CHAPTER - 1

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1.1 INTRODUCTION:

Article 22 did not exist in the Draft Constitution. It was added towards the end of the deliberations of the Constituent Assembly. The reasons for the incorporation of this Article were explained by Dr. B.R. Ambedkar in the Constituent Assembly. He pointed out that Article 21 had been violently criticized by the public outside as it merely prevented the executive from making any arrest. All that was necessary was to have a law allowing arrest and that law need not be subject to any conditions or limitations. It was felt that while this matter was included in the chapter on Fundamental Rights, Parliament was being given carte blanche to make and provide for the arrest of any person under any circumstances as Parliament may think fit. What was being done by Article 22 was a sort of compensation for what was done in Article 21. The Constituent Assembly was providing the substance of “due process” by the introduction of Article 22. This Article, in its first two clauses, merely lifted from the Code of Criminal Procedure two of the most fundamental principles which every civilised country followed as principles of international justice. By making them a part of the Constitution, the Constituent Assembly was making a fundamental change by putting a limitation on the authority of both Parliament and State legislatures not to abrogate those provisions. The view of Dr. Ambedkar was that the provisions made in Article 22 were sufficient against illegal and arbitrary arrests.

Article 22 is one of the group of Articles in Part III (Fundamental Rights) of the Constitution of India, which have been collected together under the sub-heading “Right to Freedom”. The subject-matter of the Article is personal liberty. This Article proceeds to guarantee certain Fundamental
Rights to every arrested person. These rights being guaranteed by the Constitution are of a higher status than rights which are merely conferred by the ordinary law and have no such constitutional guarantee. Clause (1) and (2) confer the four following Fundamental Rights on every person, as essential requirements and safeguards to be followed when it is necessary to deprive any person, for any cause whatsoever and for however brief a period, of his personal liberty by placing him under arrest or keeping him in detention:

1. to be informed, as soon as may be, of the grounds for such arrest;
2. not to be denied the right to consult and to be defended by a legal practitioner of his choice;
3. to 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 Magistrate;
4. not to be detained in custody beyond the said period of twenty-four hours without the authority of a Magistrate.

Clause (3) contains two exceptions and provides that the above mentioned constitutional guarantees do not apply to (a) enemy aliens and (b) persons arrested or detained under any law providing for preventive detention. Clauses (4) to (7) are devoted to laying down certain fundamental principles as to preventive detention and guaranteeing certain Fundamental Rights to persons who are arrested and detained under any law for preventive detention.

The Constitution does not directly authorise preventive detention of any person for any purpose. Article 22 only assumes the possibility of law for preventive detention. If there is no such law, the Executive cannot, of its own
responsibility, detain any person in custody. Any law relating to preventive detention must in order to be valid, satisfy the requirements of clauses (4) to (7) of this Article. The Fundamental Rights, guaranteed by clauses (4) to (7) to persons detained under any law for preventive detention, relate to the maximum period of detention, the provision of an Advisory Board to consider and report on the sufficiency of the cause for detention, the right to be informed of the grounds of detention and the right to have the earliest opportunity of making a representation against the order of detention. The two latter rights go some way to make up for the denial of the rights, which are given to an arrested person under clause (1), namely, of being informed, as soon as may be, of the grounds of arrest and the right to consult and be defended by a legal practitioner of his choice. The power of preventive detention is thus acquiesced in by the Constitution as a necessary evil and is, therefore, hedged in by diverse procedural safeguards to minimise as much as possible the danger of its misuse. It is for this reason that this Article has been given a place in the chapter on Fundamental Rights.

1.2 **STATEMENT OF THE PROBLEM:**

Present research problem relates to the tracing of vicissitudes of judicial interpretation of Article 22 since January 1950 till December 2001. After perusing all cases decided by the Supreme Court of India in this regard, the possible direction of the judicial trend may be discernible. The research problem concerns to outline clearly the judicial trend in relation to this fundamental right. Bare text of Article 22 will not give correct idea of the fundamental rights included in it unless the Article is visualized in the perspective of judicial pronouncements on it. In order to depict this panorama of Article 22, the research problem under study is defined as ‘Review of the Judicial Gloss on Article 22 of the Constitution of India’.
1.3 SIGNIFICANCE OF THE STUDY:

