RIGHT TO LIBERTY AND ARREST: COMPARATIVE STUDY OF INDIA FROM INTERNATIONAL PERSPECTIVE

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Executive Summary

In view of increasing allegations on misuse of power to arrest by the police and a recommendation of the Law Commission of India, the Government of India has amended the Section 41of the Code of Criminal Procedure, in the year 2008 and 2010. That restricts the police power to arrest persons without warrant on the ground of suspicion. However, there is no any study available that reviewed the scope of restriction laid down on the police power to arrest a person. Therefore, this thesis compares the relevant provisions of the India with the international conventions such as ECHR and the ICCPR on the 'right to liberty'. After analysis, thesis argued that though, all three jurisdictions ensures the protection of 'right to liberty' and share the common understanding of the principles of protection from 'arbitrary' deprivation of liberty. The Article 9 of the ICCPR does not specify the grounds for deprivation of liberty like the Article 5 of the ECHR. In addition, the threshold set by the national jurisdiction of India under the notion of 'reasonable suspicion' is observed to be less restrictive than that exists in the ECHR. Moreover, the requirements of an additional reason for the deprivation of liberty for arrest a person on reasonable suspicion not available for offence punishable for more than seven years. On the other hand the requirement for submitting the reason for not arresting suspected person for offence punishable for more than seven years contradict the presumption of innocence.

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Introduction

Liberty is a wider term which carries several other rights of a person such as right to freedom of speech and expression, right to religion etc. However, these rights are not an absolute right[1]. Although, there are several other forms of deprivation of liberty, but arrest is one of the conventional forms of deprivation of liberty exercised by the State authority. However, arrest is justifiable on several grounds such as an effective investigation of the offense, the production of the arrested person before a competent authority, prevention of commission of certain offenses, protection of the evidence, etc[2].

According to *Nowark* the right to liberty is one of the 'oldest human rights in the world[3]'. First-time man gets the right to liberty in the famous document of a Magna Charta in the year 1215 AD[4]. Thereafter, right to liberty found mention in several other documents such as Habeas Corpus Act of England 1640 and 1679 and French Declaration of the Right of Men and Citizen, 1789.[5] However, according to *Marcux Jr* the provision of these documents ensured protection from 'unlawful' deprivation of liberty and not from arbitrary deprivation of liberty[6].

[1] Article 21 of 'The Constitution of India' published by the Government of India, Ministry of Law and Justice (Legislative Department,), (2015), page 10; Article 5 of European Convention on Human Rights, 'European Court of Human Rights, Council of Europe' F-67075, Strasburg Ceder, page 7-8; Article 9 of the 'International Covenant on Civil and Political Rights' adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49; See also Nandini Sapathy v dani (PL) and Another1978 AIR 1025,1978 SCR (3) 6081; see infra note 18, Para 9

[2] Article 5 (a) to (f) of European Convention on Human Rights, 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder, page 7-8; and the Section 41 of the Code of Criminal Procedure

[3] Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (N. P. Engel, 2nd rev. ed. 2005). Page 211, Para 1

[4] Ibid

[5] Marcoux Jr Laurent, 'Protection form Arbitrary Arrest and Detention under International Law', 'Boston Collage International Comparative Law Review' Vol. 5, Issue 2, Article 3 dated 8/1/1982., page non 346-347; See also Supra note19, page 5

[6] Ibid

After World War II, the international community realized the importance of the 'right to liberty' in a democratic society. As a result, 'right to liberty' become the single substantive law of international instrument under Article 3 and 9 of the Universal Declaration of Human Rights (UDHR)[7]. With the adoption of this right in UDHR, it also got incorporated in the other international instruments such as the International Covenant on Civil and Political Rights (hereafter ICCPR)[8] and the European Convention on the Human Rights (hereafter ECHR)[9].

Article 9 of the ICCPR and Article 5 of the ECHR offer protection from 'arbitrary' and 'unlawful' deprivation of liberty[10] by ensuring substantive and procedural guarantee to a person deprived of his/her liberty[11]. Similarly, the Constitution of India also protects the right to 'life and liberty' under the scheme of a fundamental rights[12], which are enforceable by law as one of the essential democratic rights[13]. However, like other two international jurisdictions, the Constitution of India, consider the facts that the 'right to liberty' is not an absolute right. Nonetheless, the Article 21 of the Constitution of India similar to the Article 21 and Article 22 protects 'right to liberty' by ensuring the procedural and the substantive guarantee against arbitrary deprivation of liberty.[14] Consequently, the Constitutional guarantee of the 'right to liberty' has been reflected in the Code of Criminal Procedure of India 1973.[15] These provisions not only laid a substantive limitation on the power of

[7] Article 3 and 9 of The UDHR, Declaration and proclaimed in the UN General Assembly in Paris, 10th December 1948, GA Resolution 217A

[8] See Supra note 5, page no. 348

[9] Article 5 of the European Convention on Human Rights', 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder, page 7-8;

[10] Ibid; Article 9 of the 'International Covenant on Civil and Political Rights' Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49,

[11] Ibid

[12] Article 21 of the 'The Constitution of India' Published by Government of India, Ministry of Law and Justice (Legislative department,), (2015), page 10;

[13] Article 32 and 226 of the 'The Constitution of India' Published by Government of India, Ministry of Law and Justice (Legislative department,), (2015), page 18,

[14] See supra note 12 (Article 21 and 22 of The Constitution of India)

[15] Section 41, 42, ….etc of the Code of Criminal Procedure

authorities to arrest a person but also mentioned the procedure to be followed while making such arrest[16]. These provisions also set the condition of judicial review to check the legality of such arrest.[17]

However, The Supreme Court of India while deciding on the writ of habeas corpus recalled the National Police Commission Report which observed that 60% of the arrests made by the police are 'unreasonable' and 'unnecessary'.[18] Moreover, 152nd and 177th Law Commission of India Reports seconds the same observation[19]. Further, according to the information collected by the 177th Law Commission of India, a large number of arrests recorded by the police can be categorised as bailable offenses[20]. For instance out of total arrest 94% in Haryana, 74% in Kerala, 90 % in Assam, 84% in Karnataka and 89% in Madhya Pradesh made by police in a bailable offences.[21] The Supreme Court of India has also noticed the increasing number of cases of police abuse in the cases of *Joginder Singh v State of Uttar Pradesh*[22] and *D.K. Basu v State of West Bengal*[23].

The 177th Law Commission of India Report (2001), recommended to amend the Section 41 of the Code of Criminal Procedure under which police possesses the power to arrest a person without a warrant[24]. As a result of such recommendations, several sub section was inserted under the chapter of police power to arrest. One of such subsection was the Section 41(1) (b) the Code of Criminal Procedure (1973) as amendment in 2008 and 2010. These amendments

[16] Section 167 of the Code of Criminal Procedure Code of India
[17] Ibid
[18] Joginder Kumar v State of U.P on 25 April, 1994, (1994) 4 Supreme Court Cases260, SCC online ; D.K. Basu v State of West Bengal, (1997)1 Supreme Court Cases 416, page 425
[19] Reddy Jeven BP, '177th Law Commission of India Report 2001', Law Relating to Arrest, http://lawcommissionofindia.nic.in/reports/177rptp1.pdf, page 63
[20] where bail is the right for an arrested person, under section 436 of the Code of Criminal Procedure of India;
[21] See Supra note 19, page 8
[22] See Supra note 18
[23] D.K. Basu v State of West Bengal, (1997)1 Supreme Court Cases 416, page 425
[24] See Supra note 19, page 92-93

restricted the power of police to arrest a person on the ground of 'reasonable suspicion', 'reasonable complaint' or the 'credible information' of committed the offense[25].

Authors like *Baleri Devi* has appreciated the government move of amending the Section 41of the Code of Criminal Procedure, 1973 and said that the current provision would provide better protection to a person against arbitrary arrest by the police[26]. However, further, she suggested that it would be very premature to comment anything on the applicability of this provision[27]. Authors, *Jain and Choudhary*[28] have found to critically review the law relating to power of arrest of police on reasonable suspicion but did not make any critical comment on the amendment of to Section 41. In addition, scholars like *Bhabdari,*[29] discussed the role of various functionaries including the power of police to arrest. She pointed out various issues pertaining to pretrial detention, such as, misuse of the police power to arrest, corruption among the police, overburden of work and political interference, etc. although she extended the discussion towards the power of arrest after amendment but refrained from making any critical comment on the interpretation of the same.[30] However, she concludes that initiatives taken by the government are insufficient to prevent the prevailing number of pretrial detentions.[31] As most of these pretrial detainees are from a vulnerable section of the society[32], justice is out of their reach because of their inability to afford the cost incurred[33]. She says

[25] See Supra note 19
[26] Bellary Uma Devi, Arrest, Detention, and Criminal Justice System: A Study in the Context of the Constitution of India (Oxford University Press 2012). Page 49
[27] Ibid
[28] Jain Sanjay Kumar and Choudhary Viplav Kumar, 'Law Relating to Power of Arrest A Critical review', 'The Indian Journal of criminology and criminalization', Vol XXXIV, No.1, Jan-June2015, page 74-93
[29] Bhabdari Brinda 'Pretrial Detention in India: an Examination of the causes and solution', Asian Journal of Criminology, (2015),page 1-28
[30] Ibid
[31] Ibid
[32] Ibid; see also the National Crime Record Beauro Report 2011, around 60% of the pretrial detainees are from the SC/ST OBC and Minority community.
[33] Ibid, page no 1-28

that in such circumstances, it is not appropriate to have a blind faith on the intention of a police to arrest a person.[34]

Like the national jurisdiction of India, the international jurisdictions such as the International Covenant on the Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) also guarantees the protection of the right to liberty under Article 9 and 5 of the respective jurisdictions[35]. Further, they also guide the nation state by their interpretation of the respective provision for a better protection of the 'right to liberty'. As India remains a signatory to the ICPPR[36]; it becomes necessary to refer the jurisprudence of the UN General Committee while interpreting the law of the nation. Similarly, the European Court of Human Rights has also elaborated more on the 'right to liberty' in its jurisprudence.[37]

According to *Trecshel,* 'right to liberty' can be studied in three different perspectives; procedural, compensation, and deprivation of liberty[38]. However, this thesis constrains its inquiry on the grounds of deprivation of liberty, specifically the deprivation of liberty by the arrest on the 'ground of suspicion'.

Methodology

To understand the provisions regarding deprivation of liberty on grounds of suspicion, the author would review the relevant sections of the national and international legislations. In addition, books and articles that deal with the issue of right to liberty will also be referred. Furthermore, reference would be made to relevant reports of various Government and non-

[34] Ibid; See Supra note 19, page 64
[35] See Supra note 9; Article 9(1) of the 'International Covenant on Civil and Political Rights' Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, page 2
[36] Acceded convention on 10th April 1979, National Human Rights Commission of India, http://nhrc.nic.in/documents/india_ratification_status.pdf
[37] See Supra note 35,; 'The Constitution of India' Published by Government of India, Ministry of Law and Justice (Legislative department,), (2015)
[38] Stefan Trechsel, Human Rights in Criminal Proceeding, Oxford University Press 2005, page 425

government organizations. Landmark judgments of the Supreme Court of India, High Court of various States of India, ECtHR and the UN General Committee on the right to liberty would also be reviewed along with referral to guides on the 'right to liberty' published by the ECHR. The first chapter deals with a detailed discussion on the scope of 'protection of liberty' under the three different jurisdictions namely the Article 5(1) of the ECHR, Article 9(1) of the ICCPR and the Article 21 of the Constitution of India. The second chapter thoroughly discusses the principles developed under Article 5 (1) of the ECHR and Article 9 of the ICCPR for the protection of a person from 'unlawful' and 'arbitrary' deprivation of liberty. The third chapter elaborates on the protection available under Article 21 of the Constitution of India against 'arbitrary' and 'unlawful' arrest and the relation between 'right to liberty' and other rights available in India and fourth chapter analyses the power of police to arrest on the ground of 'reasonable suspicion' and protection from 'arbitrary' and 'unlawful' deprivation of liberty.

