CHAPTER - 10

GLOBAL PERSPECTIVE OF THE RIGHT AGAINST ARBITRARY ARREST AND DETENTION
CHAPTER - 10
GLOBAL PERSPECTIVE OF THE RIGHT AGAINST ARBITRARY ARREST AND DETENTION

10.1 INTRODUCTION:

Human rights is a matter of international concern. The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on 10th December, 1948. However, it neither creates binding obligations on the part of the nation to carry out its provisions, nor it provides for its enforcement. But it has a normative value. The International Covenant on Civil and Political Rights generally elaborates on the rights incorporated in the Universal Declaration of Human Rights. Some of the provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights correspond to the provisions in Article 22 of the Constitution of India. So also is the case with some Regional Human Rights Conventions like European Convention for the Protection of Human Rights and Fundamental Freedoms, American Convention on Human Rights etc. By and large, preventive detention provisions are not to be found in the Constitutions of various nations. These provisions are regulated by law which ordinarily are operative during emergency and war time. However, safeguards against arbitrary arrest and detention (punitive detention) corresponding to Article 22(1) and (2) of the Constitution are to be found mutatis mutandis in the Constitutions or enactments or both of almost all nations.

10.2 U.S.A. :

10.2.1 Right to Counsel :

The Fifth, Sixth and Fourteenth Amendment of the Constitution of U.S.A. incorporating right to counsel correspond to the second part of Article 22 (1) of the Constitution of India.
The Supreme Court of U.S.A. has established a general principle that the constitutional right to counsel arises only when the accused has been formally charged with the commission of a crime so that an adversary criminal prosecution is pending. The Courts have continually moved towards broadening the scope of situations requiring the assistance of counsel. The Supreme Court has imposed a duty on the government to allow the assistance of the counsel so as to conduct the criminal justice system without regard to person's financial status.

Trials

The Sixth Amendment in terms provides that in all criminal prosecutions the accused shall enjoy the right "to have the assistance of counsel for his defence." The Court had to decide in Powell v. Alabama¹ whether the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause. The Court, to find answer to this question observed that the fact that the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all civil and political institutions" is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the Federal Constitution . . . it is clear that the right to the aid of counsel is of this fundamental character.

Holding that the 'Hearing', historically and in practice has always included the right to the aid of counsel when desired and provided by the party asserting the right, the Court observed:
The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense.

It was held in this case that the failure of the trial court to give the defendant reasonable time and opportunity to secure counsel was a clear denial of due process. Assuming their inability, even if opportunity had been given, to employ counsel, under the circumstances, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, the Court did not decide. The ruling of the Court was that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defence because of ignorance, feeblemindedness, illiteracy, or the like it is the duty of the Court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.
There was a clear departure by the Supreme Court of the United States in *Betts v. Brady*\(^2\) where the Court made an abrupt break and held that the ‘due process’ clause of the Fourteenth Amendment did not impose upon the States, as the Sixth Amendment imposed upon the Federal Government, an absolute requirement to appoint counsel for all indigent accused in criminal cases. It required the State to provide a counsel only where the particular circumstances of a case indicated that the absence of counsel would result in a trial lacking ‘fundamental fairness’. Ever since the decision in *Betts’s case*, the problem of the constitutional right of an accused in a State Court became a continuing source of controversy until it was set at rest in the celebrated case of *Gideon v. Wainright*.\(^3\) Under the rule laid down in *Betts’s case*, the Court had to consider the ‘special circumstances’ in each case to determine whether the denial of counsel had amounted to a constitutional defect in the trial. The Court in *Gideon’s case* explicitly rejected the rule laid down in *Betts’s case* and held that ‘Sixth Amendment’s (unqualified) guarantee of counsel for all indigent accused’ was a “fundamental right made obligatory upon the State by the Fourteenth Amendment”.

Thus prior to *Gideon*, the State was only obliged to assign counsel for an indigent defendant in capital cases (*Powell v. Alabama*). In non-capital cases, the court would examine the circumstances of each case to determine whether absence of counsel would result in a trial which is “offensive to the common and fundamental ideas of fairness and right” (*Betts v. Brady*). But in *Gideon*, the court held that any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.\(^4\)

In 1972, in the case of *Argersinger v. Hamlin*,\(^5\) the United States Supreme Court held that under the Sixth and Fourteenth Amendments, no person may be imprisoned for any offence, no matter what the classification - petty, misdemeanour, or felony-unless afforded access to counsel at trial. This
decision was the culmination of a long line of previous cases which gradually expanded the defendant's right to counsel.

**Police Interrogation**

*Miranda v. Arizona*⁶ is important decision of the Supreme Court relevant on the point. The Court held that in custodial interrogation, prior to any questioning, the person must be warned that he has a right to remain silent and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive enforcement of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned. The Court added that the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires. The presence of counsel at the interrogation serves several significant subsidiary functions as well. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his rights to have one, his failure to
ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings. The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel. Accordingly the Court held that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. In order fully to apprise a person interrogated of the extent of his rights, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent the knowledge that he too has a right to have counsel present.

**Lineups**

In the case of *United States v. Wade* the Supreme Court held that the Sixth Amendment right to counsel extends to post-indictment, pretrial lineups, on the theory that this is a critical stage of the criminal proceedings. The *Wade* principle recognizes the need to protect the defendant's basic right to a fair trial as affected by the right to meaningfully cross-examine witnesses at trial in view of any unfairness at the lineup. The case of *Kirby v. Illinois*, expressly limited the *Wade* principle to those situations commencing after a formal accusation, such as the indictment, information, preliminary hearing or arraignment.

In the case of *Gilbert v. California*, the Supreme Court made the *Wade* rule applicable to the States through the Fourteenth Amendment. That is, the right to counsel in post-indictment lineups was held to be a fundamental right
guaranteed by the due process clause. However, the *Gilbert* decision also found that the Fifth and Sixth Amendments, guaranteeing the privilege against self-incrimination and the right to counsel, allow the obtaining of a defendant's handwriting sample in the absence of counsel and without any advice that it may be used against him or her.

**Preliminary Hearing**

The Supreme Court, in the case of *Coleman v. Alabama*,\(^1^0\) held that assistance of counsel must be provided at preliminary hearings to determine the existence of probable cause against the defendant. This is clearly a critical stage in the proceeding and always occurs after the defendant has been formally charged with the commission of a crime.

**Plea Bargaining**

The defendant cannot be denied assistance of counsel during the plea bargaining process prior to the trial. In order to fully protect his or her interests, the defendant should have counsel during this stage of the proceeding, particularly since any statement made by the defendant during the plea bargaining process may be admissible evidence against him or her at trial.\(^1^1\)

**Appeal**

In the case of *Douglas v. California*\(^1^2\) the Supreme Court held that it was an unconstitutional discrimination against the indigent defendant to deny counsel for an 'initial' appeal. In *Ross v. Moffitt*\(^1^3\) the Supreme Court held that neither the equal protection nor due process concepts of the Fourteenth Amendment were offended by not requiring counsel after an initial appeal.

**Arraignment**

For an arraignment, it is held that counsel must be available.\(^1^4\)
Effective Assistance of Counsel

Both at trial and on direct appeal the Court has clarified the Sixth Amendment to require effective assistance of counsel.\textsuperscript{15} The justices have concluded that a right to assistance of counsel means little if that right does not include effective assistance. Assistance of counsel is effective only where the accused is afforded a reasonable opportunity to consult with the counsel and counsel is afforded such opportunity to consult with the accused and to prepare his defence.\textsuperscript{16} Effective representation by counsel also means that the lawyer appointed for an accused should be free of conflicting interests and in a position to give the accused whole hearted representation.