It is worldwide recognised that every person has certain basic, natural and inalienable rights or freedoms. It is duty of the State to recognise and enforce these rights and freedoms in order that human liberty may be secured, human personality developed. It is necessary that such rights may not be violated or interfered with by the government of the day. With this object in view, Constitution guarantees a few rights to the people and forbids the Executive and the Legislature from interfering with the same. These guaranteed rights can be limited or taken away only by elaborate and difficult process of constitutional amendment and not by ordinary legislation. These rights are known as fundamental rights. The fundamental rights have been grouped under seven heads in the Part III of the Constitution of India. Article 22 falls in the group of 'Right to Freedom' which comprises Articles 19 to 22. According to Article 13(2), the state is prohibited to take away or abridge the fundamental rights. The Supreme Court of India can declare a law contravening a fundamental right void to the extent of the contravention. As the fundamental rights constitute a limitation on the governmental power, while interpreting them the Supreme Court is faced with the task of achieving a proper balance between the rights of the individual and those of the state or society as a whole i.e. between individual liberty and social control. Under the doctrine of judicial review the courts perform the role of interpreting the Constitution and exercise power of declaring any law or administrative action which may be inconsistent with the constitutional provisions as ultra vires the Constitution and hence void. The Supreme Court plays a very significant role in the interpretation of the Constitution of India especially fundamental rights. The bare text of the Constitution does not reflect in itself correct and complete law of the country. For appreciating the correct position of law regarding any fundamental right, it is necessary to read the text in the Constitution along with the gloss put thereon by the Court. The Supreme Court not only finds the
law but many a times plays a creative and dynamic role and even makes law under the guise of interpreting the Constitution. To quote Charles Evans Hughes:

"We are under a Constitution, but the Constitution is what the judges say it is."\(^2\)

The orthodox Blackstonian view, however, is that judges do not make law, but only declare what has always been law. R.W.M. Dias comes to a conclusion that a scrutiny of the judicial process shows that Blackstonian doctrine is unacceptable and judges do make law.\(^3\) Salmond asserted that it is to the courts and not to the legislature that we must go in order to ascertain the true nature of the law. Accordingly, he defined law as the body of principles recognised and applied by the state in the administration of justice, as the rules recognised and acted on by courts of justice.\(^4\) Holmes observed in 1897:

"the prophecies of what the court will do in fact, and nothing more pretentious, are what I mean by law."\(^5\)

There have been cases of judicial passivism as well as that of judicial activism in different times. The judicial review serves as a valuable check on the possible excesses by the legislature and the executive. It has been emphasized from time to time that the Constitution must not be construed in any narrow and pedantic sense. However, the judges are not free to stretch or pervert the language of the enactment in the interest of any constitutional theory or even for the purpose of supplying omissions or of correcting supposed errors. In the opinion of M.P.Jain, a renowned author of Indian Constitutional Law, judicial approach to the Constitution is no longer solely and exclusively one of literal interpretation. Occasions are not wanting when the Supreme Court has broken self-imposed shackle and gave a creative, purposive interpretation to constitutional provisions.\(^6\)
The Constitution is not just an ordinary statute; it is the *grundnorm* in the language of Kelsen. A written Constitution is intended to state not rules for the passing hour but principles for an expanding future. So its interpretation must of necessity proceed on lines somewhat different from interpreting ordinary enactments. Judges should keep their minds open to new ideas. They should play the role of judicial architect rather than judicial mason. The Constitution should receive a fair, liberal and progressive interpretation. The Constitution has made the Supreme Court the sentinel *qui vive* of the rights of man and required it to stand ever watchful against governmental encroachment on fundamental rights. *Stare decisis* is not a clog upon the authority of the Supreme Court. There is nothing in the Constitution which prevents the Supreme Court from departing from a previous decision of its own if it was satisfied of its own error. In the opinion of Justice Hidayatullah it is an error to view the Constitution, as a mere organisational document, rather it is a social document. The dynamic needs of the nation, which a Court must fulfil, leave no room for merely pedantic hair splitting play with words or semantic quibblings.

The courts are typically passive institutions. They are passive in the sense that they cannot of their own at all perform social ‘stability’ or ‘change’ tasks; the courts need activation of their jurisdiction by litigants or state officials. However, in a democracy, the Courts are the ultimate refuge of the citizens for the vindication of their rights and liberties and so important institution.

In view of this significant role of the Court, the researcher has attempted to make a close scrutiny of the case law of the Supreme Court of India and to discover general trend of judicial attitude and orientation. The researcher has tried to portray the true dimension of Article 22 of the Constitution of India. The study of the researcher highlighting judicial gloss
on Article 22 is going to make a significant contribution in the field of Human Rights Jurisprudence, especially Punitive and Preventive Detention Jurisprudence.