Chapter I

Scope of 'protection of liberty' under Article 5 (1) of the ECHR, Article 9(1) of the ICCPR and Article 21 of the Constitution of India

Introduction

This chapter would deal with three different jurisdictions namely, the ECHR, ICCPR and the Constitution of India. Out of these jurisdictions two are the international and one is a national jurisdiction[39]of India. These instruments have been drafted and enforced in different time frames and under different circumstances. In addition, all the three jurisdictions are found to use different terminologies for the protection of right to liberty[40]. For instance, both the ECHR and ICCPR used the term 'right to liberty and security of person[41]' whereas the Constitution of India, under Article 21 used a term 'protection of life and liberty'[42]. In view of the above circumstances and before going into further details on protection provided by these provisions in their respective jurisdiction, the present chapter will discuss briefly the meaning and scope of 'liberty' and 'security' under these jurisdictions[43].

[39] 'International Covenant on Civil and Political Rights' adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49,; 'European Convention on Human Rights', 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder, page 7-8;

[40] Ibid

[41] Article 5 (1) of the 'European Convention on Human Rights', 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder, page 7-8; Article 9 (1) of 'International Covenant on Civil and Political Rights' Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49,;

[42] Article 21 'The Constitution of India' Published by Government of India, Ministry of Law and Justice (Legislative department,), (2015), page 10;

[43] See Supra note 39

1.1 'Liberty and Security' under Article 5 (1) of the ECHR

The opening statement of Article 5 of the ECHR guarantees 'right to liberty' and 'security' of a person[44]. The meaning of 'personal liberty' is much wider and it also encompasses several other rights[45]. For example, as *Trechsel* says 'personal liberty' means the right of an individual to do whatever he or she wants to do[46]. The ECtHR in the case of *Engel and Others v The Netherlands*[47] made it clear that the 'personal liberty' under Article 5 contemplates the 'physical liberty' of a person. The ECtHR in the case of *Guzzardi v Italy*[48], further elaborated by distinguishing 'physical liberty' protected under Article 5 of the ECHR from the protection provided for 'restriction of movement' under Article 2 of Protocol 4 of the ECHR. According to the ECtHR, the difference between 'restriction of movement' and 'physical liberty' is not in its 'substance and nature' of detention but in 'one degree' or 'intensity' of restriction on the movement of a person.[49]

The deprivation of 'personal liberty' is more than the classical case of deprivation of liberty in the form of 'arrest' and 'detention'.[50] However, the notion of deprivation of liberty depends on several parameters. For instance the ECtHR in the case of *Engel and Other v the Netherlands*[51] observed two criteria to test the deprivation of 'personal liberty'. First, it is depends on the concrete situation of detention; and second, on some additional factors such as 'type', 'duration', 'effect' and 'manner of implementing the restriction' of movement.[52]

[44] Article 5(1) of the Article 5 (1) of the 'European Convention on Human Rights', 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder
[45] Nowak Manfred, 'UN Convention on Civil and Political Rights: Commentary on Civil and Political Rights, (2nd rev. ed.). Kehl am Rhein: Engel,2005 page 212,para 3
[46] See Supra note 38, page 408;
[47] Engel and Others V/s The Netherland, Application no. 5100/1971, 5101/1971, 5102/1971, para 58
[48] Guzzardi V/s Italy, Application no. 7367, para 93
[49] Ibid
[50] Ibid, para 92
[51] See Supra note 47, para 58- 59
[52] See Supra note 50, para 92

The ECtHR in the case of *El-Masri v the Former Yugoslav Republic of Macedonia*[53] observed that Article 5 of the ECHR has created both positive and negative obligation on nation states to restrain from active infringement of the right to liberty of a person. According to *Harris et al.* the meaning of the term 'security' under Article 5 (1) is confined to the 'physical security' of a person[54]. It includes protection against deprivation of liberty by a private person as well as protection from the 'arbitrariness'[55]. The intention of same is to protect the person from the incommunicado detention[56].

1.2 'Liberty and Security' under Article 9 (1) of the ICCPR

Similar to the Article 5 (1) of the ECHR, the opening statement of Article 9(1) of International Covenant on Civil and Political Rights (ICCPR) protects the 'right to liberty' and 'security' of a person[57]. *The General Comment No. 35* of ICCPR, citing the case of *Wackenheim v. France*[58], observed that the notion of 'liberty' under Article 9 of the ICCPR is similar to 'freedom from confinement' and 'not a general freedom of action'.[59] Similarly *Nowark* argued that notion of 'personal liberty' under Article 9(1) is not a liberty in general term[60]. According to *Nowark* liberty in general term includes right to enjoy 'freedom of religion', freedom of speech and express[61]. However, under article 9 of the ICCPR the

[53] El-Masri v. the former Yugoslav Republic of Macedonia, Application no. 39630/09, ECHR,13 December 2012, para 239

[54] David Harris, Michael O'Bayle and Others, Law of European Convention on Human Rights' 3rd Edition, Oxford; Oxford University Press, 1st October, 2014, page 132

[55] Ibid

[56] Ibid

[57] Article 9(1) of the ICCPR ' Everyone has the right to liberty and security of person' and Article 5 (1) of the 'European Convention on Human Rights', 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder, page 7-8'Everyone has the right to liberty and security of person': See also infra note 60, para 7

[58] Manuel Wackenheim v. France, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002)(http://hrlibrary.umn.edu/undocs/854-1999.html) para. 6.3.

[59] General Comment No.35, para no. 3 16 December 2014, UN Doc. No. CCPR/C/GC/35.; Also see infra note 60, page 212,para 3

[60] Nowak Manfred, 'UN Convention on Civil and Political Rights: Commentary on Civil and Political Rights, (2nd rev. ed.). Kehl am Rhein: Engel,2005 page 212,para 3

[61] Ibid

meaning of personal liberty is restricted to freedom from 'bodily movement' of a person.[62] The deprivation of liberty involves more severe restrictions of motion within a narrow space, than mere interference with the liberty of movement under Article 12 of the ICCPR.[63] For instance, 'remand detention', 'house arrest', 'administrative detention', etc., are examples of 'deprivation of liberty' under Article 9 of the ICCPR, but 'limitation on domicile', 'residency', 'exile' or 'confinement into island', etc., are not covered under the notion of 'deprivation of liberty'.[64]

According to *the General Committee No. 35* the notion of 'security' is protecting a person from the 'bodily and mental injury' regardless of his/her detention or non-detention[65]. Hence, a nation state called violates the right to 'security' of a person in both the conditions when a government personnel unjustifiably inflict bodily and mental injury to a person; and also when the nation state fails to protect a person from death threat in their private space[66]. On the other hand, the meaning of 'security' under Article 5 of the ECHR'…[does] not attribute any independent significance beyond [protecting] personal liberty.[67]' Moreover the

[62] Ibid

[63] General Comment No.35, para no. 3 16 December 2014, UN Doc. No. CCPR/C/GC/35; See also supra note 6o,para 3; Article 12 of ICCPR *1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own.3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.4. No one shall be arbitrarily deprived of the right to enter his own country.*

[64] See supra note 60

[65] General Comment No.3516 December 2014, UN Doc. No. CCPR/C/GC/35, para no. 3

[66] Ibid; See also 613/1995, *Leehong* v. *Jamaica*, Para. 9.3 and 1560/2007; *Marcellana and Gumanoy* v. *Philippines*, Para. 7 .7; See also supra note 60, page 215,para 9, Where *Nowak* citing the case of Delgado Paez V Colombia, decided on 12th July 1990 made it clear that General Committee not only establish the independent meaning of 'security' from the 'liberty' but also horizontal effect of the same.

[67] See Supra note 60, page 214,para 8; See also explanation given in above para 2.2.1 'Article 5 of the ECHR' Article 5 (1) of the 'European Convention on Human Rights', 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder,

protection of a person from the 'bodily and mental injury' is ensured under the separate articles such as Article 2[68] and Article 3[69] of the ECHR.

1.3 Personal liberty under Article 21 of Constitution of India

The Article 21 of the Constitution of India guarantees protection of 'right to life and liberty' of a person.[70] The Supreme Court of India immediately after the Constitution of India came into force in the case of *A.K. Gopalan v State of Madras*[71], interpreted the term 'personal liberty' and gave a restricted interpretation to the term 'personal liberty' as 'physical liberty'[72]. In the same case of A.K. Gopalan the Chief Justice of Supreme Court of India, Kania, speaking for the majority observed:

> *... the concept of the right to move freely throughout the territory of India is an entirely different concept from the right to 'personal liberty' contemplated in Article 21. 'Personal liberty' covers many more rights in one sense and has a restricted meaning in another sense. For instance, while the right to move or reside may be covered by the expression 'personal liberty', the right to freedom of speech (mentioned in Article 19(1)(a)) or the right to acquire, hold or dispose of property (mentioned in Article 19(1)(f)) cannot be considered part of the personal liberty of a citizen. They form part of the liberty of a citizen but the limitation imposed by the word 'personal' leads me to believe that those rights are not covered by the expression 'personal liberty'. So read, there is no conflict between Articles 19 and 2*[73]

[68] Article 2 of the 'European Convention on Human Rights', 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder, *'Right to life 1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'*

[69] Article 3 of the 'European Convention on Human Rights', 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder, 'Prohibition of torture No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

[70] Article 21 'The Constitution of India' Published by Government of India, Ministry of Law and Justice (Legislative department,), (2015), page 10;

[71] AIR 1950 SC 27

[72] Ibid; See also 'Evolution of Article 21 of Constitution of India (1950 to 1978)' AIR 103 Vol, May 2016, page 39

[73] A.K. Gopalan v State of Madras, AIR 1950 SC page 36-37;

The above interpretation was followed by the Supreme Court of India until it expanded the scope of 'personal liberty' in the case of *Kharak Singh v State of Uttar Pradesh.*[74] In this case, the Supreme Court of India observed that the 'Personal liberty' under Article 21 of the Constitution of India is not limited to bodily restraint or confinement to prison only, but it used as 'compendious term'. That includes all the varieties of rights of a person need to make a personal liberty except those rights mentioned under Article 19(1) of the Constitution of India[75]. Moreover, the same interpretation of 'personal liberty' was found to be widened by the Supreme Court of India in the case of *Maneka Gandhi v Union of India*[76] where Justice Bhagawati, writing for majority observed:

> *the expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the 'personal liberty' of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19*[77].

However, *Baleri Devi* criticised the above development of the jurisdiction[78] and said that the additional guarantees provided under Article 19 of the Constitution of India are restricted to the 'citizen' of the country[79].

