of Karnataka**¹³ the Article is a privilege against ‘testimonial compulsion’.

Therefore to stabilize the opinion the Supreme Court taking a broader view in **M.P. Sharma v. Satish Chandra**¹⁴ stated that to limit the scope of Article 20(3) to oral evidence is “to confine the content of the constitutional guarantee to its barely literal import, and it covers not only oral testimony or statements in writing of the accused but also production of a thing or of evidence by other modes.”, so to restrict is to rob the article off its substantial purpose.

¹²AIR 1954 SC 300.

¹³AIR 2010 SC 1974.

¹⁴Supra, note 23.



The main question which arose in the case of **State of Bombay v. KathiKaluOghad**¹⁵ was whether 20(3) is violated when accused is directed to give his specimen hand writing, or signature, or the impression of his palms and fingers. Which was ruled out that “self-incrimination must mean conveying information based upon the personal knowledge of the person giving information” and only “personal testimony which must depend upon his volition”.

So in order to draw a balance between the exigencies of investigation of crimes and the need to safeguard the individual from being subject to third degrees and the variegated forms of torture, several types of evidences have been excluded from the purview of article 20(3).

Also explaining the scope on documentary scope supreme court in **Oghad**¹⁶ explained that: the accused may be in possession of a document, “is not the statement of the accused, which can be said to be of nature of a personal testimony.”

Therefore self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely include the mechanical process of producing documents in court which may throw light on the controversy but may not include any statement of the accused based on his personal knowledge.

With the advancement of technology, methods of investigation are now available to the investigating authorities and therefore the constitutionality of various methods is being challenged under Article 20(3). Recently according to the Bombay High Court in the case of **Ramchandra Ram Reddy v. State of Maharashtra**¹⁷: “the tests of Brain Mapping and Lie Detector in which the map of the brain is the result, or polygraph, cannot be said to be the statement made by the witness. At the most it can be called the information received or taken out of the witness.”

But later in the case of **Selvi v. State of Maharashtra**¹⁸

“Supreme Court held that the compulsory administration of certain scientific techniques, namely Narcoanalysis, polygraph Examination and the Brain Electrical Activation Profile (BEAP) bear a testimonial character and thereby triggers the protection under Article 20(3) of the constitution.”

WHAT IS COMPULSION?

In order to avail the protection under Article 20(3), not only the person making the statement out of his personal knowledge be an accused but also that he was compelled to make the statement.

As a proposition of law, the mere fact of being in police custody at the time of making the statement does not by itself

¹⁵ AIR 1961 SC 1808.

¹⁶ Id.

¹⁷ 2004 All MR (cri) 1704

¹⁸ Supra, note 24.



lead to the inference that the accused has been compelled to make the statement. However as held in **Ghazi v. State of U.P.**¹⁹, if the police obtains the statement by employing third degree methods, the statement would be barred under 20(3).

Expansive interpretation was given to testimonial compulsion in the case of **Nandini Satpathy v. P.L. Dani**²⁰ “not only by physical threats or violence but also by psychic torture, atmospheric pressure, or any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied on an accused to obtain information highly incriminatory will be hit by Article 20(3)”.

Privilege against self-incrimination has not been applied in India to searches and seizures, or seizure of document under a search warrant. A passive submission to search and seizure cannot be styled as a compulsion on the accused and if anything is recovered during such search which may provide incriminating evidence against the accused it cannot be styled as a compelled testimony.

Under Sec 15 of TADA Act, the confession made by the accused was considered admissible in evidence, but must be strictly according to the

procedure laid down in the Act for recovering confession.

The prosecution under Article 20(3) is available only in criminal proceedings or proceedings of criminal nature before a court of law or other tribunal before which a person may be accused of an offence as defined in S. 3(38) of the General Clauses Act, that is, an act punishable under the Penal Code or a special or local law. as held by Supreme court in **Shyam Sunder Chowkhani v. Kajal Kanti Biswas**²¹ stated that “the protection of Article. 20(3) do not therefore extend to parties and witnesses in civil proceedings or proceedings other than Criminal”.

ARTICLE 21 AND ITS DEVELOPMENT TO PROTECT THE RIGHTS OF ARRESTED PERSON

Article 21 of the Indian Constitution has been incorporated with the object to prevent encroachment upon personal liberty and deprivation of life except according to the procedure established by law.

