

## SKEWED BALANCE OF JUSTICE: LOCUS OF PREVENTIVE DETENTION LAWS AND RIGHT TO COUNSEL IN CONTEMPORARY INDIAN LEGAL SYSTEM AND THE WAY FORWARD

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### ABSTRACT

*Preventive Detention for decades in the India has been used to knell the voices arbitrarily by the executive agents. This paper extensively discusses the shards of this draconian law which unduly subjects people under its wings and thereby even restricts those under this vision by limiting their power to approach and seek counsel nibbling their cardinal rights as a citizen. Taking a cue from the infamous A K Gopalan case which stands tall for inflicting a dig at the personal liberty of a person during the time of emergency is still relevant through the existing draconian law reflecting similar visions. Preventive Detention in its essence is a reminiscent of the British rule and law where the objective was to be an interception rather than a punishment and yet still continues its position tarnishing the plinth on which Indian Constitution stands on. Significant emphasis is laid on the limited powers of the detained individuals without proper remedies and trial procedure. By the virtue of this principle the article discusses plausible solutions to impending problem faced by several. India's commitments to human rights and civil liberties is something held sacrosanct in the Constitution and is a feature of the basic structure of the Constitution.*

### INTRODUCTION

The judiciary is an assumed whistleblower upon any disproportionate power-sharing between the bodies of the government and ensuring if both ends of the spectrum of justice are served with accordance to rules established by law without compromising individual liberty and ensuring social security in our society. Constitution of India underpins efficient functioning of the branches of the government, i.e. legislative, judiciary and executive. The power-

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sharing dynamic is contested whether the state is vested with excessive control over a person's autonomy and their liberty. This disparity calls for establishing the balance of power and equal rights by a person to enjoy his liberty (*'Individuals perspective'*) and the state's power to curtail the aforesaid liberty if found in contravention to the public good as the Grundnorm of any law rests with the protection of the society (*'State perspective'*).<sup>2309</sup>

*The right to personal liberty in substance is a right not to be subjected to any physical coercion without legal justification*

- A V Dicey

Dr. B R Ambedkar during the discussions of the Constituent Assembly in an inclusive reading of Article 21 and 22 apprehended threat to individual freedom from the arbitrary powers the state was being conferred with the words *procedure established by law* in Article 21. Ambedkar, therefore, suggested a draft 15-A to balance the skewed structure by granting rights to the people to defend themselves against tyrannical measures which limit an individual's autonomy by the state, and this, later formed and found its due position in Article 22.<sup>2310</sup> However, if there exists any arbitrary power of the state over an individual's autonomy, then such law shall have no locus in the Constitution. There exists an intrinsic deviation in the Constitution during the division of powers between judiciary, executive and the legislature with regards to granting rights of the arrested/detained in a criminal issue. The redressal is skewed in favour of the state with little to no personal autonomy of the individual. *States cannot have overarching powers over an individual's liberty and cannot restrict Right to Counsel to the detained under Preventive detention and should grant unfettered access to counsel by the detained* as the state abridges basic rights and limits the scope of the individual appealing for a fair trial with reasonable and just representation. The

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<sup>2309</sup> Aparna Chandra and Mrinal Satish, 'Criminal Law and the Constitution' The Oxford Handbook of Indian Constitution Chapter 44. These phraseology is excerpted from the authors usage of the terms 'liberty perspective' which emphasises individual liberty by restricting state power, and 'public order perspective' to limit individual liberty and expand state power.

<sup>2310</sup> *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1497, 15 September 1949 (BR Ambedkar).

liberty of the person rests at the behest of the executive, and the latter constrains the Right to Counsel due to the nature of the case.

There needs to be strategy at place to construe the two impediments with any criminal process, one enumerating the rules and two how the rules must be implemented<sup>2311</sup> and the tussle unfurls upon the anomaly of the implementation. In this case, the gravity is at zenith as it involves a person's liberty. (State cannot exert overarching powers and control a person's liberty by restricting right to counsel in preventive detention and restricting absolute right to counsel). A robust structure is imperative to vitiate the existence of archaic laws such as the Preventive Detention and thereby include absolute right to legal counsel as these are averse to principles of equity and representation. John Locke conceptualized the notion of 'natural rights'. He urged certain rights are naturally assumed to be vested with individuals, and they exist and date back way before the existence of societies and states.<sup>2312</sup>