[74] AIR 1963 SC 1295; 'Evolution of Article 21 of Constitution of India (1950 to 1978)' AIR 103 Vol. May 2016, page 39

[75] Ibid, page 1302 term 'personal liberty' used under Article 21 of the Constitution of India '… a Compendious term to include within itself all the varieties of rights which go to make up the 'personal liberty' of man other than those dealt with in the several clause of Article 19 (1). In other ward, while Article 19(1) deals with particular species or attributes of the freedom, 'personal liberty' in Article 21 takes in and comprises the residue.' ; The 'Rights to freedom' dealt under the Article 19(1) of the Constitution of India are 1) All citizens shall have the right (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; and (*g*) to practice any profession, or to carry on any occupation, trade or business.: See also AIR 1963 SC 1295; 'Evolution of Article 21 of Constitution of India (1950 to 1978)' AIR 103 Vol. May 2016, page 39

[76] AIR 1978,SC 597

[77] Ibid, page 622

[78] See also Bellary Uma Devi, Arrest, Detention, and Criminal Justice System: A Study in the Context of the Constitution of India (Oxford University Press 2012). Page 7

[79] Ibid

Conclusion

All these three Articles of different jurisdictions namely Article 5(1) of the ECHR, Article 9 (1) of the ICCPR and Article 21 of the Constitution of India, ensures both positive and negative obligations on the nation state to protect the 'right to liberty' of a person. Moreover, the notion of 'right to liberty' under Article 21 of Constitution of India is a much wider concept in comparison to Article 5(1) of the ECHR and the Article 9 (1) of the ICCPR[80]. Various litigations in the Supreme Court of India, over a period, have resulted in evolving the jurisprudence around the notion of 'right to liberty'. That covers several other rights including the rights mentioned under Article19 (1) of Constitution of India[81]. In addition, the notion of 'security' under the Article 9(1) of the ICCPR and notion of 'life[82]' under the Constitution of India is in contrast to the notion of 'security' under the Article 5 (1) of the ECHR. First two article protects a person from 'bodily and mental' injury on the other hand 'security' under Article 5(1) of ECHR protects a person from incommunicado detention. Before going into the specific grounds for the deprivation of liberty by arrest, the next chapter would discuss the principles developed by these jurisdictions for the protection of liberty.

[80] Ibid : See also also 'Evolution of Article 21 of Constitution of India (1950 to 1978)' AIR 103 Vol, May 2016, page 39

[81] Right to freedom guaranteed under Article 19(1) Article 21 'The Constitution of India' Published by Government of India, Ministry of Law and Justice (Legislative department,), (2015), page 9-10; *'(a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; and (g) to practice any profession, or to carry on any occupation, trade or business.'*

[82] Notion of 'life' is not limited to the bodily restrain its beyond the animal existence of the person. Evolution of Article 21 of Constitution of India (1950 to 1978)' AIR 103 Vol, May 2016, page 39

Chapter II

The Principles developed under Article 5 (1) of the ECHR and Article 9 (1) of the ICCPR

Introduction

The right to liberty is not an absolute right under both Article 5 of the ECHR and under Article 9 of the ICCPR[83]. However, deprivation of liberty, even though as a limited provision, is protected various substantive and procedural measures of the convention. For example, the ECHR under subparagraph (a) to (f) of the Article 5 (1)[84] mentioned the conditions for deprivation of liberty. Similarly ECHR and ICCPR also mentioned the procedural guidelines under sub-paragraph (2) to (4) [85] of Article 5 of the ECHR and subparagraph (2) to (4) of

[83] Second line of Article 5(1) 'European Convention on Human Rights', 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder, page 7 states that '…No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law' cleared that right to liberty is not absolute right it can be derogated but according to the; Article 15 of the ECHR; Article 9 (1) and Article 4 'International Covenant on Civil and Political Rights', adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49,; See Supra note 65, paragraph no 10 of the ICCPR

[84] Article 5 (1) 'European Convention on Human Rights', 'European Court of Human Rights, Council of Europe' F-67075, Strasburg Ceder, page 7-8' *a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law; (c) 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; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'*

[85] Article 5 (2) to (4) of 'European Convention on Human Rights', See infra note 84,page 7-8, *'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. 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'*

[85] Para 5 of Article 5 of 'European Convention on Human Rights', See infra note 84, page 8 *'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 9 (1) of 'International Covenant on Civil and Political Rights' Adopted and opened for signature,* ratification and accession by General Assembly resolution 2200A (XXI)

Article 9 of the ICCPR[86]. However, Article 9 of ECHR does not mention the grounds for deprivation of liberty. *Nowark,* invites attention towards the fact that the word 'arbitrary' has been used along with the term 'lawfulness'. He further states that the drafting history of Article 9 shows that the objective of using the term 'lawfulness' along with 'arbitrary' is to replace the exhaustive list that amounts to deprivation of liberty[87]. Besides these procedural and substantive guarantees, the subparagraph (5) of Article 5 and Article 9 ensure a compensatory remedy for 'unlawful' and 'arbitrary' deprivation of liberty[88].

Since the scope of this thesis is limited to the specific ground for the deprivation of liberty, prior to discussing Section 41 (1) (b) of CrPC, the current section would discuss the principles developed by the Article 5 (1) of the ECHR. Article 5(1) states that the deprivation of liberty must be '…in accordance with a procedure prescribed by law[89]'. Similarly Article 9(1) states that '[n]o, one shall be subjected to arbitrary arrest or detention…' and '[the deprivation of liberty of person] in accordance with such procedure as are established by law[90]'. Both the above mentioned subparagraphs of the ECHR and the ICCPR discussed various principles such as the 'principle of legality', the 'quality of law' and 'non-

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of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49;

[86] Article 9(2) to (5)'*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 authorized 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 guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'*

[87] See Supra note 60, Page 216 and 217

[88] Article 9(5) of the 'International Covenant on Civil and Political Rights' Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966,entry into force 23 March 1976, in accordance with Article 49,; 'Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'; Para 5 of Article 5 of ECHR '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.'

[89] Article 5 (1) of the 'European Convention on Human Rights', See Supra note 84, page 7

[90] Article 9 (1) of 'International Covenant on Civil and Political Rights' Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49,;

arbitrariness'[91]. The significance of these principles is that, the nation state is bound to follow the same while depriving the liberty of a person[92].

2.1 Principle of Lawfulness

2.1.1 Under Article 5(1) of the ECHR

The ECtHR, in the case of *Kafkaris v Cyprus,*[93] observed that whenever Court deals with the issue of 'lawfulness' of arrest and detention of a person, it primarily refers to the national law. The national law includes both 'substantive' and 'procedural' law of the nation[94]. In another words, primarily the deprivation of liberty of a person must be in conformity with the national law[95]. In addition, in the case of *Medvedyev and Others v France*[96]*, the ECtHR* clears that '…where appropriate, [deprivation of liberty must be according to] to other applicable legal standards, including those which have their source in international law.[97]' In another words, to fulfill the test of legality, domestic legislation must be in conformity with the object and purpose of the Article 5 of the ECHR[98].

The objective of Article 5 is to protect a person from arbitrary and unjustified deprivation of liberty. [99] In another words, deprivation of liberty must be in accordance with expressed and implied general principles laid down under the convention[100]. The general principle implied under Article 5 (1) includes the 'rule of law' which is connected with the 'legal certainty',

[91] See Supra note 60, Page 225, Para 30; See also Marcoux Jr Laurent, 'Protection form Arbitrary Arrest and Detention under International Law', 'Boston Collage International Comparative Law Review' Vol. 5, Issue 2, Article 3 dated 8/1/1982., page non 358-359; see also Supra note 38, page 419;

[92] Ibid

[93] Kafkaris V/s Cyprus, Application No.21906/2004, para no 116; See also M V/s Germany, Application No. 19359/2005, para 90

[94] Ibid; Del Rio Prada V Spain, Application No. 4750/09, ECHR (GC),21st of October, 2013,para44

[95] Ibid

[96] Medveyev & Other V France, Application No.3394/03, ECHR(GC), 29th March,2010, para 79

[97] Ibid; Crenga V Romania Application No.29226/03, ECHR, 23rd February, 2012, para 101,

[98] See Supra note 96; Assanidze v. Georgia, Application No. 71503/2001, para 171, McKay v. the United Kingdom, Application No. 543/2003, page 30; see also Supra note 54, page 132, page133; See also supra note 38, page 419;

[99] See Supra note 96; Assanidze v. Georgia, Application No. 71503/2001, para 171, McKay v. the United Kingdom, Application No. 543/2003, page 30; see also Supra note 54, page 132, page133; See also supra note 38 page 419;

[100] Pleso V Hungary, Application No. 41242/08, ECHR, 2nd of January, 2012, para 59

'principle of proportionality' and 'principle of protection against arbitrariness'[101]. The ECtHR in the case of *Simon v Belgium* observed that the 'principle of protection against arbitrariness' is an ultimate objective of Article 5 of the ECHR.[102] In another words, the quality of law must be such as to avoid all risk of 'arbitrariness'.[103]

The ECtHR in the case of *Winterwerp v The Netherlands*[104] observed that one of the principles underlying the notion 'in accordance with procedure prescribed by law' is the notion of 'fair and proper procedure'. That means 'any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary.[105] To illustrate, the ECtHR in the case of *Winterwerp v The Netherlands,*[106] observed that it is a precedent that the single judge chamber, when dealing with the cases under Section 22-24 of Mentally Ill Person Act have to be relied on the decision of a three-judge chamber. However, in this case of *Winterwrep*, the Court acted contrary. Hence, it became a violation of Article 288 (b) of the Code of Civil Procedure of the Netherlands.[107] This proves that such an act of single-judge chamber is not compatible with the 'procedure prescribed by the law' under Article 5 (1) of the ECHR[108].

2.1.2 Under Article 9(1) of the ICCPR

The *UN General Committee No.35* observed that 'norms established by law' means both grounds and procedures established by law.[109] Similarly, *Nowak* employed a method of

[101] Ibid
[102] Simon V Belgium, 71407/10, ECHR, 28th of August, 2012, Para 32
[103] Supra note 54, Page 134
[104] See infra note 106, Para 45; Ilascu and Others V. Moldova and Russia, Application No. 48787/99, Page 461
[105] Ibid
[106] Winterwerp V/s The Netherlands, Application no 6301/73, Para 17
[107] Ibid, Para 48
[108] Ibid
[109] See Supra note 65,para 11

systematic interpretation[110] whereby he compares the term 'law', which has been used in the other provisions of the ICCPR. He argued that the term 'law' used in Article 9 of the ICCPR refers to the domestic legal system.[111] In addition, *the UN General Committee* in the case of *Fardon v Australia*[112] observed that these laws and procedures 'must not be destructive of the right to liberty of a person.[113]' *The UN General Committee no.35 also* observed that 'liberty' can be deprived but according to 'rule of law' and that law must not be arbitrary[114]. *The UN General Committee*, in the case of *Bolanos v Educador*[115] observed that law under which a person is arrested or detained must be compatible with the principle of 'legality'. In another words, deprivation of liberty must be in accordance with grounds established in domestic legislation.