Article 21 ensures to the person his life and liberty, where once liberty and life were narrowed to the bodily liberty free from constraints or restraints in **Gopalan**²² case, the emergence of **Maneka Gandhi**²³ case enumerated the widest concept to the life and especially the liberty of the individual.

¹⁹ AIR 1966 All 142

²⁰ AIR 1978 SC 1025: (1978) 2 SCC 424

²¹ AIR 1999 Gau 101.

²²AK Gopalan v. State of Madras, AIR 1950 SC 27.

²³Maneka Gandhi v. Union of India, AIR 1978 SC 597.



As interpreted in **Gopalan**²⁴, Article 21 provided no protection or immunity against competent legislative action. Article 21 gave a carte blanche to a legislature to enact a law to provide for arrest of a person without much procedural safeguard. It gave final say to the legislature to determine what was going to be the procedure to curtail the personal liberty of a person in a given situation and what procedural safeguards he would enjoy.

Article 21 constituted a restriction only on the executive which could not act without law and Article 21 was impotent against legislative power which could make any law, however drastic, to impose restraints on personal liberty without being obligated to lay down any reasonable procedure for the purpose. It was not the court to judge whether the law provided for fair or reasonable procedure or not.

Thus, Supreme Court ruled in **Gopalan**²⁵ that in Article 21 the expression procedure established **by law** means the procedure as laid down in the law and enacted by the legislature and nothing more. A person could be thus deprived of his life or personal liberty in accordance with the procedure established by law.

The court was thus concerned was thus concerned with the procedure as laid down in the statute. Whether the

procedure was just, fair or reasonable was not the concern of the court. Three easy steps could deprive an individual of his life and liberty:

- 1) There must be a law
- 2) It should lay down a procedure
- 3) The executive must follow the procedure while depriving an individual of his life or personal liberty

Maneka Gandhi²⁶ case advent gave a major blow to the interpretations laid down in **Gopalan**²⁷, in the post emergency period major transformations took place in the judicial attitude towards the protection of personal liberty which went through a traumatic set back during the period of emergency in the country in the time frame of 1975-77 when personal liberty had reached its nadir.

In case **Munn v Illinois**²⁸ : “by the term life as here used is something more is meant than mere animal existence.”

Personal liberty was given a comprehensive understanding it does not mean mere the liberty of the body, i.e. freedom from physical restraint or freedom from confinements within the bounds of prison. Personal liberty was brought to the wider ambit under the law.

And especially the term ‘Procedure’ was settled after **Maneka Gandhi**²⁹ that Procedure for purposes of Article 21 has to be reasonable, fair and just and should not be arbitrary, fanciful or oppressive.

²⁴ Supra, note 26.

²⁵ Id.

²⁶ Supra, note 27.

²⁷ Supra, note 26.

²⁸ Munn v. Illinois, 94 U.S. 113 (1875).

²⁹ Supra, note 27.



Presumption of innocence is a human right. Article 21 in view of its expansive meaning not only protects life but also conducive to fair procedure. Augment of **Maneka Gandhi**³⁰ case had a very profound impact on the administration of criminal justice. Since the conditions prevailing in prisons have long been extremely deplorable and sub human; prisoners are mal treated; criminal trials are inordinately delayed; police brutality is legendary.

The protection of Article 21 extends to all persons- persons accused of offences, under trial prisoners, prisoners undergoing jail, etc all the aspects of administration of criminal justice falls under the umbrella of Article 21.

As justice is shun into shackles the moment power delegation becomes arbitrary. A procedure which is unreasonable, harsh and prejudicial to the accused cannot be in consonance with Article 21.

I. ARREST

Denying a person of his liberty is never a sign of free and civilised society. It causes to a person incalculable harm to the person's reputation and self-esteem. Reasonable restrictions are permitted by law but in accordance with the just and reasonable procedure established by law. Post **Maneka Gandhi**³¹ the court has constantly emphasised that the right to life of a citizen cannot be put in abeyance on his arrest. Arrest

should not be made on mere suspicion but only after a reasonable satisfaction reached after some investigation

In the **Joginder Kumar v. State of Uttar Pradesh**³², the Apex Court laid down the directions regarding the arrest, since the apex court wanted the arrest to be regulated and executed with the procedure established by law. The Apex Court in **D.K. Basu vs. State of West Bengal**³³ has held that transparency of action and accountability are perhaps the two most insisted upon. In this judgment, the Supreme Court has laid down more concrete and specific guidelines concerning arrest.