## RESTRICTION OF RIGHT TO COUNSEL IN THE MATTERS OF PREVENTIVE DETENTION

Our Constitution through Article 22(2) allows preventive detention provided it would be carried out cogently through very narrow limits but granting flagrant powers to the state compromises the liberty of a person. Preventive Detention sucks out the sacrosanctity by being a part of Article 22 and pushes the liberty of a person to the back seat by mere *suspicion*.<sup>2313</sup>

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<sup>2311</sup> Herbert L Packer, 'Two Models of the Criminal Process' (1964) 113 U Pa L Rev 1 Pg No. 21

<sup>2312</sup> Anita Yadav, 'Prisoners' Rights in India: An Analysis of Legal Framework' (2015) 6 Indian JL & Just 131 Pg No. 132

<sup>2313</sup> Article 22(4) Indian Constitution.

This provision reeks of uncouth executive discretion and does not fall within the ambit of progressive law<sup>2314</sup> and the refusal to recognise *right to counsel* in a criminal proceeding is a denial of equal protection by the law.<sup>2315</sup> Article 22(1) of our Constitution makes the right to be legally represented upon detention a fundamental right to any 'person'. But Preventive Detention ostracizes that right when clause 22(3) commences with disregard to 22(1). I disagree with the discussion in the case of *Rekha v State of Tamil Nadu*<sup>2316</sup> as the exception created for Preventive detention (*Jurisdiction of Suspicion*) does not deserve any locus in our Constitution as the intended exception is averse to Right to Life, and personal liberty. These rights are the most precious rights of our Constitution.<sup>2317</sup> Justice Markandey Katju seems flustered in his thoughts as he initially senses the nature of preventive detention and its repugnance towards democracy and opines the role of Fundamental rights is to defend the people and not inflict them with this barbarous law by putting them in jail arbitrarily<sup>2318</sup> for substantial periods without any recourse of law. However, in due course of the proceedings, his lordship shifts the baton and now settles with a new proposition.

Justice Katju now potentially disrupts the fabric of an individual's liberty by elucidating Article 22(3)(b) requires congruent reading with Article 19 & 21 and should be understood as a rare case which shall only apply in exceptional situations.<sup>2319</sup> Though this sounds like a very *narrow* approach, one shall be cognizant not to fall bait to the strawman fallacy in this case where Justice Katju constantly reminds the importance of individual liberty and translates his stance to defeating the same by passing the decree. The *narrow* approach is not entirely true to its nature in the current situation as it gives a lot of power and discretion to decide the fate of a person's liberty at the behest of the state. Article 22 uses the word *person* and not *citizen* and widens the ambit for seeking redressal under this Article. It is appalling to

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<sup>2314</sup> *R v. Secy. Of State for the Home Dept., Ex Parte Stafford*, (1998) 1 WLR 503 (CA)

<sup>2315</sup> William O Douglas, 'The Right To Counsel' (1960) 45 Minn L Rev 693 Pg No.693

<sup>2316</sup> *Rekha vs State of Tamil Nadu* (2011) 5 SCC 244 Para 13

<sup>2317</sup> *State of Maharashtra vs Bhaurao Punjabrao Gawande* (2008) 3 SCC 613

<sup>2318</sup> Report of the Special Rapporteur on the independence of judges and lawyers A/HRC/32/34 5 April 2016 Human Rights Council Thirty-second session Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

<sup>2319</sup> *Supra* N[8]

witness succumbing to such an archaic law. Preventive detention shall strictly be read along with Article 21 alone diverting from Justice Katju only to increase the stature and heighten the importance of one's Right to Life as restricting legal counsel would infringe upon the enjoyment of Right to live with *dignity*.<sup>2320</sup> Our Constitution recognizes certain rights to be indomitable.