2.2 Principles of Accessibility and Foreseeability

2.2.1 Under Article 5(1) of the ECHR

The ECtHR in the case of *Amuur v France*[116] observed the notion of 'quality of law' inherent in all the articles of the ECHR. For example, the second paragraph of Article 8 to 11 used the expressions such as 'in accordance with law' and 'prescribed by law'[117]. The ECtHR further observed that these expressions need to be compatible with the 'rule of law'[118]. In another word the 'quality of law' must be inherent in the domestic law of a nation state under which State may deprive the liberty of person. The 'quality of law' includes provisions under which person deprived of their liberty must be accessible and precise in order to avoid the

[110] See Supra note 60, Para 27
[111] Ibid Page 224, Para 27
[112] *Fardon* v. *Australia*, UN Communication no 1629/2007, para 7.2
[113] See Supra note 65, para 14; 1629/2007, *Fardon* v. *Australia*, para. 7.3.
[114] See Supra note 65, para no. 12
[115] Bolanos V/ Educador , the UN General Committee, Application no.238/1987, para 9, '…Mr. Floresmilo Bolaños was deprived of liberty contrary to the laws of Ecuador and not tried within a reasonable time.'
[116] Amuur v. France, Application no. 19776/92, para 50
[117] Ibid
[118] Ibid

risk of arbitrariness[119]. For instance, the secret and unpublished laws, the absence of precise provision for deprivation of liberty, statutory lacunae in provisions do not qualify the test of accessibility and foreseeability[120]. The ECtHR in the case of *Amuur v France*[121] observed that detaining the alien in the transit zone is not according to Article 5(1) of the ECHR. The ECtHR observes that there is no document supporting the detention of alien in the transit zone except one unpublished circular[122]. In addition, the ECtHR also observed that there is no single judgement which is available at a national jurisdiction to support such act[123]. Hence, detaining the alien in the transit zone is not qualified to the test of 'quality of law'[124]. None of the guidelines allow an ordinary Court to review the detention of the alien or hold any control on the administrative authority with regard to the detention time of the asylum seeker is concerned. [125] In addition, it neither provided any legal, social and humanitarian assistance nor sets the time limits for access to such assistance to the asylum seeker.[126]

In the case of *Steel and Others v The United Kingdom*[127], the ECtHR observed that it doesn't matter:

> *...whether [national law is] written or unwritten, but it must be sufficiently precise to allow the citizen if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail' to qualify the 'lawfulness' according to the 'procedure prescribed by law'*[128].

[119] Ibid
[120] Macovei Monica, "The Rights to Liberty and Security of the Person' Human Rights Handbooks, No.5,Council of Europe, Dec 2004, Germany, page 14
[121] Amuur v. France, Application no. 19776/92
[122] Ibid, para 53
[123] Ibid
[124] Ibid
[125] Ibid
[126] Ibid
[127] Steel and Ohters V.The United Kingdom , Application No. 24838/94
[128] Ibid, para 54

In the above mentioned case the applicant was arrested and detained for 'breach of peace'[129]. Aggrieved by this act of the police, the applicant contested that the term 'breach of peace' is not clearly defined under the English law.[130] However, the ECtHR rejected the applicant's argument and observed that the notion of 'breach of peace' had been clarified by English Court during a period of two decade[131]. The English Court has issued sufficient guidelines which 'formulated degree of precision [which], required by the convention'[132]. Therefore the applicant's detention for a breach of peace is compatible with the Article 5(1) of the ECHR[133].

The ECtHR in the case of *Del Rio Prada v Spain*[134] and other allied cases, observed that the necessity of legal certainty and precession of law must be fulfilled by clearly defining the condition for deprivation of liberty[135]. In the word of ECtHR [136]*:*

> *'[ECtHR] considers that at the time when the applicant was convicted, when she worked in detention and when she was notified of the decision to combine the sentences and set a maximum term of imprisonment, she could not have foreseen to a reasonable degree that the method used to apply remissions of sentence for work done in detention would change as a result of a departure from case-law by the Supreme Court in 2006, and that the new approach would be applied to her.*[137]*'*

In the case of *Del Rio Prada v Spain*[138]*,* the applicant would have been released on completion of 9 years of imprisonment, if she had known the latest development in the law.

[129] Ibid, para 52
[130] Ibid
[131] Ibid, para 55
[132] Ibid
[133] Ibid
[134] Del Rio Prada V Spain, Application No. 4750/09, ECHR (GC),21st of October, 2013, Para 125;
[135] Ibid
[136] Ibid
[137] Ibid, Para 130
[138] Ibid, Para 131-132

Hence, the ECtHR observed that detention of the applicant after 3rd of July 2008 is unlawful[139].

The ECtHR in the case of *Medveyev and Others v France*[140] observed that the principle of 'legal certainty' must be fulfilled before the depriving a person of his/her liberty. The principle of legal certainty clearly mentions the conditions to be fulfilled according to the national and international law under which the liberty of a person is deprived[141]. For example, Arrest and detention of crew members, under a law which is lacking specific reference to potential arrest and detention will foul of the requirement of legal certainty and foreseeability under the convention[142]**.** In addition, the ECtHR in the case of *Nasrulloyev v Russia*[143] observed that the provisions which interpreted in an inconsistent and mutually exclusive manner by the domestic author will also fall short to the standard of the 'quality of law'[144].

Similarly, *Harris et al* argues that the 'quality of law' under Article 5 will not be met if their code **'**does not provide details of what constitutes exceptional circumstances for deprivation of liberty and government cannot submit in practice or case law which help to identify the

[139] Ibid, Para 131-132
[140] Medveyev & Other V France, Application No.3394/03, ECHR(GC), 29th March,2010, para 79
[141] Ibid, para 80
[142] Ibid
[143] Nasrulloyev V Russia, Application No. 656/06, ECHR, 11th October, 2007, Para 77;
'In one case, to which the Government referred, the Supreme Court had expressed the view that the detention of persons whose extradition from Russia had been sought was to be governed, after the initial forty-day period provided for by the 1993 Minsk Convention, by foreign criminal law, i.e. that of the requesting party (see the Government's submissions and also paragraph 56 above). The same view was apparently held by the International Cooperation Department of the Prosecutor General's Office, which advised the applicant's counsel to petition the Tajikistani authorities for his release (see paragraph 23 above). However, a Moscow district court (Nagatinskiy) pointed out to the applicant's representative that her references to the provisions of the Tajikistani Code of Criminal Procedure were irrelevant for the purposes of criminal proceedings in Russia (see paragraph 22 above). Another district court in Moscow (Tverskoy) expressed the opposite view, holding that the applicant was not a party to criminal proceedings within the meaning of the Russian Code of Criminal Procedure (see paragraph 28 above). That finding implied that his detention was not attended by any of the safeguards and guarantees that ordinary suspects or defendants enjoyed. The same District Court subsequently opined that the Prosecutor General's Office, that is the authority processing the request for the applicant's extradition, was not responsible for the applicant's detention and therefore could not be held liable for a failure to put an end to his continued unlawful detention (see paragraph 33 above).'

same[145]'. For example, the deprivation of liberty will not be prescribed by law within the meaning of Article 5(1) of the ECHR, where the legal provision used to justify the deprivation of liberty, has been shown to be vague enough to cause confusion for the practical effect even amongst the competent State authorities[146].

2.2.2 Under Article 9(1) of the ICCPR

Commenting on the notion of 'law', *Nowark* stated that 'law' is not necessary to be passed by the parliament or equivalent bodies[147]. The 'law' here includes unwritten law which include all common people under a particular jurisdiction[148]. For example, although administrative provision is not considered as a law under Article 9 of the ICCPR, it would be considered as law. If that administrative law is enforceable by the nation state, the provisions of it are clear and the enforcement of a same is regulated by the procedural measures. [149]

Under the provision of deprivation of liberty, 'lawfulness' need to be reviewed by the judicial officers as prescribed under Article 5(4) of the ECHR and under Article 9 of the ICCPR[150]. For example in the case of *Badan et al v Australia*[151], the applicant and his son were detained for illegally entering into the territory of Australia. The UN General Committee observe the violation of such detention on the ground of not prescribing the reason for detention and opportunity for judicial review.

The *UN General Committee no. 35* observed that 'any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid

[145] See Supra note 54 Page 134; See also Gusinskiy v. Russia, Application no. 70276/01, para 63-4
[146] Ibid; See Supra note 120, page 13, Jecius V/s Lithunia: No clear rules governing detainees position ' any provision which is vague enough to create confusion amongst the competent state authorities must be incompatible with the requirement of lawfulness'
[147] See Supra note 60Page 224, Para 27; Ibid
[148] Ibid
[149] Ibid
[150] See infra note 151, para 7.2; See Supra note 60, Page 224, Para 27; see also para 51
[151] Badan et al v Australia, UN Communication no.1014/2001, para 7

overly broad or arbitrary interpretation or application.[152]' For example, *the UN General Committee* in their concluding observation of Mauritius[153] noted that even a person arrested under the Prevention of Terrorism Act (2002) deserve some procedural guarantee. Moreover, the meaning of 'terrorism' under the Prevention of Terrorism Act (2002) is vague and open for a broad interpretation[154]. The provisions of the Prevention of Terrorism Act (2002), clearly denies the possibility of getting bail and access to legal counsel, which is contrary to the provisions of Article 9 of the ICCPR[155].

Similarly, the UN General Committee in the case of *McLawrence v Jamaica*[156], rejected the claim of author that he was arbitrarily arrested under suspicion and convicted on grounds different from that existed at the time of his arrest. Further, the UN General Committee observed that although'…the principle of legality is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation.[157]' It does not matter in this case because the ground of suspicion of the author reasonably existed at the time of his arrest.[158]

2.3 Principle of Non-arbitrariness

2.3.1 Under Article 5(1) of the ECHR

The ECtHR in the case of *Creangă v Romania* [159] and in the case of *A. and Others v the United Kingdom*[160] observed that the '…notion of 'arbitrariness' under the Article 5(1) extend beyond the lack of conformity with national law, so that the deprivation of liberty may

[152] See Supra note 65,,para 22
[153] Mauritius (CCPR/CO/83/MUS, 2005, para 12
[154] Ibid
[155] Ibid
[156] See infra note 158, para 3.2
[157] Ibid para 5.5; See also Supra note 65, par 22
[158] 702/1996, McLawrence v. Jamaica, para 4.3
[159] Creangă v. Romania, Application No. 29226/03, para 84
[160] A. and Others v. the United Kingdom, Application No. 3455/05, ECHR, 19th February, 2009, Para 165;

be lawful in terms of domestic legislation but still arbitrary and thus contrary to convention[161].' For example, in the case of *Čonka v Belgium*[162] The applicant, who was an asylum seeker, dishonestly called in the police station and later got arrested for departing the respective country. Such act of State is not according to law, therefore the ECtHR found the violation of Article 5 (1) of the ECHR.[163]

The ECtHR, in the case of *Saadi v the United Kingdom*[164], observed that there has been no global definition formulated by the ECtHR under paragraph 1 of Article 5 of the ECHR to indicate what kind of conduct of authority is 'arbitrary'. Nonetheless, the ECtHR has developed certain key principles based on cases referred[165] indicating that the notion of 'arbitrariness' varies depending on the type of detention involved with some flexibility in their application[166]. This flexibility is dependent upon the grounds for deprivation of liberty[167]. The key principles mentioned earlier are listed below.