Right to Consult Privately

The constitutional guarantee has been held to include not only the right to have a fair opportunity to secure a counsel of his own choice but also the right to consult him privately and any violation of this right vitiates the trial without proof of actual prejudice resulting from denial of the right.\textsuperscript{17}

Waiver of the Right to Counsel

The defendant has the right to waive counsel, provided certain constitutional requirements are satisfied. The waiver must be an express waiver, and the defendant must be mentally competent, both as to understanding his or her action and acting as his or her own counsel, before the judge can accept the waiver.\textsuperscript{18} The right to counsel may be expressly waived by the accused provided he does it voluntarily.\textsuperscript{19} Waiver must be with full comprehension of all the facts and circumstances which are essential to a proper understanding of his right and it's waiver, \textit{e.g.} the nature of the charges, the range of punishment prescribed for the offence and the like.\textsuperscript{20} Waiver must be with the approval of the Court which has the duty to satisfy itself that all the conditions of waiver have been satisfied.\textsuperscript{21} Pleading guilty of one charge does not constitute waiver of the right to counsel as regards other charges.\textsuperscript{22}
10.2.2 Right to be informed of the nature and cause of accusation

The 6th Amendment of U.S.A. Constitution which corresponds to Article 22 (1) of the Constitution of India provides:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.

The right to be informed of the nature and cause of accusation means that the police must with reasonable promptness show legal cause for detaining an accused person.\(^\text{23}\) \textit{i.e.} a specification of the charge against him so that he may decide whether he should present his defence by motion to quash, demurrer or plea.\(^\text{24}\) This guarantee has been used to quash conviction upon vague and obscure charges.\(^\text{25}\)

10.2.3 Right to be produced before a Magistrate:

Rule 5 (a) of Federal rule of Criminal Procedure, which corresponds to Article 22 (2) of the Constitution of India, requires that an arrested person must be taken before, a committing Magistrate without 'unnecessary delay'. Any confession made by an arrested person who is detained in violation of this rule, shall be inadmissible at the trial.\(^\text{26}\)

The aim of an arrest is not sequestration of a suspect or his detention for purposes of interrogation. The purpose of the arrest is assurance that he will respond to a criminal change. A warrant of arrest directs the arresting officer to produce the arrested person in court, either at the time fixed in the warrant or within a reasonable time after the arrest. One who makes an arrest without a warrant has authority to detain the prisoner only for such a time as may be reasonably necessary to procure a legal warrant for his further detention or until a preliminary hearing of the charge against him can be had. Production of the accused before the magistrate serves another function. It
brings him to the public eye and makes possible a contact with his family, his friends, and his lawyer. It puts an end to the possibility of detention incommunicado. Prompt production before a magistrate is therefore essential to protection of the rights of the accused. The Sixth Amendment is indeed, wholly at war with the practice of police in holding a man incommunicado.

10.2.4 Preventive Detention:

In U.S.A. there is no constitutional provision for Preventive Detention. Similarly there is no provision for preventive detention in times of peace. But the Congress under Article 1 Section 8 is empowered to enact laws on various subjects including “to declare war” and “to suppress insurrection” and “to repel invasions”. These powers become sweeping and unlimited when combined with Clause 18 of the same Section which empowers the Congress to pass laws that shall be “necessary and proper” for executing the various powers conferred. Besides Article 1 Section 9 Clause 2 empowers Congress “to suspend the privilege of writ of habeus corpus in cases of rebellion or invasion”, when “the public safety may require it’s suspension.” These powers plus the powers in the Commerce Clause 3 of Article 1 Section 8 to maintain essential supplies and services, and the Supremacy clause of Article VI enables Congress to enact laws dealing with just about anything and problem that appears to be national in scope.27

Until 1950, it could be said that an American citizen could not be detained unless convicted by a Court of law of an offence. Though this still holds good as regards times of peace, a system in the nature of preventive detention was introduced, as regards times of emergency, by the Internal Security Act, 1950, also known as McCarran Act. This Act was amended in 1968, doing away with its obnoxious features. Provision for preventive detention in an ‘emergency’ was made by Ss. 100-103 of the Internal Security Act, 1950. In the event of any one of the following – (a) invasion of the
territory, (b) declaration of war by Congress, (c) insurrection within the United States in aid to a foreign enemy, the President may make a proclamation of an 'Internal Security Emergency'. During the continuance of such emergency, the President is authorised to apprehend and by order detain "each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage."\textsuperscript{28}

The procedure for detention under this Act has some similarity to that under our Preventive Detention Laws, with this difference that the American Statute can be used only in a war emergency, and that there is provision for an ultimate judicial review of the grounds of detention. The Attorney General is empowered to issue a warrant for the arrest of any person whom he believes to be dangerous. The arrested person is brought before a preliminary hearing officer who issues a detention order if he finds that there is a probable cause for detention. Against the order of detention, the detenu may appeal to the Detention Review Board. From the decision of the Board the detenu may have a judicial review by way of appeal to the Federal Court of Appeals; but the findings of the Board as to facts, if supported by 'reliable, substantial and probative' evidence, are conclusive. At the hearing before the preliminary hearing officer, the detenu is to be told the grounds of his detention, is allowed to be represented by counsel, to introduce evidence on his behalf as well as to cross-examine witnesses except those whom the Attorney-General withholds from cross-examination on the ground of national security.

Judiciary in U.S. gradually reconciled the needs of state security to the principles of 'Due Process' of law and procedure. The authority of preventive detention given under Title II of the Internal Security Act was repealed in 1971. In U.S.A., therefore, there is practically no preventive detention during peace since 1971.\textsuperscript{29}
When the enemy is not near, the doctrine of national security is not accepted *ipso facto* in U.S.A. Preventive detention is hostile to American ideas of civil rights.

In U.S., only the Congress is empowered to enact laws for preventive detention and that also only for prosecution of war, suppression of insurrection and repulsion of invasion; in India both Parliament and State legislatures can enact laws for preventive detention not only during the war but also in peace and for reasons connected with as many as six subjects as per entry 9 of List I and entry 3 of List III of the VIIth schedule.

10.3 **U.K. (ENGLAND):**

10.3.1 **Introduction:**

The British Constitution contains no fundamental rights in the strict sense. Being unwritten any part of it can be changed in the same way as any other part, namely, by ordinary Act of Parliament. And the legislative sovereignty of Parliament means that there is no legal limit to the extent to which Parliament can abridge or abolish rights which in other countries would be regarded as 'fundamental'. The practical checks are the influence of public opinion, the vigilance of the opposition and the restrictive interpretation of the Courts. What the British Constitution lacks in formally guaranteed rights is more than compensated by judicial remedies.

10.3.2 **Preventive Detention:**

Until World War I, Parliament used to pass *Habeus Corpus* Suspension Act to help the Executive in proper prosecution of the war. After Cessation of War, Act of Indemnity usually followed. Since World War I, instead of the practice of directly suspending the writ of *habeus corpus*, Parliament chose to pass Acts like the Defence of the Realm Act, 1914, the Emergency Powers (Defence) Act, 1939, authorising the Executive to make Regulations for the public safety or the defence of the realm, including a power to detain without
trial. As a general rule, the Courts would not interfere with the Executive power to detain without trial, except in cases of misuse of power. The Right of access to the Courts has never been barred either during World War I or II.30

The traditional theory of 'personal liberty' as Dicey understood it, has thus undergone a major change. According to him, personal liberty means that "(i) Physical restraint of an individual may be justified only on the ground that he has been 'accused' of some 'offence' and must be brought before the court to stand his 'trial' or (ii) that he has been 'convicted' of some offence and must suffer punishment for it." But the decisions in R. v. Halliday and Liversidge v. Anderson, departing from this theory laid down that Parliament may empower the Executive to make regulations for the detention without trial of persons whose detention appears to be expedient in the interest of the public safety or the defence of the realm. These powers are derived from Parliament. English Parliament never authorised preventive detention except in times of war or beyond the duration of such exigency.