II. SPEEDY TRIAL

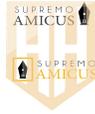
There is no such provision in the constitution of the country, prescribing any maximum period for which a magistrate can keep an undertrial in jail or even without trial. But quick justice is now regarded as sine qua non of Article.21. Inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of the accused will also be relevant fact. The prosecution should not be allowed to become persecution.

³⁰id.

³¹ Supra, note 27.

³² AIR 1994 SC 1394.

³³ AIR 1977 SC 3017.



The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vies, to enforce the fundamental right of the accused to speedy trial by issuing necessary directions to the State.

The Apex Court in **Maneka Gandhi's**³⁴ case has evolved it, through a process of interpretation that speedy trial though not a specifically enumerated fundamental right in the Constitution, is an integral and essential part of Article 21 of the Constitution. The Supreme Court has repeatedly in **Husainara Khatoon v. State of Bihar**³⁵, **A.R. Antuley v. R.S. Nayak**,³⁶ and in consequent landmark cases has held that the speedy trial of an accused is his fundamental right for being implicit in the broad sweep and content of Article 21 of the Constitution though neither the Constitution nor legislation provides any time limit for High Courts to pronounce their judgements but it has to be without delay.

In **Anil Rai vs. State of Bihar**³⁷ the problem of delay in delivery of judgements has been elaborately treated and termed delay in imparting justice as a 'horrible situation' and 'Shocking state of affairs prevalent in some High Courts'.

In the words of learned Justice Sethi, "Such a delay is not only against the provisions of law but in fact infringes the right of personal liberty guaranteed by Article 21 of the Constitution of India. Any procedure or Course of action, which does not ensure a reasonable quick adjudication, has been termed to be unjust. Whereas justice delayed is justice denied, justice withheld is even worse than that".

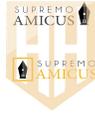
The learned judge further said. In a country like ours where people consider judges second to God, efforts make the judges only to strengthen that belief of the common man. Delay in disposal of cases facilitates the people to raise eyebrows, sometimes genuinely, which if not checked, may shake the confidence of the people in Judicial System. A time has come when the judiciary itself has to assert for preserving its stature respect and regards for the attainment of the rule of law. For the fault of a few, the glorious and

³⁴ Supra, note 27.

³⁵ AIR 1995 SC 366.

³⁶ AIR 1992 SC 1630.

³⁷ AIR 2001 SC 3173 (1).



glittering name of the judiciary cannot be permitted to be made ugly. It is the policy and purpose of law, to have speedy for which efforts are required to be made to come up to the expectation of the society by ensuring speedy, untainted and unpolluted justice.

In **Hussainara Khatoon (IV) V. State of Bihar**³⁸, the Supreme Court considered the problem in all its seriousness and declared that speedy trial is an essential ingredient of 'reasonable, fair and just' procedure guaranteed by Article 21 and that it is the constitutional obligation of the state of devise such a procedure as would ensure speedy trial to accused. And emphasised that financial constraints and priorities in expenditure would not enable the Government to avoid its duty to ensure speedy trial to the accused. The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability.

The guarantee of speedy trial is intended to avoid oppression and prevent delay by imposing on the Court and the prosecution an obligation to proceed with the trial with a reasonable dispatch of justice, and the right to speedy trial flowing from Art.21 encompasses all the stages, namely, "the stage of investigation, inquiry, trial,

appeal, revision, and retrial. And the ensuring of life and liberty under article 21 extends till that horizon till where the ensured justice and the method to get it implemented has reached its zenith.

III. INVESTIGATION

Investigation is the first step on the basis of which prosecution files a case against accused in the court which tries the accused for alleged offence. It is a well settled proposition that right to speedy trial in all criminal prosecutions is an inalienable right under article 21 and this right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police investigations as well.

Article 21 of the Constitution of India confers upon every individual a fundamental right not to be deprived of his life or liberty except in accordance with due procedure prescribed under law. The procedure prescribed under law has to be necessarily reasonable, fair and just. Under Article 21 of the Constitution, the right to speedy investigation is a fundamental requirement. Hence, it is the state that has on its shoulders the burden of investigation as well as the prosecution in a criminal trial. Speedy and expeditious investigation and trial, which have been envisaged under section 309(1) of the Code of Criminal

³⁸AIR 1995 SC 366.