First principle, 'detention will be 'arbitrary' where, despite complying with the letter of the national law, there has been an element of bad faith or deception on the part of the authorities[168].' For example, sub-paragraph (a) of article 5(1) of the ECHR states that the conviction of a person by a competent authority is a prerequisite for deprivation of a person's liberty[169]. In such cases, there must be a casual link between the order of detention of a

[161] See Supra note 159; see also Supra note 54, Page 134 (David Harris and other observed that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness which goes beyond the lack of conformity with the national law); See also infra note 164,at 67; See Supra note 106,at 37, Amuur at 50, Chalal at 48 and Witold Litwa at 78

[162] Čonka v. Belgium, Application no. 151564/99,para 40-42

[163] Ibid

[164] Saadi v The United Kingdom, Application no. 13229/03, para 68

[165] Ibid

[166] Ibid

[167] Ibid

[168] Ibid, para 69; see also James, Wells and Lee v. the United Kingdom, Application No. 25119/05, 57715/09 and 57877109/09, ECtHR, 18th September,2012, , para 192; Čonka v. Belgium, Application no. 151564/99,para 40-42; Bozano v. France, Application no. 9990/82,para59-60

[169] See supra note 164, para 71

person and the period of a detention[170]. In such cases the deprivation of persons may be considered arbitrary if the deprivation of liberty of persons cased by bad faith or deception by the nation state. Even though such detention would be considered as 'arbitrary' if it is caused by bad faith or deception on the instance of the national authority.[171]

The second principle is '...both the order of detention and execution of detention genuinely conforms with the purpose of restriction permitted by the relevant subparagraph of Article 5 (1) of the Convention.[172]' For instance, the ECtHR in the case of *Winterwerp v The Netherlands*[173] observed that in order to detain the applicant under subparagraph (e) of Article 5 (1) of the ECHR, there must be a medical evidence to prove that the mental state of a person justifies his compulsory hospitalisation.

In the third principle, '[t]here must, in addition, be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention[174]'. For example, the ECtHR in the case of *Enhorn v Sweden,*[175] observed that deprivation of liberty of a person under subparagraph (e) of the Article 5 (1), is for cause of mental disorder. Hence, the deprivation of liberty, in such cases, is justified in confinement to either 'hospital', 'clinic' or other 'appropriate institute', where the person deprived can be treated[176].

[170] Ibid, para 71
[171] Ibid
[172] Ibid, para 69; see also James, Wells and Lee v. the United Kingdom Application No. 25119/05, 57715/09 and 57877109/09, ECtHR, 18th September,2012, , para 192; See supra note 106, Para 39; O'Hara v The United Kingdom, Application No 37555/97 para 34; Bouamar V Belgium, Application no. 9106/80 para 50
[173] See supra note 106, Para 39; see also James, Wells and Lee v. the United Kingdom, Application No. 25119/05, 57715/09 and 57877109/09, para 193
[174] See supra note 164, para 69; see also James, Wells and Lee v. the United Kingdom Application No. 25119/05, 57715/09 and 57877109/09, ECtHR, 18th September,2012, , para 194; Bouamar V Belgium, Application no. 9106/80 para 50; Enhorn v. Sweden, Application no. 56529/00 ,para 46
[175] Enhorn v. Sweden, Application no. 56529/00 ,para 42
[176] Ibid

The forth principle is that the arrest and detention of a person under paragraphs (b)[177], (d)[178] and (e)[179] of Article 5 (1) of the ECHR.[180] However, the ECtHR directs that detention of a person under these provisions should be considered as a last resort[181]. To illustrate, in cases there is not any other measure available than detention of a person or in a condition, where the detention is necessary to protect the interest of general public.[182] For example, if the person detained under subparagraph (d) of Article 5 (1) of the ECHR a person can be justifiably detained to educational institutions, such as schools, so that the object of detention is fulfilled.[183] Additionally, when the liberty is deprived for the fulfilment of any objective of a law, care must be taken to achieve a right balance between the 'immediate fulfillment of the obligation in question' in a democratic society and the right to liberty of a person[184]. While striking such balance, the duration of detention may also to be considered as a relevant factor[185].

Harris et al argued that there is an additional principle called 'legal certainty' along with the first three principles mentioned above. [186] The same principle is already discussed in the earlier section of this chapter. *Harris et al* also argued that the applicability of the above discussed principles varies according to the grounds of deprivation of liberty[187]. For example,the ECtHR applied a stricter approach while depriving liberty under subparagraph

[177] Article 5(1)(b) of the ECHR See infra note 184; 'the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;'

[178] Ibid Article 5(1)(d)'the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;'

[179] Ibid Article 5(1)(c) 'the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;'

[180] See supra note 164, para 70

[181] Ibid

[182] Ibid

[183] Bouamar V Belgium, Application no. 9106/80 para 50; See also James, Wells and Lee v. the United Kingdom, Application No. 25119/05, 57715/09 and 57877109/09, ECtHR, 18th September,2012,para 194;

[184] See supra note 164, para 70; See also Vasileva v. Denmark, Application no. 24724/99, para 37

[185] Ibid

[186] See supra note 54, Page 137

[187] See supra note 54, Page 137

(b), (d) and (e) of Article 5(1) of the ECHR[188]. On the other hand, the ECtHR applied a much linear approach in case of deprivation under sub-paragraph (a) of Article 5 (1) of the ECHR[189].

2.3.2 Under Article 9(1) of the ICCPR

Macken argued that there are two possible ways to interpret the notion of 'arbitrariness'.[190] One is a narrow interpretation, where arbitrary means 'unlawful';[191] for example, arresting a person without following the procedure laid down by law[192]. The second, is a wider interpretation, where arbitrary is not only 'unlawful' but also 'unjust'[193]. For example, the arrest here is not in accordance with the 'principle of justice'[194].

Macken interpreted the term 'arbitrariness' by employing various methods of interpretation under Article 31(1) of Vienna Convention and argued that the word 'arbitrariness' should be interpreted widely[195]. Similarly, *Nowark* recalling the historical background of the Article 9 (1) of the ICCPR and employing a 'systematic interpretation' argued that interpretation of arbitrariness must be broad[196]. *Nowark* also argued that deprivation of liberty according to law must not be 'disproportionate', 'unjust' or 'unpredictable'.[197] Arrest should be non-discriminatory, appropriate and proportionate to the circumstances of each case.[198]

[188] Ibid
[189] Ibid
[190] See Macken, Claire, Preventive Detention and Personal Liberty and Security under International Covenant on Civil and Political Rights,1966, HeinOnline, 26 Adel, L. Rev. 1,2005, page 5
[191] Ibid
[192] Ibid
[193] Ibid
[194] Ibid
[195] See further details in Macken, Claire, Preventive Detention and Personal Liberty and Security under International Covenant on Civil and Political Rights,1966, HeinOnline, 26 Adel, L. Rev. 1,2005, page 5 to 89 (Macken used the ordinary meaning of Arbitrariness, Structural interpretation and Contextual analysis.)
[196] See supra note 60, Page 225, Para 30 ; See also Marcoux Jr Laurent, 'Protection form Arbitrary Arrest and Detention under International Law', 'Boston Collage International Comparative Law Review' Vol. 5, Issue 2, Article 3 dated 8/1/1982., page non 358-359
[197] See supra note 60Page 225, Para 30;
[198] Ibid

The UN General Committee in the case of *Zelaya Blanco v Nicaragua*[199] observed that arrest and detention, which lacks any legal basis, is 'arbitrary'. In another words, arrest and deprivation of liberty of a person must be in accordance with domestic law of the respective nation state. For example, *the UN General Committee* in the case of *Mika Miha v Equatorial Guinea,*[200] observed that arresting and detaining the author merely on the direction of sitting president in absence of any legal basis is 'arbitrary' under Article 9(1) of the ICCPR.

In the case of *Hugo Van Alphen v The Netherlands*[201], the author was arrested and detained for nine weeks pursuant to the respective law of the nation state. The reasons for detainment was two-fold, one for 'accessory' and 'compliance' with an offense like forgery, and second for intentionally filing false income tax returns[202]. However, the national jurisdiction justified the author's arrest and detention on the ground of his denial to co-operate with the investigation[203] perticularly when the author's client waived him from maintaining confidentiality[204]. The UN General Committee, while deciding the allegation of the author noticed that the information of waiving professional obligation of maintaining confidentiality is not available for scrutiny[205]. In addition, since the author is also a suspected offender in the case[206], he is not bound to assist the state in investigation[207].

Consequently, *the UN General Committee* observed, by recalling the history of sub-paragraph (1) of Article 9, that the term 'arbitrariness' is not equal to 'against the law'[208]. But, it should be '…interpreted more broadly to include […] the elements of

[199], *Zelaya Blanco* v. *Nicaragua*, UN General Committee, Communication no, 328/1988 para 10.3; See also supra note 65, para no 16
[200] Mika Miha v. Equatorial Guinea, UN General Committee, Application no 414/1990, para 2.3 and 6.5; See also supra note 65, para 11
[201] Hugo Van Alphen V Netherlands , UN General Committee, Communication no. 305/1988
[202] Ibid para 2.1
[203] Ibid para 2.13
[204] Ibid
[205] Ibid, para 5.7
[206] Ibid, para 5.7
[207] Ibid
[208] Ibid, para 5.8; See supra note 60 Page 225, Para 30;

inappropriateness, injustice, and lack of predictability.[209]' In addition, the UN General Committee observed that lawful arrest must be 'reasonable' and 'necessary in all circumstances[210]. For instance, the arrest may be necessary to 'prevent flight' or to prevent a person from interfering with evidence or 'recurrence of crime'.[211] In other words, the in absence of any of the reasons discussed above, the arrest and detention of a person is not in accordance with subparagraph 1 of Article 9 of ICCPR[212].

In the case of *Mukong v Cameron[213]*, the author was arrested for making an inimical argument against the government. The said arrest of author was justified by the national government on two grounds;(i) the author was arrested according to a national law, and (ii) the same arrest was being reviewed by the national Court[214]. Hence, the government argued that the arrest of author is compatible with the Article 9 of the ICCPR[215]. However, The UN General Committee observed the absence of any reason discussed in the case of *Hugo Van Alphen v Netherland[216]* for the arrest, except for making comments against the sitting government in a democratic society, which cannot be considered as 'necessary in circumstances'.[217]

The UN General Committee in the case of *Gorji-Dinka v Cameroon*[218] found violation of subparagraph (1) of Article 9 based on argument of author that he was arrested to influence the proceedings of a trial before the Military Tribunal. The Committee observed the role of

[209] Ibid
[210] Ibid, para 5.8; See also Gorji-Dinka v. Cameroon, Communication no. 1134/2002, para 5.1; See Supra note 60, Page 225, Para 30;
[211] Ibid
[212] See Supra note 201
[213] Mukong v Cameron, UN General Committee, Communication no. 458/1991
[214] Ibid, para 9.6 and 9.8 (Necessary for example 'to prevent fight', 'interference with evidence' or the' recurrence of crime')
[215] Ibid
[216] See Supra note 201, para 5.8
[217] See Supra note 21, para 9.6 and 9.8 (Necessary for example 'to prevent fight', 'interference with evidence' or the' recurrence of crime')
[218] Gorji-Dinka V Cameron, UN General Committee, Communication no 1134/2002, para 5.1

the author as just a witness and found his detention as not 'reasonable' and not 'necessary'[219]. It was observed that this detention was not going to fulfil the purpose of 'preventing flight' or 'interference with evidence or the recurrence of crime'[220]. Further, the UN General Committee in the case of *Gorji-Dinka v Cameroon*[221] also added an additional principle of 'due process of law' to fulfill the criteria of 'arbitrariness' along with above principles discussed in the case of *Hugo Van Alphen v The Netherlands*[222].