The leading case in the First World War was R. v. Halliday, ex. p. Zadig.31 Zadig, a naturalised British subject of German birth, was interned by order of the Home Secretary under a Regulation made under the Defence of the Realm Consolidation Act, 1914. The Act gave power to the King in Council "during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm." The Regulation 14 B provided that where, on the recommendation of a competent naval or military authority or of one of the advisory committees set up by the Home Secretary to advise him on the internment and deportation of aliens, it appeared to the Home Secretary that for securing the public safety or the defence of the realm it was expedient in view of the hostile origin or associations of any person that he should be subjected to restriction of movement or internment, the Home Secretary might issue an order accordingly. Failure to comply with such order would be an offence. Zadig contended that the regulation was *ultra vires*, but...
it's validity was upheld by the House of Lords (Lord Finlay L.C. and Lords Dunedin, Atkinson and Wrenbury with Lord Shaw dissenting). Lord Finlay L.C. said:

It is beyond dispute that Parliament has power to authorise the making of such a regulation. The only question is whether on a true construction of the Act it has done so.

Lord Shaw in his dissenting judgment said:

If Parliament had really meant to sanction internment without trial for the cause assigned, it could have said so without the slightest difficulty and not left a point which, I think is so fundamental to be reached by inference.

Lord Finlay, L.C. felt:

One of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restrictions on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy. Preventive detention is not a punitive but a precautionary method. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it.

The Lord chancellor, Lord Finlay, who delivered the leading judgment pointed out that under Regulation 14 B an internment order could only be made on the recommendation of a competent Naval or Military authority. Further, the Regulation made it obligatory to state in the order of internment in respect of a person not an enemy subject that the internee could make a representation against the order of internment for the consideration of an advisory committee presided over by a person who holds or has held high judicial office. The regulation, therefore, provides means for ascertaining whether any complaint against the justice or necessity of the order is well founded. He further explained:

The statute was passed at a time of supreme national danger which still exists. The danger of espionage and of damage by secret agents to ships, railways, munition works, bridges etc. had to be guarded against. The restraint imposed may be a necessary measure of precaution, and in the interests of the whole nation it may be regarded as expedient that such an order should be made in suitable cases. This appears to me to be the meaning of the statute. Every reasonable precaution to obviate hardship which is consistent with the object of the regulation appears to have been taken.
The Second World War necessitated the passing of the Emergency Powers (Defence) Act, of 1939 which gave power to the executive to make regulations for purpose of public safety, defence of the realm, maintenance of public order, trial and punishment of persons offending against the regulations and detention of persons “whose detention appears to the Secretary of State to be expedient in the interests of the public safety for the defence of the realm etc.

The original Defence Regulation 18 B made by Order in Council on 1st September, 1939 gave the Secretary of State power to detain “any particular person . . . if satisfied . . . that it is necessary to do.” In the House of Commons debate of 31st October 1939 this Regulation was strenuously attacked. As the result of an informal conference of Members the Regulation was amended in several particulars and notably by the substitution of the phrase “If the Secretary of State has reasonable cause to believe” for the curt “if satisfied”. The amended Regulation was issued on 23rd November, 1939. The terms and scope of the whole Regulation as amended from time to time broadly are as follows.

There were four grounds on which a person might be subjected to preventive detention: (1) hostile origin or associations; (2) having been recently concerned in, or in the instigation of, acts prejudicial to the public safety, etc. (3) membership of, or activity in furthering, any organization concerning which the Secretary of State was satisfied that either “the organisation is subject to foreign influence or control, or the persons in control of the organisation have or have had associations with person concerned in the government of or sympathies with the system of government of, any Power with which His Majesty is at war.” (4) actions or words “expressing sympathy with the enemy”, or indicating likeliness to assist the enemy, in any area specified by the Minister.
Para (2) gave the Minister power to suspend, subject to conditions if necessary, a detention order; Para (3) provided for the setting up of one or more Advisory Committees, and any person aggrieved by the exercise of any of the Minister's powers "may make his objections to such a committee". Para (4) made it the duty of the Minister to afford the detenu "the earliest practicable opportunity" of making "representations in writing to the Secretary of State", and to inform him of his right of making objections to the Advisory Committee: Under para (5) it was the duty of the Chairman of the Advisory Committee "to inform the objector of the grounds on which the order has been made against him and to furnish him with such particulars as are in the opinion of the Chairman sufficient to enable him to present his case," Para (6) required the Secretary of State to report to Parliament at least once a month "action taken under the Regulation" including the number of persons detained and the number of cases in which he has not followed the recommendation of the Advisory Committee.

Detenu was served, at the time of his arrest, with a brief statement, in general terms, of the ground of his detention; this was a little more than a definition of the part of the Regulation which was put in force against him. Particulars of the facts, incidents allegations or sources of information were not supplied to him and he did not know the case which he had to meet when he went before the Advisory Committee. The sitting was in camera. The suspect was not allowed to be represented by counsel. Evidence was not on oath. The procedure consisted principally of questions by the Committee and answers by the detenu, and statements by him of his objections. The Advisory Committee reported to the Home Secretary. The report was strictly confidential.

The detenu might ask for his case to be reconsidered from time to time. Home Secretary might, and frequently did, himself submit it for reconsideration. It was principally in this manner that orders were suspended
and releases made. Detenu had no means of compensation even if he could prove that his detention was totally unjustified.

A leading case under Regulation 18 B was *Liversidge v. Sir John Anderson*[^1]. Liversidge, a detenu filed a suit for the declaration that his detention was unlawful and for false imprisonment. In the suit he applied for particulars of the grounds on which the respondent had reasonable cause to believe the appellant to be a person of hostile associations and of the grounds on which the respondent had reasonable cause to believe that by reason of such hostile association it was necessary to exercise control over the appellant.

The House of Lords (Lord Maugham L.C. and Lords Macmillan, Wright and Romer, with Lord Atkin dissenting) held that the Secretary of State could not be compelled to furnish the appellant the grounds of detention and a valid order of detention was *prima facie* answer to any action for damages and false imprisonment. The burden was on the appellant to prove the order to be invalid. Lord Macmillan observed in the case:

> In a time of emergency, when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of it's drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace time measure . . . The liberty which we so justly extol is itself the gift of the law and as *Magna Carta* recognises, may by the law be forfeited or abridged. At a time when it is undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause it may well be no matter of surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention . . . It is for the Secretary of State alone to decide in the forum of his own conscience whether he has a reasonable cause to believe and he cannot, if he has acted in good faith, be called upon to disclose to any one the facts and circumstances which have induced his belief or to satisfy any one but himself that these facts and circumstances constituted reasonable cause to believe.

The main question in the case was the interpretation of the expression "if the Secretary of State has reasonable cause to believe" (that a detention is necessary). The opinion of the majority was that "reasonable cause" was

[^1]: Liversidge, a detenu filed a suit for the declaration that his detention was unlawful and for false imprisonment. In the suit he applied for particulars of the grounds on which the respondent had reasonable cause to believe the appellant to be a person of hostile associations and of the grounds on which the respondent had reasonable cause to believe that by reason of such hostile association it was necessary to exercise control over the appellant. The House of Lords (Lord Maugham L.C. and Lords Macmillan, Wright and Romer, with Lord Atkin dissenting) held that the Secretary of State could not be compelled to furnish the appellant the grounds of detention and a valid order of detention was *prima facie* answer to any action for damages and false imprisonment. The burden was on the appellant to prove the order to be invalid. Lord Macmillan observed in the case:

> In a time of emergency, when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of it's drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace time measure . . . The liberty which we so justly extol is itself the gift of the law and as *Magna Carta* recognises, may by the law be forfeited or abridged. At a time when it is undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause it may well be no matter of surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention . . . It is for the Secretary of State alone to decide in the forum of his own conscience whether he has a reasonable cause to believe and he cannot, if he has acted in good faith, be called upon to disclose to any one the facts and circumstances which have induced his belief or to satisfy any one but himself that these facts and circumstances constituted reasonable cause to believe.