Procedure, 1973 reflect the spirit of Article 21 of the Constitution of India.

in **R.P. Kapur vs. State of Punjab**³⁹ where there was extraordinary delay in the investigation and in submitting the charge-sheet, the Supreme Court remarked:

"It is an utmost importance that investigation into criminal offences must always be free from any objectionable features or infirmities which may legitimately lead to the grievance of the accused that the work of investigation is carried on unfairly or with an ulterior motive".

Inordinate delay by the police in the investigation of criminal cases is violative of fundamental right under Article 21 of the Constitution and gives rise to a right in favour of the accused to move the High Court under Article 226 or to the Supreme Court under Article 32 of the Constitution for the enforcement of his right.

Inordinate delays in investigations raise presumption that either there is no evidence against the accused to put him on trial or the investigation is malafide with a view to keep the accused in custody or harass the same. In both the cases, the appropriate remedy is quashing of the investigational proceedings.

In cases of inordinate delay there are two approaches followed by the courts. The first approach is to release the accused on personal bond or without any bond, where an accused had been in Jail for the maximum term which could have been awarded to him if found guilty for the offence he was charged with, he was ordered to be released from custody forthwith. In cases where no charge sheet had been filed for three years, accused remaining in Jail custody, they were ordered to be released on furnishing personal bonds in meagre amount.⁴⁰ The second approach is somewhat radical and revolutionary.

In **Abdul Rehman Antulay vs. R.S. Nayak**⁴¹ now the Supreme Court has finally settled the position that right to speedy trial flowing from Article 21 of the Constitution of India encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial, by this decision the Apex Court has broadened the scope of this right.

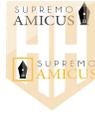
Fair investigation and fair trial are concomitant to preservation of fundamental rights of accused and cannot be compromised unless by the fair procedure established by law under Article 21 of the Constitution.

PROTECTION GIVEN TO ARRESTED PERSON UNDER

³⁹1960 Cr. LJ 1239(SC).

⁴⁰Mohd.Saleem Khan V. State of UP AIR 1982 SC 1996.

⁴¹ Supra, note 36.



ARTICLE 22 OF THE CONSTITUTION

Article 22 of Indian constitution lays down the quintessential rights of an arrested person to protect him from the oppression and abuse at the hands of arresting officials. When an individual is detained his basic liberties of life and freedom of movement are denied. Art 22 provides protection against arrest and detention.

I. PROTECTION AGAINST ARREST

When a person is arrested, he loses his liberties, freedom of movement and his reputation in society the Supreme Court granting protection stated in *Joginder Kumar v. State of Uttar Pradesh*⁴² “no arrest should be made without a reasonable satisfaction reached after some investigation as to genuineness of the complaint”. The Article 22(1) made mandatory for the detaining authority to notify the grounds of arrest. Also the Supreme Court in *Shobharam case*⁴³ said that “a person’s liberty cannot be curtailed by arrest without informing him, as soon as possible, why he is arrested”. The rationale behind this is that the person arrested has to prepare his

defence for bail and failure to inform the person of grounds for arrest would entitle him to be released and if there is any delay in communication of the grounds then the same should be justified. The insufficiency of information regarding grounds of arrest will make arrest unlawful. Article 22(1) also gives the person arrested to be defended by a lawyer and as Justice Iyer in *Nandini Satpathy*⁴⁴ said “the spirit and sense of Article 22(1) is that it is fundamental to the rule of law” and every person can avail his right to consult a legal practitioner of his choice even if he is not under arrest or detention and if an arrested person wishes to have a lawyer by his side while he is examined then such demand cannot be denied to him⁴⁵ and state has no duty to provide the accused person with a lawyer.⁴⁶

Under Article 22(2) the arrested person also has a right to be produced before a magistrate within 24 hours of his arrest excluding the travelling time. If the arrest is made without a warrant in presence of a magistrate then the person can’t be produced before the same magistrate. The Supreme Court in *Khatri v. State*

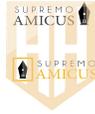
⁴²AIR 1994 SC 1349.

⁴³State of Madhya Pradesh v. Shobharam, AIR 1996 SC 1910.

⁴⁴Nandini Satpathy v. P.L. Dani, AIR 1978 SC 1025 : (1978) 2 SCC 424.

⁴⁵ Id.