The UN General Committee in the case of *Shafiq v Australian*[223] observed that the provision against 'arbitrariness' under subparagraph 1 of Article 9 is applicable in both 'criminal' and 'civil' cases. For instance, the deprivation of liberty can be administered in cases of 'mental illness', 'drug addiction', 'education purpose' and for 'immigration control'[224]. Under such conditions, the deprivation of liberty may be arbitrary if not 'necessary under circumstances of the cases and proportionate to end sought by the detention[225]'. For example, deprivation of liberty must be to prevent from absconding and to protect from interference in the evidence.[226] The UN General Committee in the case of *Shafiq v Australia* held that the act of nation state to detain an author based on the general assumption that asylum seekers may abscond from the custody was 'arbitrary' under paragraph 1 of the Article 9 of the ICCPR[227]. Particularly in view that there is no such example available to show that any asylum seeker has absconded from custody in the past several years[228]. The Committee also held the nation state responsible as the author suffered from mental illness during his period of detention[229].

[219] Ibid
[220] Ibid
[221] Ibid
[222] See Supra note 201
[223] Danyal Shafiq v. Australia, UN General Committee, Communication no. 1324/2004, para 7.2
[224] A v Australia,UN General Committee Communication No. 560/1993, para.9.2; See also Supra note 233, para 7.2
[225] Ibid
226 Ibid
[227] See supra note 233
[228] Ibid
[229] Ibid

The UN General Committee, in the case of *A v Austria*[230] observed that detention must be necessary under all the circumstances or otherwise it would amount to arbitrary in nature. For example, to prevent an accused from absconding, protecting interference of accused with the evidence, etc., and such detention must be proportionate in a relevant context[231]. In the above mentioned case of *A v Austria*[232], the author was detained 'unlawfully' for enterering the territory of a nation state and under a fear of he might abscond. *The UN General Committee* found the act of state 'arbitrary' as the author was detained without any periodic review and except any other reason mentioned above for a period of four years[233]. Further, *the UN General Committee no. 35* observed that along with a test of necessity the Court has to look for less intensive measures as an alternative to the extended period of detention[234]. The national court was also directed to consider the physical and mental condition of a person before deprivation of the liberty of a person[235]. For example, *the UN General Committee* in the case of *Shafiq v Australia*[236], observed that in the case of children, their vulnerability and need for care has to be taken into consideration while deciding the duration and place of detention[237]. Similarly, *the* UN General Committee in the case of *D and E, and their two children v Australia*[238], observed that the detention must be pursuant to the 'appropriate justification' by the nation State. Therefore, the UN General Committee observed the act of

[230] See Supra note 224, para 9.2
[231] Ibid
[232] Ibid
[233] Ibid, para 9.2 and 9.4; See also Mrs Roqaiha Bakhtiyari V Australia, UN General Committee, Communication no 1069/2002, para 9.2 ' …in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification.'
[234] See Supra note 65, para no.18; See also *Baban* v. *Australia*, UN General Committee, Communication no 1014/2001, para 7.2; *Bakhtiyari* v. *Australia*, UN General Committee, Communication no 1069/2002, Para's 9.2–9.3
[235] See Supra note not 223, para 7.3
[236] *Ibid*
[237] *Ibid*; See also *C.* v. *Australia*, UN General Committee, Communication no 900/1999 Para's 8.2 and 8.4. ; See also Comment No.35, December 2014, UN Doc. No. CCPR/C/GC/35, para no18; Supra note 65, para 19
[238] D and E, and their two children v. Australia**,** UN General Committee, Communication no 1050/2002, para 7.2

state of detaining the author along with two children for three years and two months as 'arbitrary' in nature.

Similarly, *The UN General Committee no 35,* indicates that there must be a balance between the 'harm inherent in deprivation of liberty' and harm in a situation of 'involuntary deprivation of liberty'. Additionally, it also needs to consider the availability of less restrictive alternative for example, the use of a community-based mental health service or alternative social care service[239]. Just having the mental disability is not a justifiable reason for deprivation of liberty[240]. It must be accompanied with the test of necessity, for example, to protect a person from serious harm or to prevent injury to others[241]. Moreover, such deprivation of liberty must be a 'last resort' and for a 'shortest possible of time' followed by the 'adequate procedure' and 'substantive safeguard'[242]. In another word when a detained person is institutionalised in a place of treatment and rehabilitation, such detention needs to be evaluated sporadically.[243]

2.3.2.1 Right Guaranteed by Other Provision of the Convention

The UN General Committee no.35, observed that arrest and detention for legitimately exercising of the right guaranteed by the convention is arbitrary in nature.[244] Examples of legitimate rights guaranteed by the conventions include arrest 'the freedom of opinion and expression' (art. 19), 'the freedom of assembly' (art. 21), 'the freedom of association' (art. 22), 'the freedom of religion' (art. 18), and the 'right to privacy' (art. 17)'.[245] *The UN General*

[239] Latvia (CCPR/C/LVA/CO/3, 2014), para16;
[240] Bozeno Fijiakowski v Poland, UN General Committee, Communication no 1061/2002, para 8.3; Fardon V Australia, UN General Committee, Communication no 1629/2007, para 7.2; See also Supra note 65 para no 19
[241] Ibid
[242] Ibid
[243] Bulgaria (CCPR/C/BGR/CO/3, 2011), para 10; A. v New Zealand, UN General Committee, Communication no 754/1997,para. 7.2; see Committee on the Rights of the Child, general comment No. 9, para. 50.
[244] See Supra note 65, para no. 17
[245] Ibid

Committee in the case of *Zelaya Blanco v Nicaragua*[246], observed that detaining the author for his different opinion from the ruling government is 'arbitrary'. The Committee observed that such arrest violates the author's freedom of opinion and expression, which has been ensured under Article 19 of the ICCPR[247].

The UN General Committee no.35[248] also observed that the notion of arbitrariness includes arrest and detention made on the discriminatory ground and violates Article 2 para 1[249], Article 3[250] or Article 26[251]. In addition, a retroactive criminal punishment is a violation of Article 15 and hence amounts to arbitrary detention[252]. For example, the detention of family members of an accused as hostages, arresting of a person for extracting bribe or any other criminal purpose is considered as arbitrary[253].

Conclusion

The provisions of above conventions states that the deprivation of liberty of a person must be according to the national law. Moreover, such a national law under which the liberty of a person is deprived must be compatible with the international statues, particularly the respective articles of the conventions, such as Article 5 of the ECHR and Article 9 of the ICCPR. In addition, the national law must qualify the 'test of legality' which includes the principle of foreseeability and the accessibility of a law. It can be noticed that both Article 5 of the ECHR and Article 9 of the ICCPR did not define the meaning of 'arbitrariness'. However, the ECtHR and the UN General Committee explicitly elaborated on the notion of

[246] Zelaya Blanco v. Nicaragu, UN General Committee, Communication no. 328/1988, para 10.3;
[247] Ibid
[248] See Supra note 65, para no. 17
[249] '*1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'*
[250] 'The States Parties to the present Covenant undertakes to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.'
[251] See supra note 249
[252] See Supra note 65, para no. 17
[253] Ibid para no. 16

'arbitrariness' that is binding on the nation State to qualify the deprivation of liberty according to international convention.

Both the Articles have developed the 'test of necessity' and 'proportionality' and clarified that the application of these tests are different according to the grounds of deprivation of liberty. For example, the test of necessity which is applied to the subparagraph (b), (d) and (e) of Article 5 (1) of the ECHR must be stricter in comparison to test applied to the subparagraph (a) of the Article 5 (1) of the ECHR. Similarly, Article 9 (1) applied the most restrictive measures to the deprivation of liberty under civil cases for example, deprivation of liberty for bringing children to school, dealing with a mentally challenged person and the asylum seekers, etc. In addition, it is also noted that before deprivation of liberty the physical and mental condition of a person need to be considered to determine the place and condition of deprivation of liberty.

Chapter III

The deprivation of liberty: Protection available under Article 21 of the Constitution of India

Introduction

Similar to Article 5 of the ECHR and Article 9 of the ICCPR, the 'right to liberty' under Article 21 of the Constitution of India is a derogable right[254]. The same can be deprived but according to the 'procedure established by law'[255]. The present chapter attempts to answer certain questions: Does Article 21 of the Constitution of India empowers the Supreme Court of India to review the legislation passed by the parliament? Does it evolve the principles for protection from the 'unlawful' or 'arbitrary' deprivation of liberty as discussed in the previous chapter? What is the relation between the deprivation of liberty and other protected freedoms discussed in the chapter I of this thesis?

3.1 Notion of '…Procedure prescribed by law' under Article 21 of the Constitution of India…'

Article 21 of the Constitution of India protects person's life and liberty defined by the terms 'no person's life and liberty shall be deprived without procedure established by law[256]'. The notion of 'procedure established by law' under the Indian Constitution is now similar to the 'due process' clause of the American Constitution. However, the founding fathers of the Constitution of India deliberately abstained from accepting the American 'due process'

[254] Article 21 'The Constitution of India' Published by Government of India, Ministry of Law and Justice (Legislative department,), (2015), page 10; 'European Convention on Human Rights', 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder, page 7-8; 'International Covenant on Civil and Political Rights' Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, page

[255] Article 21 'The Constitution of India' Published by Government of India, Ministry of Law and Justice (Legislative department,), (2015), page 10;

[256] Ibid

clause under the Constitution of India[257] as they considered that by accepting the same, the Supreme Court may become more powerful than the parliament[258]. In other words, the founding fathers of Indian Constitution believed that a more powerful Supreme Court may not be appropriated for democracy[259]. Hence, the drafting committee confined the power of the Supreme Court of India by incorporating the term 'procedure established by law'[260]. According to this provision, the Supreme Court of India is empowered to review the procedural requirement established by the parliament before deprivation of liberty of a person.[261]

After the enforcement of the Constitution of India in 1950, the Supreme Court of India in the case of *A K Gopalan v State of Madras*[262] interpreted the term 'procedure established by law'. In this case, the Supreme Court of India held that the term 'law' as used under Article 21 of the Constitution of India means any legislature enacted by the legislative body[263]. Besides, the Supreme Court of India observed that, such 'law' enacted by the legislature is not entitled to judicial review[264].