The main question in the case was the interpretation of the expression "if the Secretary of State has reasonable cause to believe" (that a detention is necessary). The opinion of the majority was that "reasonable cause" was
something which existed solely in the mind of the Minister, that he alone
could decide it, and that it was not subject to challenge or judicial review. The
majority view was that the words "reasonable cause" cannot be construed as
imposing an objective condition precedent of facts on which a person detained
would be entitled to challenge the grounds of the Secretary of State's honest
belief; in short that the condition is subjective. The majority of the House of
Lords held that though the *prima facie* meaning of the words "if A.B. has
reasonable cause to believe a certain circumstance" was "if there is in fact
reasonable cause to believe", yet in a special context "the words might well
mean if A.B. acting on what he thinks is reasonable cause (and of course
acting in good faith) believes the thing in questions."

In the dissenting view of Lord Atkin "reasonable cause" in English law
has always meant something which a judge and jury, reviewing all the
circumstances, would hold to be reasonable; it is therefore "objective" and
always involves the possibility of judicial review. In his powerful dissent he
emphatically said that the words "has reasonable cause to believe" had always
meant, if there was in fact a reasonable cause and that the different words used
in Regulation 18 B themselves supported this meaning. In his remarkable
dissent Lord Atkin observed:

I view with apprehension the attitude of judges who on a mere
question of construction when face to face with claims involving the
liberty of the subject show themselves more executive minded than the
executive. Their function is to give words their natural meaning ... In this
country, amidst the clash of arms, the laws are not silent. They may be
changed, but they speak the same language in war as in peace. It has
always been one of the pillars of freedom, one of the principles of liberty
for which on recent authority we are now fighting, that the judges are no
respecters of persons and stand between the subject and any attempted
encroachments on his liberty by the executive alert to see that any coercive
action is justified in law ... I protest, even if I do it alone, against a
strained construction put on words with the effect of giving an
uncontrolled power of imprisonment to the minister. To recapitulate:
The words have only one meaning. They are used with that meaning in statements of the common law and in statutes. They have never been used in the sense now imputed to them. They are used in the Defence Regulations in the natural meaning, and when it is intended to express the meaning now imputed to them, different and apt words are used in the regulations generally and in this regulation in particular. . . After all this long discussion the question is whether the words 'If a man has' can mean 'If a man thinks he has'. I am of opinion that they cannot, and that the case should be decided accordingly.

Lord Atkin emphasized a principle which is one of the pillars of liberty in that in English law every imprisonment is prima facie unlawful and it is for a person directing imprisonment to justify his act.

In an earlier case, Eshugbaye Eleko v. Officer Adminisering Government of Nigeria Lord Akin had observed:

In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.

In Greene v. Secretary of State for Home Affairs the House of Lords dismissed an appeal on an application for habeus corpus arising out of the same Regulation 18 B. The House held that the production of the Home Secretary's order, if made in good faith and in proper form, was a complete answer to an application for habeus corpus and that no affidavit was necessary. Lord Maughum L.C. thought the order itself a sufficient answer, and it should be presumed that the Secretary of State acting under a regulation having the force of law had what he considered reasonable cause for his belief. He added that it would be useless anyway to hold otherwise, as the Home Secretary could not be made to disclose the sources of the grounds for his belief if he took the view that it would be contrary to public interest. In this case Lord Atkin agreed with his colleagues, as the Home Secretary had filed
an affidavit setting out a number of particulars and stating that he had acted on information from responsible and experienced persons.

The decision in *Liversidge v. Anderson*, however met with a mixed reception outside the Courts. This case has never had many champions among the legal profession and as against Lord Atkin’s shattering dissent, it has generally been regarded as the House of Lords’ “contribution to the war effort”.

In *Nakkuda Ali v. Jayaratne* the Judicial Committee per Lord Radcliffe, had this to say of it:

> It would be a very unfortunate thing if the decision in *Liversidge case* came to be regarded as laying down any general rule as to the construction of such phrases (*i.e.* “reasonable cause to believe”) when they appear in statutory enactments. It is an authority for the proposition that the words “if A.B. has reasonable cause to believe” are capable of meaning “if A.B. honestly thinks that he has reasonable cause to believe” and that in the context and attendant circumstances of Defence Regulation 18 B they did in fact mean just that . . . After all words such as these are commonly found when a legislature or law-making authority confers power on a minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power.

Thus the Privy Council held that the *Liversidge v. Anderson* must not be taken to lay down any general rule on the construction of the expression “has reasonable cause to believe”. The fact that the emergency was already over in *Nakkuda’s case* may also have made some difference. *Nakkuda’s case* reflects on *Liversidge case* as it should be limited to the special case of Regulation 18 B. However, the decisions of privy Council are not binding on English Courts, but it seems probable that this interpretation will be generally accepted; and, in peace-time at least, the draftsman who wishes to make his statute “judge-proof” will adopt some other form than “reasonable cause”.

According to H.W.R. Wade, the *Liversidge case* stands as an isolated example to show how strongly in exceptional circumstances the ordinary trend of legal reasoning may be deflected.
Prof. C.K. Allen speaking on preventive detention says:

It is, of course, mere fiction to say that the individual was not imprisoned but merely "detained", that he was not "charged with any offence" and that he was not being "punished". "Control" which may go on indefinitely, without accusation or defence is a far worse experience than imprisonment of defined duration, and suspicion is often more damaging than indictment.

Regulation 18 B, Allen observes, is memorable for having elicited from the highest tribunal in the land a doctrine of "subjective reasonable cause", which is a landmark in the history of executive powers and which, though in a calmer atmosphere it has been doubted and qualified, still presents a danger of bringing us near to administrative absolutism!

Preventive detention in India vis-à-vis England

In U.K., only Parliament can pass laws for preventive detention, but in India both Parliament and State legislatures may pass laws for preventive detention for reasons connected with the security of state, the maintenance of public order or the maintenance of supplies and services essential to the community as per entry 3 of List III (of the VIIth schedule) which is the Concurrent List. However, only Parliament can pass laws under entry 9 of List I for reasons connected with the Defence, Foreign Affairs, security of India. In U.K. again no person other than the Home Secretary has the authority to issue order of detention, while in India many officers like the District Magistrate, Additional District Magistrates of the various districts and the Commissioners of Police are empowered to issue order of detention. In U.K. the Home Secretary, as a detaining authority has to make monthly reports to the Parliament with regard to preventive detention in use. In India, there is no such responsibility of the detaining authority to the Parliament or the State legislature. In U.K. the appointment of the Advisory Committee is compulsory and the right of the detenu to make representation to the Advisory Committee is intact in every case of detention. Even in war period there existed Advisory
Board in U.K. to supervise preventive detention. However, the Home Secretary is not bound by the report of the Advisory Committee, but he has to report to the Parliament as to how many of detention orders were confirmed without clearance by the Advisory Committee. But in India no Advisory Committee is needed for detention up to three months and even for detention of longer period than three months, if law is made by Parliament under clause 7 (a) and (b) read with clause 4 (b) of Article 22. The report of the Advisory Committee to the effect that there is no sufficient cause for detention is binding on the detaining authority and in such cases, the detaining authority is to release the detenu forthwith.36

10.3.3 **Right to be informed of the grounds of arrest:**

Arrest consists of the actual seizure or touching of a person’s body with a view to his detention. The mere pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer. An arrest may be made either with or without warrant. An arrest without a warrant may be under a power conferred by common law or statute.