The state cannot suspend them under any circumstances, Article 21- Right to Life read along with Article 22 cannot be taken away by the government and are immune to any situation as they deal with an individual's autonomy and freedom as said by Jurist Soli Sorabjee and even H V Kamath resonated similar intentions with non-abrogation of rights even in gravest emergencies.<sup>2321</sup> Preventive Detention has an awful state of affairs in India as other countries such as The United States of America and The United Kingdom only practice this during the time of emergencies. Ambedkar believed in circumventing few rights during emergencies should be with regards to '*public order*', and this phrase was only added through the first amendment of our Constitution. The important aspect should be deciphering the meaning of public order which the Ambedkar failed to explain. Analysis of the words '*In the interests of public order*' or '*maintenance of public order*' is essential as the former grants wider discretion to the state, which our current law is equipped and executing, but the latter helps in branching out to an objective decision of the matter.<sup>2322</sup>

The "*loss of liberty*" elucidated by Justice Wisdom talks about how there is a perpetual right to counsel in all the cases where the person is subjected to a loss of personal liberty.<sup>2323</sup>

## RESTRICTION OF ABSOLUTE RIGHT TO COUNSEL

United Declaration of Human Rights<sup>2324</sup> and International Covenant on Civil and Political Rights<sup>2325</sup> which are the cornerstones of International Human Rights<sup>2326</sup> recognize

<sup>2320</sup> Maneka Gandhi vs Union of India (1978) 1 SCC 248 Para 228

<sup>2321</sup> Soli J. Sorabjee, 'HUMAN RIGHTS DURING EMERGENCY' High Court of Judicature at Allahabad

<sup>2322</sup> Supra N[2]

<sup>2323</sup> James v. Headley: Right to Counsel for Petty Offenses' (1969) 3 Ga L Rev 750 Pg.754

<sup>2324</sup> Article 11(1) UDHR



the importance of right to counsel which is a manifestation to protect states excessive power by granting rights to the arrested and detained. The legal maxim *salus populi suprema lex* (safety of the people is supreme law) and *salus republicae suprema lex* (safety of the state is supreme law) and for it to co-exist there should be perfect balance and in current legal discourse there exists an evident skew in favour of *social control* perspective as elucidate in the above paragraphs. The Criminal Procedure Code Section 303 recognizes the right of every arrested and detained *person* to consult a legal practitioner of their choice.

Post the judgement of D K Basu<sup>2327</sup> there was an introduction of a new clause which formed Section 41-D<sup>2328</sup>. The most troubling phrase in this amendment section are the words “*not throughout the interrogation*”. Denial of absolute access to counsel during the criminal process prima facie questions the procedural morality and the murky lines of limitations by the State. Section 41-D is rendered adept if there exists greater power with the executive body of the government violating the *Equality of Arms*<sup>2329</sup> principle to decide when the detained/arrested can have their access to their legal counsel. The US Supreme Court in 1938 through sixth amendment gave an absolute right to counsel at trial and appeal to the detained/arrested<sup>2330</sup>. There may be a restriction to absolute right to counsel in special circumstances the onus shall rest on the accused to show she/he was restricted absolute right to counsel and such restriction disrupts the due process of law.

## SUGGESTIONS TO RESPECTIVE AUTHORITIES

Deeply concerned with the state of affairs of the criminal procedure in India it is imperative for the system to succour to the ignored rights to the detainees being a victim to the archaic

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<sup>2325</sup> Article 14(3)(b) ICCPR

<sup>2326</sup> Mary Ann Glendon, ‘Knowing the Universal Declaration of Human Rights’ 73 NOTRE DAME L. REV. 1153, 1153 (1998)

<sup>2327</sup> D. K. Basu v State of West Bengal (1997) 1 SCC 416Pg.436 Para 35

<sup>2328</sup> Criminal Procedure Code(Amendment) Act, 2008 (Act 5 of 2009)

<sup>2329</sup> Elisa Toma, ‘The Principle of Equality of Arms- Part of the Right to a fair trial’ (2011) Ro L R Pg.1

<sup>2330</sup> John L Jr Oliver, ‘An Absolute Right to Counsel on Appeal Rule and Retroactivity in Missouri’ (1967) 32 Mo L Rev 230 Pg.232

preventive detention law, as Article 21 casts an obligation over the laws to be fair just and reasonable<sup>2331</sup> as one must realize that the chapeau of Indian Constitution is empowered through basic human rights is governed by the Constitution. Following recommendations quench for a place in the Criminal Procedure Code through amendments and sanitize from the arbitrary power of the state;