Conversely, the same interpretation of the 'law' was changed in the case of *Maneka Gandhi v Union of India.*[265] The interpretation of Maneka Gandhi Judgement was influenced by the earlier Supreme Court decision in the case of *R.C. Cooper v Union of India*[266]. The Supreme

[257] Evolution of Article 21 of Constitution of India (1950 to 1978)' AIR Vol 103, May 2016, page 34
[258] Ibid; see also Andhyaruhina T.R., 'The Evolution of Due Process law by the Supreme Court', 'Supreme But Infallible' Oxford University Press, India, 2000, page no. 195-196 'Discussed the history of Constitution drafting of India'
[259] Ibid
[260] Ibid, page no. 193-194
[261] Ibid
[262] AIR 1950 SC 27
[263] Ibid page 39; see also See supra note 258, page no. 193-194; See Supra note 26 Page no3; 'Evolution of Article 21 of Constitution of India (1950 to 1978)' AIR Vol 103, May 2016, page 36;
[264] AIR 1950 SC 27 page 39; see also see Supra note 258, page no. 193-194; See Supra note 26 Page no3; See Supra note 257, page 36;
[265] AIR 1978 SC 597
[266] AIR 1970 SC 564; See also Supra note 26, Page no 7:

Court of India in the *Maneka Gandhi v Union of India*[267] case observed that the 'law' must be 'reasonable' as it is one of the principles of 'natural justice'. In the very same case, Justice Bhagwati writing for majority judges observed that:

> *Procedure must be reasonable, fair and not arbitrary or capricious…if the procedure is arbitrary, it would violate Article 14, which would not accommodate any arbitrary power and create the scope of judicial scrutiny to the 'law' enacted by the legislative body*[268]

However, while criticising the observation of Justice Bhagawati, *Andhyaruhina*[269] argued that it is not necessary that arbitrary law or procedure always violates Article 14 of the Constitution[270]. That ensures 'equality before the law and equal protection by law[271]'. Moreover, he emphasised that the notion of 'arbitrariness' cannot be equated with the violation of 'right to equality'. According to him 'arbitrariness' is a much wider concept, which carries several other circumstances in which the right to equality is not violated, but is categorised as 'arbitrary'[272]. For instnce, in a situation where a school authority rather than taking comparatively additional fees from certain groups of students, unreasonably increases the fees of all students is also to be categorised as 'arbitrary'[273]. Consequently, *Justice Bhagwati* has also changed his view regarding the notion of arbitrariness[274].

Similarly, few judges also differ from the interpretation of *Justice Bhagawati* that the 'right to liberty' is similar to 'right to equality'. They interpreted the Article 21 independently from other articles, such as, Article 14 of the Constitution of India.[275] For example, in the same

[267] AIR 1978 SC 597
[268] Ibid at Page 624
[269] See supra note 265
[270] Article 14 of the Constitution of India '14. Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'
[271] Ibid
[272] Andhyaruhina T.R., 'The Evolution of Due Process law by the Supreme Court', 'Supreme But Infallible' Oxford University Press, India, 2000, page no. 209-10;
[273] Ibid page no. 209
[274] Ibid page no. 209-10
[275] See Supra note 26 Page no 9;

judgment of *Menaka Gandhi v Union of India*[276], Justice Krishna Iyer while interpreting the 'procedure established by law' observed:

> *... 'Procedure' must rule out anything arbitrary, freakish or bizarre…A constitutional right can be channelized only by civilized process…established means settle firmly and not wantonly or whimsically. If it is rooted in the legal consciousness of the community, it becomes an 'established' procedure. And 'law' leaves little doubt that it is normal regarded as just since law is the means and justice is the end*[277]

The Supreme Court of India in its subsequent judgement of *Sunil Batra v Delhi Administration*[278], made it clear that the notion of 'process established by law' under Article 21 of the Constitution of India is having a same effect as 'due process of law', under United States of America.[279] Further, in the case of *Bachan Singh v State of Punjab*[280], *Justice Sakaria* observed that '[n]o person shall be deprived of his life and liberty except according to fair, just and reasonable procedure established by valid law[281].' In addition, the interpretation of Article 21 also evolved in the case of *Mithu v State of Punjab*[282]. In *Mithu v State of Punjab*[283] case, first time a constitutional bench of the Supreme Court of India unanimously invalidated a substantive criminal law, Section 303 of Indian Penal Code (IPC)[284]. Section 303 of IPC awards mandatory death sentence for a person who is found guilty of murder while he is already sentenced for life imprisonment. While making deciding the Supreme Court of India observed:

[276] AIR 1978 SC 597
[277] Ibid at page 658; for more details see also Supra note 26 Page 10
[278] AIR 1978 SC1675
[279] Ibid at page 1690; See Supra note 26 page 11.; 'true, our constitution has no due process clause… but after Cooper… and Menaka Gandhi…, the consequence is the same'
[280] AIR 1980 SC 898
[281] AIR 1980 SC 898 at 930; See Supra note 26, page 11
[282] AIR 1983 SC 473
[283] Ibid
[284] Ibid at page 476

> *These decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contended that it is for the legislature to prescribe the procedure and for the Courts to follow it; that it is for the legislature to provide the punishment and for the Courts to impose it… the last word on the question of justice and fairness does not rest with the legislature*[285]

Moreover, *Justice Krishna Iyer* quoting the descending judgement of *Justice Fazal Ali* in the case of *A. K. Gopalan v State of Madras*[286] observed in the case of *Maneka Gandh v the Union of India*[287]*:* "…'procedure' in Article 21 means fair, not formal procedure [and] 'Law' is reasonable law, not any enacted piece' and procedure established law under article 21, means both substantive and the procedural law[288]*."* In addition, in the same case of *Maneka Gandhi v the Union of India*[289], it also reads to ensure the principle of 'natural justice' as a part of 'procedure established by law'. The Supreme Court of India in the case of *A K Gopalan v the Union of India,* interpreted term 'established' as a 'power of legislation to make a law[290]'. However, in the same case *Justice Kania* observed that 'established' means settled in the society, which suggests the limitation of the parliament to follow the rule of a certainty[291]. Further, the Supreme Court of India in the case of *A. K. Roy v Union of India* [292], it is held that 'established' includes elements such as:

> *…'preciseness' for example it must be clearly 'defined' in the law under circumstances person liberty would be deprived. 'the word 'established' after all does not mean that the state dicta was final and the 'reasonableness' or otherwise of a law deliberately put out of the purview of the court. instead, it puts the law makers under an obligation to define procedure with certainty. This interpretation is, indeed, consistent with the constitution scheme and any*

[285] Ibid at page 476
[286] AIR 1950 SC 27
[287] AIR 1978 SC 597
[288] Ibid at 659
[289] Ibid; See also Supra note 26, Page no 13
[290] See Supra note 26, Page no 14;
[291] Ibid
[292] 1982 AIR 710, 1982 SCR (2) 272

other reading would defeat the very purpose of including the Article in a chapter devoted to guarantee fundamental rights.[293]

In the same case, Justice Krishna Iyer also observed that established means rooted in the society in the form of principle of justice[294]. In another words, the principles settled in the international community[295].

3.2 Right to Liberty and Other Rights

The Supreme Court of India in the case of *A.K Gopalan v Union of India*[296] applied the test of 'pith and substance' and observed the directness of the provision[297]. For example, the deprivation of liberty violates the right to liberty which is guaranteed by Article 21 of the Constitution of India. However, due to this test, it could not consider that deprivation of liberty also violates the other guarantees of a person protected under Article 19[298] of the Constitution of India. In addition, as a result of using the test of 'pith and substance', the Court implied detention *per se* is legal without considering the need to test the deprivation of liberty on the yardstick of Article 19 of Constitution of India[299]. The same test of 'pith and substance' was replaced by the Supreme Court of India in the case of *R.C. Cooper v Union of India*[300] to the 'test of direct and inevitable consequence of State action'. Whereas the Supreme Court observed that:'…the guaranteed fundamental rights were a restriction on the

[293] See Supra note 26, Page no 15; 1982 AIR 710, 1982 SCR (2) 272
[294] Ibid, Page no 15; 1982 AIR 710, 1982 SCR (2) 272
[295] Ibid
[296] AIR 1950 SC 27
[297] Ibid
[298] Article 19 of Article 21 'The Constitution of India' Published by Government of India, Ministry of Law and Justice (Legislative department,), (2015), page 9-10; '19. Protection of certain rights regarding freedom of speech, etc.—(1) All citizens shall have the right— (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India;'
[299] See Supra note 26 Page no 19-20
[300] AIR 1970 SC 564

exercise of the State power and under a Constitutional guaranteed fundamental right the State cannot bypass these restrictions on the exercise of its power, whatever be its object[301].'

Balari Devi argued that deprivation of liberty by detention inevitably denies the exercise of freedoms guaranteed under Article 19 of the Constitution of India[302]. Further, she argued that the Supreme Court of India fails to explain how such a denial could be valid, unless it fell under the permissible grounds of restriction mentioned under the Article 19 of the Constitution of India[303]. Moreover, permitted detention shall be within the constitutionally permitted ambit[304]. In addition, the state is empowered to impose a restriction on the freedoms guaranteed by the Article 19[305]. However, the court has only avoided the question of constitutionality of the detention law by holding that a law, which attract Article 19, must be capable of being tested for reasonableness under subclause (2) to (6) of Article 19[306].

Conclusion

From the above discussion, it is clear that the power of the Supreme Court of India was not as wide as the ECtHR or the UN General Committee. The Supreme Court of India was just an observer of procedural guarantee laid down by the legislation to a person under deprivation of liberty. In other words, the Supreme Court of India was not entitled to ensure the quality of substantive and procedural law under which person's liberty was deprived.

Over a period of time, the Supreme Court of India has evolved their jurisprudence, which guaranteed not just a 'procedure' security. The Supreme Court further observed that such a procedure must be 'fair', 'reasonable', 'just' and 'civilised'. It also ensures that such

[301] See Supra note 26, Page no 20
[302] Ibid, Page no 18
[303] Ibid, Page no 20
[304] Article13 of the Constitution of India, 'The Constitution of India' Published by Government of India, Ministry of Law and Justice (Legislative department,), (2015), page 10
[305] Article 19 of the Constitution of India 'The Constitution of India' Published by Government of India, Ministry of Law and Justice (Legislative department,), (2015), page 10
[306] See Supra note 26, Page no 28

procedure shall protect a person from 'arbitrary', 'capricious', 'freakish' or 'bizarre' procedure of deprivation of liberty. In addition, the notion of 'law' is evolved not only as law passed by the legislation but such law must be 'just', 'fair' and 'reasonable'. Both, law and procedure must be established; meaning they may be 'settled firmly' and 'rooted in the legal consciousness of the community'. That includes settled in the coconscious of international community. In view of above discussion, the next chapter will discuss the scope of police power to arrest the person on the ground of suspicion.

Chapter IV

Reasonable suspicion and protection from arbitrary and unlawful arrest

Introduction:

All the three jurisdictions, ICCPR, ECHR and the Constitution of India, protect the 'right to liberty' of a person, under both procedural and substantive grounds[307]. However, in a contrast to ECHR, ICCPR does not prescribe an explicit list on the grounds at which liberty can be deprived[308]. However, the drafting history of ICCPR clears that the objective of adding the term 'arbitrary' along with 'law' under Article 9(1) of the ICCPR was to replace the suggested grounds for deprivation of liberty.[309] According to *Nowark*, acceptable grounds for deprivation of liberty under Article 9(1) of ICCPR include the grounds mentioned in the subparagraph (a) to (f) of Article 5(1) of the ECHR and under Article 7 of the American Convention on Human Rights (ACHR)[310]. Deprivation of liberty under 'suspicion of committed offense' under subparagraph (c) of the Article 5(1) of the ECHR is also considered as one of the accepted ground under the Article 9 of the ICCPR. Similarly, Section 41 of the Code of Criminal Procedure (CrPC),1973 empowers the police to deprive liberty by arrest under the ground of suspicion of committing an offense[311].