A person who is arrested without a warrant must be informed of the true grounds of the arrest, though the information need not be given in technical language. In *Christie v. Leachinsky* the plaintiff respondent was arrested without a warrant by the defendants, two police officers, on a charge under the Liverpool Corporation Act, 1921, of “unlawful possession” of a bale of cloth. The Act did not give them a right to arrest the plaintiff without a warrant. The plaintiff was remanded in custody, and eventually prosecuted on a charge of larceny, on which he was acquitted. In answer to his action for damages, the defendants pleaded that at the time of the arrest they suspected with reasonable cause, that the plaintiff had stolen or feloniously received the cloth. It was held that as the plaintiff had not been told the true ground of his
arrest, but had been given a different ground which was no ground for arresting him at all, he was entitled to damages for false imprisonment. Every person is *prima facie* entitled to his freedom, and is only bound to submit to restraint if he knows why it is claimed to impose restraint upon him. Viscount Simon laid down following two important propositions in this regard:

(i) If a policeman arrests without warrant upon a reasonable suspicion of felony or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words a citizen is entitled to know on what charge or on suspicion of what crime he is seized.

(ii) The requirement that the person arrested should be informed of the reason why he is arrested naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.

Lord Simon gave an illustration of the circumstances where the accused must know why he is being arrested: there is no need to explain the reasons of arrest "if the arrested man is caught red-handed and the crime is patent to high Heaven."

But the latter observation now has to be seen in the light of S. 28 (3), (4) of the Police and Criminal Evidence Act, 1984, which requires that, at the time of making arrest, the person arrested is to be informed of the ground for the arrest, at that time or as soon as practicable afterwards – and if a constable makes the arrest, even if that ground is obvious, such as being caught red-handed. Otherwise the arrest would be unlawful. But if an arrested person is subsequently informed of the reason, the arrest is only unlawful from its inception until that moment. Arrested person does not have to be told the
technical name of the offence in question; nor is it necessary to say anything to him if it is reasonable to think that announcing one’s presence before seizing him would cause him to run away from the scene; nor does one have to communicate the reasons to a person who, unknown to oneself, is deaf. The purpose of requiring communication is to enable the person arrested to clear himself by explanation at the first opportunity. The object of the right to be informed of the cause of arrest is also to enable the person to take immediate steps for regaining his freedom.

10.3.4 Right to be produced before a Magistrate:

The powers of the police to detain a person after arrest and before charging him are now subject to the Police and Criminal Evidence Act, 1984. The Act imposes time limits on the period of detention without charge. From the time at which the arrested person arrives at the police station, the police have twenty-four hours in which to charge him, failing which he must be released [S. 41 (1)]. But the police may themselves authorize his detention for a total of up to thirty-six hours, and a magistrate’s Court for up to a total of ninety-six hours, if this is necessary to obtain evidence of a ‘serious arrestable offence’ [Ss. 42-44]. ‘Serious arrestable offence’ is defined in S. 116 partly by reference to certain named crimes and partly by reference to other arrestable offences made serious by their consequences in the particular case. The arrested person must be released within these limits unless he is charged. A person arrested and charged must be brought before a magistrate’s court as soon as practicable and in any event not later than the first sitting after he is charged (which will usually be the following day (S. 46). He may be remanded in custody or released on bail pending further proceedings.
10.3.5 Right to Counsel:

At common law, a prisoner had no right to be defended by a counsel. Exceptions have however, been engrafted by statutes. Thus in 1695 a statute permitted one accused of treason to be defended by a counsel, and in 1836, the right was extended to persons accused of summary offences and charges of felony. Next, the Poor Prisoners' Defence Act, 1930 provided for the supply at public expense of legal aid to poor persons accused of crime. Finally came the Legal Aid and Advice Acts 1949-74. Thus, though there is no right to have a counsel to be appointed by the Court, there is a right to engage counsel for defence, and there are statutory provisions to make a counsel available to persons of low income.  

10.4 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966):

Some of the provisions of the International Covenant on Civil and Political Rights correspond to Article 22 of the Constitution of India. General Assembly of the United Nations adopted this Covenant on December 16, 1966. The Covenant generally elaborates on the rights set forth in the Universal Declaration of Human Rights, 1948. On 23rd March, 1976, the International Covenant on Civil and Political Rights entered into force after having received the requisite number of ratifications. India acceded to International Covenant on Civil and Political Rights, 1966 on March 27, 1979. The rights set forth in the Covenant are not absolute and are subject to limitations. By and large, the rights in the Covenant shall not be subject to restrictions except those specified by law, and those which are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others. The Covenant, at present, is subscribed by more than 140 State Parties. The Covenant has legal force as treaties for the parties to them, containing codification of human rights. The machinery for
implementation under the Covenant is a Human Rights Committee to carry out the functions provided in the Covenant. The 18-member Human Rights Committee is a watchdog body to ensure that state parties apply the Covenant. But there is no provision in the Covenant giving binding power to the reports and comments of the committee. It can only review, criticize and comment on the reports submitted by State Parties to the Covenant. It does all this to ensure the implementation of the human rights recognized in the Covenant. The State parties to the Covenant have, under Article 2, undertaken to respect and to ensure to all individuals within its territories and subject to its jurisdiction the rights recognized in the present Covenant.

Article 51 of the Constitution of India in its clause (c) provides that the State shall endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another. The municipal courts of India have applied the provisions of the treaties entered into by India if they have been incorporated into municipal law through legislation. But it would be wrong to contend that the implementation of every treaty would require legislative aid. In *A.D.M. Jabalpur v. Shivkant Shukla*\textsuperscript{45} one of the questions for consideration before the Supreme Court was whether Universal Declaration of Human Rights and the two International Covenants on Human Rights, 1966 were part of Indian Municipal law. By majority the Supreme Court held that they were not part of Indian Municipal law. However, in his spirited dissenting opinion, H.R. Khanna, J. held that if there was a conflict between the provisions of an international treaty and the municipal law, it is the latter that will prevail. But if two constructions of the municipal law were possible the Court should give that construction as might bring about harmony between Municipal Law and International Law or treaty. The constitutional provisions should be construed in such a way as to avoid conflict. However, by the time, this case was decided, India had not ratified this Covenant on Human Rights.
J.S. Verma, C.J. observed in Vishaka v. State of Rajasthan:

It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.

Even before ICCPR was adopted in 1966, these human rights, were available to persons in India as fundamental rights in Part III of the Constitution.

**Right to Compensation for Unlawful Arrest and Detention**

Article 9 (5) of the International Covenant on Civil and Political Rights provides for compensation to the victim of unlawful arrest or detention. Article 9 (5) reads:

"Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

The Constitution of India does not provide for this right to compensation. Moreover, while acceding to the Covenant on 27th March, 1979, India has made *inter alia* the following declaration (*i.e.* reservation).

With reference to Article 9 of the International Covenant on Civil and Political Rights the Government of the Republic of India takes the position that the provisions of Article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of Article 22 of the Constitution of India. Further under the Indian legal system there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State.

But due to judicial activism and liberal interpretation of Article 21 of the Constitution by the Supreme Court, the above reservation relating to right to compensation has become a dead letter. Thus in Bhim Singh v. State of J. & K. the petitioner M.L.A. was arrested and detained illegally and *mala fide* so as to prevent him from attending Session of the Legislative Assembly. The Supreme Court, while holding that the constitutional rights of Bhim Singh, guaranteed under Article 21 and 22 (2) were violated, held:
Since he is now not in detention, there is no need to make any order to set him at liberty but suitably and adequately compensated, he must be. That we have the right to award monetary compensation by way of exemplary costs or otherwise is now well established in *Rudul Shah v. State of Bihar* and *Sebastian M. Hongray v. Union of India*. In appropriate case we have the jurisdiction to compensate the victim by awarding suitable monetary compensation.

The Supreme Court directed the State of Jammu and Kashmir to pay Bhim Singh a sum of Rs. 50,000 within two months from the date of judgment.