- a) Requests the addition of the word “detention” in Section 50 of the Criminal Procedure Code as the section in the current situation only allows the arrested people to be informed about the grounds of their arrest. This insertion leads to more inclusivity of detained people under the purview, thereby dismantling the *unequal* treatment given to arrested and detainees.
- b) Requests the expansion of the scope in Section 57(CrPC) to detained people whose liberty is limited through Preventive Detention and should be submitted to the court within 24 hours of the detention for a *fair* trial. Failure of this expansion is a severe assault to people who are detained without any option for redressal through Right to Legal representation. Moreover, preventive detention can extend to almost three months making it highly unfair placing it *pari-passu* with the limit prescribed under section 167(CrPC) for offenders punishable with death, life and sentences not less than 10 years. Even post that, the Appellate Body reeks of secrecy as the judgements are not published and are not guaranteed oral hearings<sup>2332</sup> which meant denial of fair trial rights.
- c) Understanding that police are agents of the state and are given significant powers over a person life liberty and to limit this arbitrary power vested with them through amending section 41-D CrPC<sup>2333</sup> by changing the regressive statute from (“*not throughout the interrogation*” to “*throughout the interrogation*” as the former stains the constitutional fabric. This amendment shall thereby grant absolute rights to the detained person to protect basic rights<sup>2334</sup> by not restricting the counsel at the discretion of the police and be allowed

WORDS SPEAK

<sup>2331</sup> Abhinav Sekhri , “Not Fair, Just or Reasonable” (*The Hindu*,2020) <<https://www.thehindu.com/opinion/op-ed/not-fair-just-or-reasonable/article30905962.ece>>

<sup>2332</sup> *Ibid*

<sup>2333</sup> Criminal Procedure Code (Amendment ) Act, [2008] (Act 5 of 2009), S-41D

<sup>2334</sup> Paul R Mattingly, 'Right to Counsel: A Comparative Analysis of the United States and Great Britain ' (1974) 50 Notre Dame Law 117 Pg.135

presence during *all* the stages of interrogation and can merely audit and not engage in it<sup>2335</sup> as adopted and operated by South Korea.<sup>2336</sup>

- d) Repudiate Article 22(3) as it is not congruent with the foundational aspects of our Constitution as it threatens equal treatment and disrupts fair trial rights by the detinue. Understanding the Object-Effect dichotomy<sup>2337</sup> of the law makes it lucid for further comprehension if a law is vitiating the Fundamental rights or not. The *object* of the law i) was non-punitive but preventive<sup>2338</sup> with the view to restrict any disruption in the order of the law but giving such a power to the state is *in effect* impugning with an individual's liberty and Article 21 cannot allow the state the powers to confine a person without any legal representation. ii) The *object* of non-absolute rights to counsel in *effect* restricts and additionally grants supervening powers to the state over an individual. Padfield's principle substantiates "that there are no unfettered discretions in public law, and that statutory powers must be used to promote the policy and objects of the statute, to be determined by the courts as a matter of law".<sup>2339</sup> The object however good it might be in law, the effect should not impugn a person's right and anything contravening this, shall not hold good with the constitutional sanctity of India as restricting a person's liberty.

## CONCLUSION

Fundamental Rights of an individual is motivated by the intention of protecting Human Rights for any constitution. And, no law should shall threaten these fundamental rights of a person and the main question in a situation to deem a law unconstitutional should be through individuals liberty and their rights to be represented and any deviation on this front cannot be tolerates and this power should exists only at the behest of the victim in question and nobody else however if there exists any deviation the Constitution becomes intolerant by the archaic division of powers to state thereby deeming it be an irrational co-existence. The US Supreme Court opined the methods a state employs in enforcing Criminal law can be a befitting gauge

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<sup>2335</sup> Basic Principles on the Role of Lawyers (*OHCHR*) 1990, Article 1

<sup>2336</sup> Ho Hock Lai, 'Recent (Non)-Developments in an Arrested Person's Right to Counsel' (2014) 2014 *Sing J Legal Stud* 267 Pg.278

<sup>2337</sup> Sakal Papers & Ors vs Union of India AIR 1962 SC 305

<sup>2338</sup> Mian Abdul Qayoom vs State of J&K and Ors.,(2020) SCC OnLine J&K 96 Para 67

<sup>2339</sup> Lord Carnwarth, 'Judicial review in a changing society'(Joint UCL-HKU conference,Hong Kong University,14<sup>th</sup> April 2014 <<https://www.supremecourt.uk/docs/speech-140414.pdf>> Pg.6



to measure the level of civilization.<sup>2340</sup> Individuals are forsaking their civil liberties in the hope of security and the state cannot misuse such a position.



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<sup>2340</sup> *Coppedge vs The United States*, (1962) 369 US 438