1.4 **REVIEW OF LITERATURE:**

As the statement of the problem is 'Review of the Judicial Gloss on Article 22 of the Constitution of India', the literature consisted mainly of case law. The researcher thought it fit to confine his study to Supreme Court decisions only as the law declared by the Supreme Court of India is law of the land and it is binding on all the subordinate courts in India including High Courts. For this purpose, the time when Article 22 came into force was selected as the proper time from which decisions of the Supreme Court of India would be studied. The Constitution of India came into force on 26th January, 1950 and along with it Article 22. So, the decisions reported since January, 1950 were considered. All the decisions of the Supreme Court of India on Article 22 reported in All India Reporter, a reputed legal journal, were identified and collected. The researcher enrolled himself as a research student in the month of January 2002. So, all the decisions reported till December 2001 were made the subject matter of the study. All such decisions were perused by the researcher and carefully studied. Treatises, textbooks, reference books and some Articles in the journals which dealt with the Constitution of India were also studied with reference to Article 22. Bibliography at the end of this thesis enumerates all these books and periodicals. To name few renowned authors whose books were studied by the researcher: H.M. Seervai, Durga Das Basu, M.P. Jain, V.N. Shukla, V.D. Mahajan, V.G. Ramchandran, Granville Austin, T.K. Tope, M.V. Pylee, B.Shiv Rao.
1.5 **OBJECTIVES OF THE STUDY:**
The main objectives of this research study are as follows:

i) To trace the genesis of Article 22 of the Constitution of India with the help of Constituent Assembly Debates and Reports of the Drafting Committee.

ii) To explore the relationship of Article 22 with other Articles, specially Articles 14, 19, 20 and 21 as interpreted by the Supreme Court of India in various cases.

iii) To identify the different component parts of Fundamental Right under Article 22.

iv) To analyse and evaluate the case law on Article 22 critically with respect to cases decided by the Supreme Court of India from January 1950 to December 2001.

v) To assess the trend of judicial decisions and to find out whether the interpretation of the Supreme Court is literal or liberal.

vi) To study foreign legal provisions corresponding to Article 22 of the Constitution of India and to have a broad comparative view of the same.

vii) To come to a conclusion whether the Supreme Court of India is gradually moving from static and literal interpretation to dynamic and liberal interpretation of Article 22 of the Constitution of India.

viii) To make a meaningful contribution to Human Rights Jurisprudence, especially Punitive and Preventive Detention Jurisprudence.

ix) To throw more light on the broad perspective of the ever-increasing scope of the fundamental right under Article 22 *i.e.* 'Protection against Arrest and Detention in certain cases'.
1.6 HYPOTHESIS:

The hypothesis which is formulated in the beginning of the study is:

"The Supreme Court of India is gradually moving from static and literal interpretation to dynamic and liberal interpretation of Article 22 of the Constitution of India".

The last chapter of this thesis deals with the testing of this hypothesis with the help of the findings of the research study.

1.7 DEFINITION OF IMPORTANT TERMS:

Some of the words used in the Statement of the Problem and hypothesis which require explanation are defined as follows:

i) **Literal Interpretation:**

Literal Interpretation means that interpretation where the words of an enactment are given their ordinary and natural meaning, the meaning that is according to the rules of grammar. Literal Interpretation means construing a statute in its primary and etymological sense without recourse to any suggested meaning, when judge does not modify the language of an Act with his own views as to what is right and reasonable; intention of the legislature is found in the words used by the legislature itself.

ii) **Liberal Interpretation:**

Liberal Interpretation means that interpretation of a statute where its meaning can be extended to matters which come within the spirit or reason of the law or within the evils which the law seeks to suppress or correct, although, of course, the statute can under no circumstances be given a meaning inconsistent with or contrary to language used by the legislators. Consequently, any matter reasonably within the statute's meaning may be included within the statute's scope, unless the language necessarily excludes it.
Liberal Interpretation is that by which the letter of the statute is enlarged or restricted so as to more effectually accomplish the purpose intended.\textsuperscript{10}

iii) **Review**:
Review means the act of looking over something (again), with a view to correction or improvement. It also means a general survey or reconsideration.\textsuperscript{11}

iv) **Judicial**:
Judicial means of or belonging to judgment in a court of law.\textsuperscript{12} In this thesis 'court of law' means Supreme Court of India only.

v) **Gloss**:
Gloss means comment, explanation, interpretation.\textsuperscript{13}

vi) **Gradually**:
Gradually means taking place by a series of small changes over a long period \textit{i.e.} not sudden.\textsuperscript{14}

1.8 **METHODOLOGY**:
This research is of fundamental or basic type. It is a doctrinal research. Analytical methodology is adopted by the researcher for obtaining the findings and coming to the conclusion.

The main data for this research is Primary. The source of this Primary Data being all the cases reported in All India Reporter from January 1950 to December 2001. The cases relating to Article 22 decided by the Supreme Court only are collected.

The Secondary Data consists of sixty-three treatises (text-books and reference books) written by renowned authors, one official report and few periodicals and legal journals of international repute.
In this research study, methodology of data collection is of Census Survey as the whole Universe is studied. The Universe for the research study comprises the cases relating to Article 22 decided by the Supreme Court of India and reported in the Journal, All India Reporter from January 1950 to December 2001. There was no sampling. Consequently, the findings of the research study are accurate and comprehensive.