In a recent important case of *Nilabati Behera v. State of Orissa* Article 9 (5) of the International Covenant on Civil and Political Rights was referred to by the Supreme Court to support the view taken that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right, as a public law remedy under Article 32, distinct from the private law remedy in torts. The Supreme Court observed that there is no reason why these international conventions and norms cannot be used for construing the fundamental rights expressly guaranteed in the Constitution of India.

**Right against Arbitrary Arrest and Detention under Article 9**

Article 9 of the International Covenant on Civil and Political Rights which corresponds to Article 22 of the Indian Constitution reads as follows:

1. Every one has the right of liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest, and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantee to appear for trial, at any other stage of judicial proceedings, and should occasion arise, for execution of the judgement.
(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in order that such court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

(5) Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.

The Article protects a person against ‘arbitrary’ arrest and detention. The meaning of the word ‘arbitrary’ is doubtful. For it may mean arrest against the existing provisions of law or in violation of the principles of natural justice. While debating the subject, the Third Committee of the General Assembly had deliberately refused to substitute the word ‘arbitrary’ with ‘illegal’. The Committee felt that the intention of the word was to guarantee the rights of an individual against the highhandedness of the executive authorities which were entrusted with discretionary powers in almost all the countries. In the opinion of the Committee, the word ‘arbitrary’ meant not only illegal, but also unjust and incompatible with the principles of natural justice and human dignity. Thus the substance of the word was said to mean:

“any act which violated justice, reason or legislation, or was done according to some one’s will or discretion, or which was capricious, despotic, imperious, tyrannical or uncontrolled.”

Thus the term ‘arbitrary’ is not synonymous with the term illegal and former signifies more than the latter. While an illegal arrest or detention is almost always arbitrary, an arrest or detention which is in accordance with law may nevertheless be arbitrary.

The words ‘arrest and detention’ respectively mean the seizure and confinement of a person by a valid authority.
Article 9 (3) of the Covenant requires that a person arrested or detained on a criminal charge be brought 'promptly' before a judge or other officer authorized by law to exercise judicial power. 'Promptly' remains undefined. More precise time limits are fixed by law in most State parties. Article 9 (3) applies only to persons arrested or detained 'on a criminal charge'. In non-criminal cases like preventive detention Article 9 (3) offers no protection. However, the Human Rights Committee has observed that preventive detention for reasons of public security must be controlled by these same provisions i.e. it must not be arbitrary, and must be based on grounds and procedures established by law [Article 9 (1)] .

Article 14 (3) Provides :

3. In the determination of any criminal charge against him everyone shall be entitled to the following minimum guarantees, in full equality :

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right, and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

The provision of free legal aid to indigent accused as provided under the Directive Principles of State Policy under Article 39-A and implicit in Article 21 and 22 of the Indian Constitution are in tune with Article 14 (3) (d) of the Covenant.50
Article 22 of the Constitution of India in its clauses (1) and (2) bestow, a person who has been arrested, with four rights:

1. A person shall not be detained in custody without being informed, as soon as possible, of the grounds of his arrest.
2. He shall not be denied the right to consult and to be defended by a legal practitioner of his choice.
3. He will be entitled to be produced before the nearest magistrate within a period of twenty-four hours of such arrest. In computing the period of twenty-four hours, the time necessary for the journey from the place of arrest to the court of magistrate shall be excluded.
4. He shall not be detained in custody beyond the said period of twenty-four hours without the authority of Magistrate.

In the view of Pannalal Dhar, preventive detention is permissible under Article 6 and 4 of the Covenant. While Article 6 permits preventive detention on such grounds and in accordance with such procedures as are established by law, Article 4 permits it during emergency under certain conditions.

**Emergency and Human Rights**

To deal with the State of emergency, it may be necessary to suspend some of the human rights. Article 4 of the Covenant recognises this right of States Party to take measures derogating from their obligations under the Covenant to tackle the situation. Article 4 does not permit suspension of all human rights. The human rights which cannot be suspended even during emergency are called non-derogable rights. Right to life under Article 6 is non-derogable but the rights under Article 9 and 14 both of which directly relate to the right against arbitrary arrest and detention are derogable. Article 4 incorporates a number of limitations and conditions for taking measures by the State Parties by suspending derogable rights. First, the emergency must be such that it threatens the life of the nation; second, the emergency must be officially proclaimed; third, the derogatory measures are only those which are strictly required by the exigencies of the situation; fourth, such measures must
be in conformity with other international obligations; fifth, the measures are non-discriminatory.

Article 4 cannot be invoked in all types of emergencies. Only when there is a threat to the life of the nation or its territorial integrity on account of a crisis, Article 4 may be attracted. It seems that in India, Article 4 may apply only when there is emergency proclaimed under Article 352 and not under Article 356 or 360.

Dr. Umesh Kadam, a renowned authority on International Law aptly remarks:

The experience of execution of preventive detention and anti-terrorism laws in India during the recent past has been severely criticized. Such misuse violates the proportionality requirement envisaged by Article 4 of the Covenant. To ensure that such legal measures are sparingly and judiciously used, it is necessary to sensitise the executive and administrative personnel as well. One of the most important wings of the State, the judiciary, has shown remarkable sensitivity to human rights values during its entire history except on some rare occasions. Today, the judiciary is very active in curbing governmental lawlessness. In the same vein, it is significantly contributing to the process of human rights protection. Additionally, it will also play the crucial role of ensuring that the legislature and executive do not exceed their limits and compel them to follow the human rights norms even during a state of emergency.

It is difficult to say as to which event threatens 'the life of the nation'. The word used is 'nation' and not 'government', this again brings an idea that it does not apply to internal troubles. The expression 'threatens the life of the nation' denotes present tense which means that once the exigency is over, the emergency cannot continue. In India during the emergency of 1975, even the non-derogable right to life was suspended and such step was upheld by the Supreme Court in *Habeas corpus case*. Khanna J. in his dissent observed that the Presidential Order of June 27, 1975 did not affect the maintainability of the *habeus Corpus* petitions to question the legality of the detention orders that such petitions could be proceeded with despite that order. Concluding his
judgement, his Lordship said that a dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting Judge believes the court to have been betrayed. What was hoped by Khanna J. proved to be partly correct. The error committed by the majority of the Judges of the Constitution Bench was later on corrected, not by the Judiciary but by the Legislature. Forty-fourth Amendment to the Constitution by amending Article 359 (1) now provides that the enforcement of fundamental rights conferred by Articles 20 and 21 (Protection of life and personal liberty) cannot be suspended even in emergency. Thus, by and large, the provisions of the Constitution now have become consistent with the Article 4 of the Covenant.53

10.5 UNIVERSAL DECLARATION OF HUMAN RIGHTS54:

The efforts to regulate human rights at an international level gained momentum after the establishment of the United Nations. Human rights cannot be said to be a matter within the domestic jurisdiction of any state. It was generally recognised that human rights have ceased to be a matter of domestic jurisdiction and have become a matter of international concern even though at that time it was agreed by all that the Universal Declaration had only moral and political significance and no legal value. With a view to implement the provisions of the United Nations Charter concerning human rights, the General Assembly of the United Nations decided to prepare an International Bill on Human Rights. The provisions of the Universal Declaration on Human Rights were transformed into international conventional law in the International Covenants on Human Rights, which along with the Universal Declaration of Human Rights are known as International Bill on Human Rights. Universal Declaration of Human Rights is a global proclamation of "a common standard of achievement for all peoples and all nations." It is the mine from which other conventions and national constitutions protecting these rights have been and are being quarried. India was a party to the Universal
Declaration of Human Rights. The Indian Constitution bears the impact of the Universal Declaration of Human Rights. The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on December 10, 1948. The Universal Declaration of Human Rights proclaims the human rights and fundamental freedoms for 'everyone' and no distinction is made between a 'person' and a 'citizen'. Strictly speaking, Universal Declaration of Human Rights neither creates binding obligation on the part of State to carry out its provisions, nor it provides for its enforcement. As such it has a normative value.