⁴⁶Janardhan Reddy v. State of Hyderabad, AIR 1951 SC 217 : 1951 SCR 344



*of Bihar*⁴⁷ said that the arrested person should be produced before magistrate within 24 hours and this constitutional provision should be **strictly and scrupulously** observed. The court in *Gunpati v. NafisulHasan*⁴⁸ held that if the provision is breached the arrested person is entitled to be released.

Clause 3 of Article 22 mentions the exceptions for above clauses:

- Enemy aliens, and
- Person arrested under preventive detention law.

These provisions only apply to the criminal or quasi criminal cases or for some activity prejudicial to public interest.

II. PREVENTIVE DETENTION

Preventive detention means detaining a person without trial or conviction by a court only on the suspicion of authorities on the person doing it will be threat to law and order. The difference between an imprisonment after conviction and preventive detention is where former goes through the process of trial the later doesn't involves the trial procedure and person detained is only on the suspicion of executive officials. In conviction the punishment is for the past act and the offence has to be proved beyond reasonable doubt whereas in preventive detention the past act is the merely the material for inference about the future

course of probable conduct. Both Parliament and State legislature can make laws on preventive detention concurrently for maintenance of law and order. Clauses 4 to 7 of Article 22 lay down the minimum procedure which is to be observed by the authorities even in preventive detention.

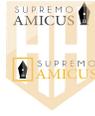
COMMUNICATION OF GROUNDS TO THE DETENU

Article 22(5) gives two rights to the arrested person first, detaining authority must convey the grounds of arrest to the person being detained as soon as possible and second is the right of detenu to make representation against such detention at the earliest possible opportunity. This is natural justice woven into the fabric of preventive detention by the constitution. And there is relation between the two rights given in 22(5) because to defend oneself against the detention in a court of law the detenu must know the grounds of his detention. Further in *Khudiram Das v. State of West Bengal*⁴⁹ the Supreme Court held that all basic facts and particulars which influenced the detaining authority in arriving at its satisfaction must be communicated to detenu. No additional grounds can be added, after the communication of grounds of detention to detenu, to strengthen the detention

⁴⁷AIR 1981 SC 928, 932.

⁴⁸AIR 1954 SC 636.

⁴⁹AIR 1975 SC 550: (1975) 2 SCC 81.



order.⁵⁰ But any additional fact can be conveyed later within a reasonable time period.⁵¹

All the grounds of detention must be communicated in one instalment. Once the grounds have been conveyed, fresh or new grounds cannot be added to strengthen the original detention order. But the detaining authority can withhold facts if they are not desirable to be disclosed in interest of public and this power to withhold only the facts of detention is given in Article 22(6). Here distinction should be made between ground and facts; the former has to be compulsorily communicated whereas the latter can be withheld by authorities under 22(6). The detaining authority is under no obligation to disclose the decision on which the facts of detention are withheld from him.⁵²

a) RIGHT TO MAKE REPRESENTATION

To make a representation before the court against the detention the detenu should be communicated the grounds of detention so as to make him able to defend himself. All the grounds of detention must be disclosed to the detenu and non-disclosure of the same would make the rights of detenu to make effective representation will be curtailed. For a proper representation the communication must be clear, non-ambiguous and in a language which is

understandable to the detenu and which can be interpreted by common man. If the language in which grounds are communicated needs interpretation of lawyer then the grounds are held to be vague. In *Ichhu Devi v. Union of India*⁵³ court held that the detention of the petitioner became illegal because of non-compliance with statutory and constitutional requirement. Further in *Kamarunnissa v. Union of India*⁵⁴ court held that the detenu has to show that because of non-supply of copies of the document in time denied him opportunity to make an effective defence against the detention and hence denying him of his rights.

b) CONSIDERATION OF THE REPRESENTATION

The interpretation of Article 22(5) by the court is such that it creates a duty on the authorities to consider the representation of the detenu before sending it to the advisory board. Creation of advisory board doesn't mean that the authorities have been absolved from their duty. So there are two scenarios regarding representation, first being the representation made to the authority is considered, second being the representation is made to authority but due to lack of time it is referred to advisory board after the decision of

⁵⁰ State of Bombay v. Vaidya, AIR 1951 SC 157: 1951 SCR 167.

⁵¹ Ujagar Singh v. State of Punjab, AIR 1952 SC 350.

⁵² Puranlal Lakhanpal v. Union of India, AIR 1958 SC 163: 1958 SCR 460.

⁵³ AIR 1980 SC 1983: (1980) 4 SCC 531.