To some extent, a comparative method is adopted and in the chapter on 'Global Perspective of the Right against Arbitrary Arrest and Detention' provisions corresponding to Article 22 of the Constitution of India are briefly given and some relevant case law is also cited.

1.9 **SCOPE AND LIMITATIONS OF THE STUDY**:

The field of Research covers only Article 22 in Part III of the Constitution of India. The field of Research is limited to reviewing of the judicial gloss put on Article 22. The decisions of only Supreme Court of India are studied. All the decisions of the Supreme Court of India from January 1950 to December 2001 are studied. The limitations of the study are that no decision of the Supreme Court of India reported since January 2002 is considered. Similarly no decisions of any High Court are considered. As the decisions of the Supreme Court are binding on all the High Courts in India and as the study of all the decisions of all the High Courts would have been unmanageable for the researcher, High Court decisions are left out of the purview. Research Study also has incidental global perspective. A general study is made of comparable rights and few cases decided thereon of some foreign countries. But this study gives only cursory glance and is not comprehensive at all. It is broad global perspective of rights corresponding to Article 22. Some important International Covenants, Regional Conventions are also referred to in this part of the study.
1.10 **SCHEME OF CHAPTERISATION:**

The thesis has total 11 chapters.

**Chapter-1: Introduction**

This chapter deals with brief introduction, statement of the problem, significance of the study, review of literature, objectives of the study, hypothesis formulated, definition of important terms, methodology, scope and limitations of the study and scheme of chapterisation.

**Chapter-2: Genesis of Article 22 and it's correlation with Articles - 14, 19, 20 and 21**

This chapter traces the genesis of Article 22 while framing the Constitution with the help of Constituent Assembly Debates and Drafting Committee Reports. This chapter also explains with the help of decided cases the correlation of Article 22 with fundamental rights under Articles 14, 19, 20 and 21.

**Chapter-3: Rights of Arrested Person under Article 22 (1) and (2)**

This chapter examines the judicial gloss put on the following four fundamental rights.

i) Right of a person arrested not to be detained in custody without being informed, as soon as may be, of the grounds of his arrest.

ii) Right of such person not to be denied the right to consult, and to be defended by, a legal practitioner of his choice.

iii) Right of a person arrested and detained in custody to be produced before the nearest magistrate within a period of twenty-four hours of his arrest.

iv) Right of such person not to be detained in custody beyond this period without the authority of a magistrate.
**Chapter-4: Grounds of Preventive Detention**

This chapter is devoted to the interpretation of the Supreme Court relating to various aspects of grounds of preventive detention e.g. meaning of the word ‘grounds’, relevant grounds, vague grounds, extraneous grounds, communication of the grounds of detention to the detenu, language of communication of grounds, sufficiency of the grounds, meaning of the phrase ‘as soon as may be’.

**Chapter-5: Detenu's Right of Representation**

This chapter analyses decisions of the Supreme Court relating to detenu's right of representation against the detention order, authority to whom representation is to be made, consideration of the representation and effect of delay in considering representation.

**Chapter-6: Validity of Detention**

This chapter gives a sketch of circumstances under which the Supreme Court holds detention order valid or void e.g. validity of detention order against a person in custody, effect of time-lag between the prejudicial activity and the order of detention and effect of delay in making arrest after the order of detention, concept of public order *vis-a-vis* law and order, subjective satisfaction of detaining authority *etc*.

**Chapter-7: Article 22 and Emergency**

This chapter probes into some important Supreme Court decisions when safeguards in Article 22 are suspended in Emergency.

**Chapter-8: Role of the Advisory Board**

This chapter outlines the role of Advisory Board in preventive detention cases. It deals with composition of Advisory Board, scope of Advisory Board, circumstances when Advisory Board may be dispensed with.
The chapter also discusses the right to appear through legal practitioner or friend before the Advisory Board.

Chapter-9: Maximum Period of Preventive Detention

This chapter discusses with the help of decided cases as to what may be the maximum period of detention, whether period of parole may be counted in the period of detention, whether the Parliament is bound to fix the maximum period of detention.

Chapter-10: Global Perspective of the Right against Arbitrary Arrest and Detention

This chapter surveys the law and case law, corresponding to Article 22, as exists in some foreign countries like U.S.A., U.K. etc. This chapter attempts to apply comparative method of study for the topic under research.

Chapter-11: Conclusion and Suggestions

This last chapter incorporates concluding remarks, the finding of the researcher, testing of the hypothesis and few suggestions of the researcher regarding the field of research.
REFERENCES

5. Ibid. at 13; Holmes, "The Path of the Law" (1896-97) 10 H.L.R. at 461.
12. Ibid.
13. Ibid.