Article 9 of the Universal Declaration of Human Rights corresponds to Article 22 of the Indian Constitution and reads:

"No one shall be subjected to arbitrary arrest, detention or exile."

Two possible interpretations of the word 'arbitrary' are frequently advanced: One is that persons may only be arrested, detained or exiled in accordance with legal procedures; the other is that nobody should be subjected to arrest, detention or exile of a capricious or random character, where there is no likelihood that he or she committed an offence.

The right under Article 9 is subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society [Article 29 (2)].

H.R. Khanna J. in A.D.M. Jabalpur v. Shivakant Shukla in his powerful dissent, while construing the expression the 'Rule of Law', while dealing with the Presidential Order under Article 359 (1) avoided a construction which would bring it in conflict with the Articles 8 and 9 of the Universal Declaration of Human Rights.
Article 10 of the Universal declaration of Human Rights also has indirect bearing on Article 22 of the Indian Constitution and reads as under:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

10.6 REGIONAL HUMAN RIGHTS CONVENTIONS:

10.6.1 Introduction:

The Charter of United Nations contains provisions relating to regionalism with regard to international peace and security. Regional Human Rights Conventions are not under the authority and control of the United Nations. Such Conventions cover homogenous regions having same level of social and economic development such as Europe, America, Africa etc.

10.6.2 European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950:

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “ECHR”) is the first international instrument to give effect to the rights and freedoms proclaimed in the Universal Declaration of Human Rights which incorporates only civil and political rights. ECHR was signed at Rome on 4th November 1950 and entered into force in September, 1953. There are 22 parties to it like France, Germany, Greece, Italy, Netherlands, Switzerland, United Kingdom etc.

Under Article 1 of ECHR the State Parties to the Convention undertake to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention. The rights which correspond to Article 22 of the Indian Constitution are as follows:
Article 5 (2) – Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 (3) – Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Article 5 (1)(c) which is referred to in Article 5 (3) reads as follows:

The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

Article 15 (1) provides that in time of war or public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

To ensure the implementation of the rights and freedoms recognized in ECHR by the High Contracting Parties, Article 19 of ECHR provides for establishing a European Commission of Human Rights and a European Court of Human Rights.
The American Convention on Human Rights was adopted by the Organisation of American States at its inter-governmental conference held in San Jose, Costa Rica on 22nd November, 1969. It came into force on July 11, 1978. The Convention has been ratified by 21-member States. But these 21 States do not include the United States. The Convention incorporates only civil and political rights.

The Convention inter alia guarantees Right to Personal Liberty and Right to a Fair Trial respectively under Article 7 and 8, which are partly analogous to Article 22 of the Indian Constitution. By Article 7, paragraph 5, the right to be brought promptly before the judicial authority applies simply to 'any person detained', regardless of the existence or otherwise of a criminal offence.

The American Convention also permits the States Parties to suspend rights and freedoms in time of war, public or other emergency that threatens the independence and security of a State Party. During the period of such emergency the State Party may thus avail the right of derogating from the obligations under the Convention.

The Convention provides for two specialized enforcement mechanisms (i) Inter-American Commission of Human Rights; and (ii) Inter-American Court of Human Rights.

Before making the complaint to Inter-American Commission of Human Rights, domestic remedies must have been exhausted.

Inter-American Court of Human Rights is not accessible to individuals. It is accessible only to the Inter-American Commission and to those State Parties who have expressly recognized it's jurisdiction. The States Parties
have undertaken to comply with the judgment of the Court in any case to which they are parties. However, the Court lacks the power to enforce its judgments.

The Convention is a multilateral legal instrument enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction.

It is the second important regional convention on Human Rights. European Convention was the first Convention to implement the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, 1948. Under both the Conventions, the Court lacks the power to enforce its judgment.

10.6.4 **African Charter on Human and People's Rights**

African Charter on Human and People's Rights was adopted on June 27, 1981 and entered into force on October 21, 1986. Forty-nine states have acceded to it.

Articles (6) and (7) of the Charter partly correspond to Article 22 of the Indian Constitution. Article (6) confers Right to Liberty and security of person while Article (7) *inter alia* confers right to have his cause heard including right to defence; and the right to fair trial within a reasonable time by an impartial court or tribunal.

Parties to the Charter undertake to adopt legislative or other measures to give effect to these rights.

Before the complaint is made to African Commission on Human and People's Rights, all local remedies are to be exhausted. African Charter has not established any court for the enforcement of human and peoples' rights thereby relying heavily on mediation, conciliation and arbitration. The Commission can neither take a binding decision nor can it enforce it.
10.7 **BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT**:

In 1988, the General Assembly adopted the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. This instrument contains a detailed checklist of safeguards relating to personal liberty. However, Body of Principles does not, *per se*, have the force of international law.

These principles apply for the protection of all persons under any form of detention or imprisonment.

In these Body of Principles the word "Arrest" is defined to mean the act of apprehending a person for the alleged commission of an offence or by the action of an authority; the word "Detained Person" means any person deprived of personal liberty except as a result of conviction for an offence; "Detention" means the condition of detained persons as defined above.

Some of the Principles in the Body of Principles which correspond to the provisions of Article 22 of the Constitution of India are as follows:

**Principle 10** - Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

**Principle 11** - (1) A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

(2) A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

(3) A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

**Principle 12** - (1) There shall be duly recorded: (a) The reasons for the arrest; (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority; (c) The identity of the law enforcement officials concerned; (d) Precise information concerning the place of custody.
(2) Such records shall be communicated to the detained person or his counsel, if any, in the form prescribed by law.

**Principle 13** - Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.

**Principle 14** - A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands, the information referred to in Principle 10, Principle 11, paragraph 2, Principle 12, paragraph 1 and Principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

**Principle 17** - (1) A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

(2) If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

**Principle 18** - (1) A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

(2) A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

(3) The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

(4) Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within hearing, of a law enforcement official.

(5) Communication between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

**Principle 32** - (1) A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

(2) The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.
The phrase "a judicial or other authority" occurring in these Principles is defined to mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence. This makes clear that where the decision maker is not a judge, the official should possess the main attributes of a judge.

Principle 4 provides that any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by or be subject to the effective control of a judicial or other authority. This effectively brings the judiciary into the process at the pre-arrest stage ('ordered by') or at least immediately upon arrest ('under the effective control of'). The language further suggests that judicial responsibility remains after the original arrest.

In approving the Body of Principles, the General Assembly urged that every effort be made so that the Body of Principles becomes generally known and respected. This is strongly supportive language, but certainly not such as to suggest that the Assembly was seeking to promote their recognition as legally binding.

It seems that the Supreme Court, first in Joginder Kumar v. State of U.P.61 and then in D.K. Basu v. State of West Bengal62 while expanding the scope of rights against arbitrary arrest and detention, heavily relied on and borrowed from the Principles 12, 13 and 18. Out of 11 requirements laid down in D.K. Basu's case to be followed in all cases of arrest and detention, many of those are based on above mentioned Principles in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.
10.8 OTHER NATIONS:

The following is the brief resume of the provisions of some other nations, corresponding to Article 22 of the Constitution of India.

1) Malaysia - Article 151 of the Constitution of Malaysia authorises preventive detention during a period of emergency, to combat organised violence, promoting disaffection against the Government or between different classes or any activity prejudicial to the security of the Federation or any part thereof. In exercise of the power conferred by Article 149, read with Article 151, Parliament had enacted the Internal Security Act, 1960. The powers conferred by it are available only during an 'Emergency' as defined in Article 150, but the subjective satisfaction of the President is not justiciable on any ground. The detenu must be informed of the grounds of detention and allowed to make representation for which a detenu is entitled to two consultations with his lawyer for preparing written representation under conditions specified in Rules framed in 1970. The consultation must be during normal working hours within sight but not within hearing of an officer. Additional consultation must be within hearing and also the sight of the officer with the written consent of the Attorney-General.