⁵⁴ Kamarunnissa v. Union of India, AIR 1991 SC 1640, 1648 : (1991) 1 SCC 128.



advisory board the authority detaining must consider the representation⁵⁵ independent of the report of advisory board⁵⁶ but if authorities transfer the case to advisory board then it would violate Article 22(5) and vitiate the detention. The government is still bound to consider the representation because it is not bound by the report of advisory board.⁵⁷ The consideration of representation must be promptly and diligently and it should be at earliest opportunity.⁵⁸ The Supreme Court has often sharply criticized the phlegmatic attitude of bureaucrats in taking up the consideration of representation. The court accentuated the importance of prompt action authority as said “personal liberty of a person is at stake. Any delay would not only be an irresponsible act on the part of the appropriate authority but also unconstitutional”⁵⁹.

c) **ADVISORY BOARD**

Another safeguard under 22(4) is 22(4) (a) which says that for detention beyond the period of three months can be made if advisory board has opinion that there is sufficient cause for detention. The report of advisory board should be made within three months otherwise

detention becomes illegal.⁶⁰ The board must consist of persons who are qualified to be a judge of High Court. Article 22(7)(c) Prescribes the procedure followed by an advisory board. Some changes have been introduced by 44th Constitutional Amendment Act:

- Maximum detention period has been reduced to 2 months.
- Board must consist of at least three persons, a chairman (serving judge of High Court) and at least two other members (serving or retired judge of High Court).
- The board must be constituted in accordance with the recommendation of Chief Justice of Respective High Court.
- Detention beyond the maximum period must be in accordance with laws made by Parliament.

These changes have not been implemented yet.

d) **CONFIRMATION OF THE DETENTION ORDER**

Article 22(4) interpretation also says that apart from advisory board the government should confirm and extend the period of detention within the three months limit beyond that the detention becomes invalid as soon as the time is elapsed. The government should not only consider the report of advisory

⁵⁵MossaHuseinSanghar v. State of Gujarat, AIR 1994 SC 1479 : (1993) 1 SCC 511.

⁵⁶Union of India v. Manish Bahal, AIR 2001 SC 2685.

⁵⁷Pankaj Kumar v. State of West Bengal, AIR 1970 SC 97 : (1969) 3 SCC 400.

⁵⁸B.C. Dutta v. State of West Bengal, AIR 1972 SC 2605.

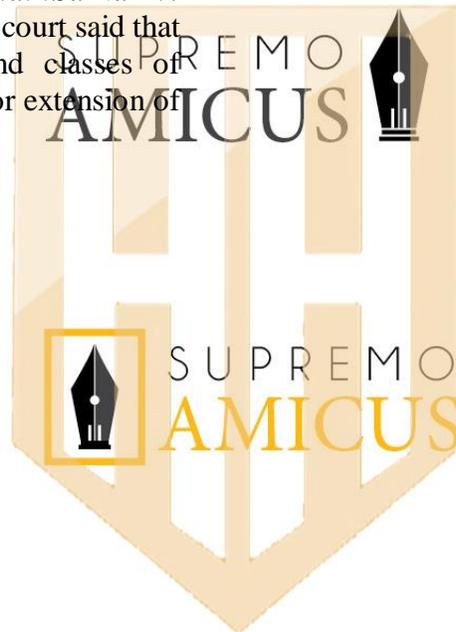
⁵⁹JayanaryanSukul v. State of West Bengal, AIR 1970 SC 675.

⁶⁰Abdul Latif v. B.K. Jha, AIR 1987 SC 725 : (1987) 2 SCC 22.



board but also apply their mind.⁶¹ The order of detention should be in writing and communicated to detenu non communication will be treated as irregularity and does not invalidate the detention.⁶²

In *Gopalan*⁶³ the Supreme Court said that the 'and' used in Article 22(7) means 'or' so parliament can either lay the circumstances or classes of cases for extension of detention beyond the period of three months. But this view of court changed and in *SambhuNathSarkar v. State of West Bengal*⁶⁴ the court said that both the circumstance and classes of cases must be prescribed for extension of period of detention.



⁶¹Nandlal v. State of Punjab, AIR 1981 SC 2041 : (1981) 4 SCC 327.

⁶² Deb Sadhan Roy v. State of West Bengal, AIR 1972 SC 1924 : (1972) 1 SCC 308.

⁶³Supra, note 26.

⁶⁴ AIR 1973 SC 1425 : (1973) 1 SCC 856.