2) Nigeria - Article 11 (4) of the Constitution of Nigeria, 1979 provides that when, on account of any situation, the House of Assembly of any State is unable to perform its functions, the National Assembly may make any law which may be deemed necessary or expedient for the peace, order and good Government of that State, which would include a law of preventive detention.

3) Zimbabwe - Para 1 (2) of Schedule II to the Constitution of Zimbabwe, 1979, empowers the Legislature to enact a law providing for preventive detention, during a period of public emergency, subject to the safeguards laid down in that para.
4) Uganda - Section 13 of the Constitution of Uganda, 1967, provides for preventive detention during Emergency. The Detention (Prescription of Time Limit) Amendment Decree of 1971 provides for review by the Committee set up by the Government for the purpose, of all orders of internments with power to scrutiny all allegations of facts upon which the detention order was based. The Committee is to be informed of all sources of information so that it may effectively perform it's duty. But this information is not given to the detenu or his legal representative. The Committee scrutinises the facts for justification of detention. The detenu is allowed to have his legal representative to plead on his behalf before the Committee.


6) Ghana - In Ghana, preventive detention is lawful not only in time of war but also in times of peace. Preventive Detention Act, 1958 allows preventive detention to prevent a person acting in a manner prejudicial to the security of the State. The Act authorises the President to order detention of any person on his 'subjective satisfaction'. There is no provision for reviewing of detention order by any Advisory Board under the Act.

7) Eire - The Irish Parliament passed the Emergency Powers Acts, 1939 and 1940 under Article 28 (3)(c) of the Irish Constitution. These Acts empowered the Government, during Emergency, to control any of the supplies or services essential to the state, to detain persons where such detention is, in the opinion of the Minister, necessary or expedient in the interests of the public safety or preservation of the State.

8) Australia - Power to detain without trial persons engaged in activities prejudicial to the safety of the realm has been deduced from the 'defence' power or the power relating to 'immigration'. In Australia,
personal liberties may be restrained for Defence needs but judiciary sees that such needs do not unnecessarily affect people's rights.

9) **Kenya** - Section 83 of the Constitution of Kenya empowers the Legislature to provide for preventive detention during War.

10) **Israel** - In Israel, by an Emergency Regulation issued by the Israeli Minister of Defence in August 1983, non-citizens may be arrested and detained if there is good reason to presume that considerations of state security or public safety require it. Appeal, however lies to an Appeal Commission against the order of detention, and the detenu has to be told of the right of appeal within a fortnight of the arrest and the Appeal Commission has to dispense with the appeal within a fortnight of filing of appeal. The secrecy surrounding detention and the detention being also incommunicado, and no measure of redress being made available during the initial fortnight may give rise to abuse of power.

11) **Tanganyika** - Tanganyika Preventive Detention Act, 1962 authorises the President to order the detention of any person where it is shown to his satisfaction that that person is conducting himself so as to be dangerous to peace and good order in any part of Tanganyika or is acting in a manner prejudicial to the defence of Tanganyika or the security of the State or he is satisfied that an order is necessary to prevent any person so acting or conducting himself. A person detained must be informed within fifteen days from the beginning of his detention of the reasons therefor, and given an opportunity to make representations to the President. An Advisory Committee to which all the information relevant to the order of detention and any representations made by the detenu are referred, may interview the detenu. The Advisory Committee advises the President whether in its opinion the order ought to be rescinded, continued or suspended. But the President is not required to act on its advice.
12) South Africa - In South Africa, Section 6 of the Terrorist Act permits incommunicado detention without charge or trial for an unlimited period, and permits the security police to withhold information about places of detention. The Internal Security Act of 1982 may subject people to restrictions on their freedom of movement, association and expression. In the Ciskel region of South Africa, Section 26 of the Ciskel National Security Act permits even non-disclosure of reasons of detention. Even the detenu's counsels are detained to prevent access to Supreme Court for redress.

13) Spain - In Spain under Anti-terrorist law of 1980, the detenus are held incommunicado, denied access to lawyers, have no right to independent medical treatment or to inform their families of their detention for a period of 72 hours.

14) Syria - Under the State of Emergency Act of 1963 citizens are liable to arbitrary arrest and indefinite incommunicado detention in secret places. Under this Act all powers of internal and external security vest in the Martial Law Governor (the Prime Minister) appointed by the President.

15) Chile - In Chile, the law permits security force, CNI, to detain persons for 20 days on the orders of the Minister of the Interior without production to the Court. Under the Constitution no one can be arrested, detained, put into preventive custody or imprisoned anywhere other than in his own home or in a public place specifically designated for the purpose. There is a right similar to habeus corpus petition, within a period of 48 hours.

16) Sri Lanka - In Sri Lanka the Prevention of Terrorist Act of 1979 as amended in 1982 allows absolute discretion to the Minister of Defence to detain a person in the custody of any authority if he is of the opinion that it is necessary and expedient to do so in the interest of national security or public order in such place and such conditions to be determined by him. It is subject,
however to such directions as may be given by High Court to ensure a fair trial.

17) Japan - Article XXXIV of the Japanese Constitution, 1946 and last part of Article XXXVII which correspond to Article 22 (1) of the Constitution of India read as under:

Article XXXIV - No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.

Article XXXVII - ... At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

18) West Germany - Article 104 of the West Germany Constitution 1948 provides:

(2) Only the judge shall decide on the admissibility and continued duration of a deprivation of liberty. If such deprivation is not based on the order of a judge, a Court decision must be obtained without delay. The police may, on its own authority, hold no one in custody beyond the end of the day following the arrest. Details shall be regulated by legislation.

(3) Any person temporarily detained on suspicion of having committed a punishable act must, at the latest on the day following the arrest, be brought before a judge, who shall inform him of the reasons for the arrest, interrogate him, and give him an opportunity to raise objections. Without delay, the judge must either issue a warrant of arrest setting out the reasons thereof, or order his release.

19) Bangladesh - Article 33(2) of the Constitution of Bangladesh, 1972, which is analogous to Article 22 (2) of the Constitution of India reads:

Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in Custody beyond said period without the authority of a Magistrate.
20) **Rumania** - Article 28 of Rumanian Constitution provides that no person shall be arrested and detained for more than 48 hours without warrant from the Department of Prosecutions, from the examining authorities appointed by law, or an authorisation from the courts in conformity with the provisions of the law.

21) **Czechoslovakia** - Clauses (2) and (3) of Article 3 of the Czechoslovak Constitution of 1948 read:

(2) Unless caught in the act of committing an offence, no person shall be arrested except on the written order of a judge, giving the reason therefor. The order shall be delivered at the time of the arrest or, if this is not possible, within 48 hours thereafter.

(3) No person shall be taken into custody by a public official except in the cases prescribed by law; he must then be either released within 48 hours or brought before a court or authority which is competent to proceed with the case from the view of it's nature.

22) **Canada** - Constitution of Canada, 1982 in it's Sections 9 and 10, provides safeguards against arbitrary arrest and detention. Sections 9 and 10 of Canadian Constitution are as under:

**Section 9 (Imprisonment)** - Everyone has the right not to be arbitrarily detained or imprisoned.

**Section 10 (Arrest)** - Everyone has the right on arrest or detention (a) to be informed promptly of the reason therefor; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of *habeus corpus* and to be released if the detention is not lawful.
REFERENCES

1. 287 U.S. 45 (1932).
2. 316 U.S. 455 (1942).
31. (1917) A.C. 260.
32. (1942) A.C. 206.
33. (1931) A.C. 662.
34. (1942) A.C. 284.
35. (1951) A.C. 66.


41. (1947) A.C. 573.


43. Durga Das Basu *op. cit.* at 159.


57. www.hri.org/docs/ECHR50.html

58. legal.apt.ch

59. www.hrcr.org