[307] Article 21 'The Constitution of India' Published by Government of India, Ministry of Law and Justice (Legislative department,), (2015), page 10; Article 5 of the 'European Convention on Human Rights', 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder, page 7-8; Article 9(1) of the ICCPR; 'International Covenant on Civil and Political Rights' Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, page

[308] Article 21 'The Constitution of India' Published by Government of India, Ministry of Law and Justice (Legislative department,), (2015), page 10; Article 5 of the ECHR and the Article 9 of the ICCPR; 'European Convention on Human Rights', 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder, page 7-8; See also 9 (1) of 'International Covenant on Civil and Political Rights' Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, page

[309] Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (N. P. Engel, 2nd rev. ed ed. 2005). Page 216-217, Para 10-11;

[310] See Supra note 60,Page 225, Para 31

[311] Section 41 of the Code of Criminal Procedure, 1973, Act 2 of 1974, Jan 1974

Before discussing the specific grounds for deprivation of liberty, it is essential to recall the principles those have been discussed in the chapters two and three. Those principles are applied differently depending on the grounds of deprivation of liberty, with little flexibility.[312] For instance, the ground under which liberty has been deprived need to pass the test of 'legality' and 'non-arbitrariness' to be compatible with Article 5 of ECHR. When the liberty of a person is deprived on the ground of 'reasonable suspicion' of committing the crime under subparagraph (c) of Article 5(1) of the ECHR, it has to be compatible with the principle of 'non-arbitrariness'.[313] Such as '[o]rder of detention and execution of detention genuinely conforms with the purpose of restriction permitted by the relevant subparagraph of Article 5 (1) of the convention[314]'.

Similarly, the Article 9(1) of the ICCPR also prescribes the principle for the protection of liberty from 'arbitrariness'. For example, the UN General Committee in the case of *Hugo Van Alphen v the Netherlands*[315] observed that 'lawful' arrest is not sufficient, it must be 'reasonable' and 'necessary in all circumstances' such as 'to prevent flight', interference with evidence or the recurrence of crime'.[316] However, the test of 'reasonable suspicion' cannot be found in the Article 9(1) of the ICCPR unlike that observed under subparagraph (c) of Article 5 (1) of ECHR and Section 41 of the CrPC, 1973 of India. The present chapter would discuss the notion of 'reasonable suspicion' under subparagraph (c) of Article 5 (1) of the ECHR and Section 41 of the CrPC, 1973, India.

[312] See also Fox, Campbell and Hartley V/s The United Kingdom, Application no. 12244/86, 12245/86, 12383/86, Para 32' The ECtHR in the case of Fox, Campbell and Hartley V/s The United Kingdom while establishing the notion of 'reasonable suspicion' observed that bona fide intention of the police is not sufficient for the test of 'reasonableness' there must be exist some 'facts or information' which would satisfy the 'objective observer' of suspicious'

[313] Ibid

[314] James, Wells and Lee v. the United Kingdom, Application No. 25119/05, 57715/09 and 57877109/09, ECtHR, 18th September,2012, 19; See also Supra note 164, para 69

[315] Hugo Van Alphen V Netherlands , UN General Committee, Communication no. 305/1988

[316] Ibid, para 5.8; See also Gorji-Dinka v. Cameroon, Communication no. 1134/2002, para 5.1

Trechsel states that subparagraph (c) of Article 5 (1) of the ECHR can be discussed in three different ways: first, the reason for deprivation of liberty; second, the notion of 'offence', and third, the notion of 'reasonable suspicion'.[317] The meanings of 'offense' under this subsection are 'autonomously' interpreted in several cases by the ECtHR.[318] However, going into details of the same is out of the scope of this thesis. Therefore, the meaning of 'offense' for the purpose of this thesis is limited to 'offense' under the respective national jurisdiction. Therefore this part of the chapter will discuss the 'reason for deprivation of liberty' and the notion of 'reasonable suspicion' mentioned under subparagraph (c) of Article 5(1) of ECHR.

4.1 Notion of reasonable suspicion under Article 5 (1) of the ECHR

Article 5 (1) (c) of the ECHR:

> *"1. … No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
> *…*
> *(c) 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;"*[319]

Trechsel,[320]mentioned that ECtHR was reluctant to look into the issue of 'reasonability of suspicion' before the case of *Fox, Campbell and Hartley v The United Kingdom*[321]. That the relevant authority of nation state is expected to follow the test sets by the ECHR under the notion of 'reasonable suspicion' before the deprivation of liberty[322]. ECtHR in the same case of *Fox, Campbell and Hartley v The United Kingdom*[323] while interpreting the notion of 'reasonable suspicion' observed that 'bona fide intention' of police is not sufficient to get

[317] Trechsel Stefn, ' The Liberty and Security of Person: Rules of imprisonment', Human Rights in Criminal Proceeding, Oxford, Oxford University Press, 20015 at page 423
[318] Engel and Others V/s The Netherland, Application no. 5100/1971, 5101/1971, 5102/1971; Guzzardi V/s Italy, Application no. 7367
[319] The Article 5(1) (c) of 'European Convention on Human Rights', 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder, page 7-8
[320] See supra note 317, at page 423-424;
[321] Fox, Campbell and Hartley V/s The United Kingdom, Application no. 12244/86, 12245/86, 12383/86;
[322] See Supra note 317
[323] See Supra note 321

through the test of 'reasonableness'. In addition, there must exist some 'facts or information' which will satisfy the 'objective observer' on the availability of 'reasonable suspicious'[324]. To illustrate, in the same case of Fox, *Campbell and Hartley v The United Kingdom*[325], the applicants were arrested by the police under 'bona fide intention' for the purpose of inquiry. Further, the police kept them under detention for several hours and released them without producing before the judge or without charging any offense.[326] The said arrest was justified as based on a previous conviction of the applicants in a terrorist-related offense[327]. In this case, the ECtHR found the violation of Article 5(1) of the ECHR. In reasoning it was observed that the 'honest suspicion' for the deprivation of liberty is the lowest threshold set by the national government. Moreover, before deprivation of liberty, the arresting authority has to submit at least 'some facts or information' to satisfy the 'objective observer' that the arrested person has committed the offense.[328]

On the other hand, three descending judges in the same case of *Fox, Campbell and Hartley v The United Kingdom,*[329] carries the common opinion with the majority that a 'genuine suspicion' is not equivalent to 'reasonable suspicion'. However, they disagreed with the findings of majority on the violation of Article 5(1) (c) of ECHR[330]. According to descending judges, this is not a case where it is '…possible to draw a sharp distinction between the 'genuine […] and reasonable suspicion[331].' Hence, the reasoning of the majority, which states that the facts and information submitted by the National Government are insufficient to reach the threshold of 'suspicions', was stated to be not acceptable[332].

[324] Ibid, Para 32
[325] Ibid
[326] Ibid, Para 34
[327] Ibid
[328] Ibid, Para33
[329] Ibid
[330] Ibid,Page12
[331]Ibid, Page 21
[332] Ibid

The failure of arresting authorities, to conduct a 'genuine inquiry' to verify the genuineness of the complaint under which the person is arrested is also not compatible with Article 5 (1) (c) of the Convention.[333] For example, the ECtHR in the case of *Stepuleac v Maldova,*[334] observed that the prosecutor's act of not conducting a genuine inquiry of an involvement of the applicant in the crime is a violation of Article 5(1) (c) of ECHR. The ECtHR noted that there wasn't any incriminating statement against the applicant in the complaint or any evidence that point towards the applicant's involvement in the crime[335]. Hence, detention of applicant is not sufficient to satisfy the existence of 'reasonable suspicion'.[336]

Further, ECtHR in the case of *Brogan and Others v the United Kingdom* [337], observed that the 'reasonableness' of an arrest and detention depends on all circumstances of the case. For instance, the ECtHR in the case of *Murray v the United Kingdom*[338], observed that terrorism is one of the serious crimes which need immediate attention. However, ECtHR in the case of *O'Hara v the United Kingdom*[339] and some other cases[340] observed that the nature of crime and the notion of 'reasonableness' cannot be stretched beyond the point where the essence of safeguard secured under Article 5(1) (c) is impaired[341].

The ECtHR in the case of *Murray v the United Kingdom*[342], observed that although it is necessary to pass the test of 'reasonable suspicion,'[343] one could not ignore the special nature

[333] See Supra note 120, page 25-26
[334] Stepuleac v Maldova, Application no 8207/2006 para, 73; See also Elcl and Others v Turkey, application no. 23145/93 and 25091/ 94 , paragraph no 674
[335] Ibid
[336] Ibid
[337] Brogan v the United Kingdom, Application no 11209/04, 11234/84, 11266/84 and 11386/85, para no. 52
[338] Murray V the United Kingdom, Application no 14310/88, para 51
[339] O'Hara v The United Kingdom, Application no.37555/97, para 35
[340] Fox, Campbell and Hartley V/s The United Kingdom, Application no. 12244/86, 12245/86, 12383/86, Para, 32
[340] O'Hara v The United Kingdom, Application no.37555/97
[341] See Supra note 340,
[342] Murray v The United Kingdom, Application no. 14310/88,
[343] Ibid, para 70; Fox, Campbell and Hartley V/s The United Kingdom, Application no. 12244/86, 12245/86, 12383/86

attached to offences relating to terrorism.[344] However, ECtHR did not hold the violation of Article 5(1) (c) of the ECHR[345] because, according to ECtHR, the following facts are sufficient to hold the applicant on 'reasonable suspicion.[346] In the above mentioned case, the applicant's two brothers were convicted in the US for transferring the money for terrorist-related offences. When the applicant visited the US, she was detained for a short duration[347] till verification of facts from reliable sources.[348]

Consequently, the descending judges namely, Justice *Loizou*, Justice *Morenilla and* Justice *Makarczyk* have shared the common opinion with the majority on the point that crimes related to terrorist activities are of special nature since the lives of several people are at stake[349]. Therefore, it requires expedite response as well as confidentiality of the informants.[350] However, they differ with majority on the reasoning part. According to descending judges the facts of Murray v United Kingdom is distinct from the case of *Fox, Campbell and Hartley*[351], where the ECtHR observed that the information furnished by the government is 'insufficient' to satisfy the objective observer that there was a 'reasonable suspicion' about the offence being committed[352].

4.1.1 Standard of proof and reasonable suspicion

Although, the ECtHR in the case of *Fox, Campbell and Hartley v The United Kingdom*[353], has established the 'objective test' for deprivation of liberty by setting the criteria of some 'facts or information' to satisfy the objective observer. However, same found to become less

[344] Murray v The United Kingdom, Application no. 14310/88, para 51
[345] Ibid, para 70
[346] Ibid
[347] Ibid, para 62
[348] Ibid, para 62 and 67
[349] Ibid, descending opinion para 1
[350] Ibid, descending opinion para 1
[351] Fox, Campbell and Hartley V/s The United Kingdom, Application no. 12244/86, 12245/86, 12383/86
[352] See Supra 344, descending opinion para 2
[353] Fox, Campbell and Hartley V/s The United Kingdom, Application no. 12244/86, 12245/86, 12383/86

effective, by the subjective criteria developed under the notion of 'standard of proof' which gives wider discretionary power the Court.[354] For example, the ECtHR in the case of *O'Hara v the United Kingdom*[355] observed that standard of evidence presupposed before the arrest should not be required to bring conviction or frame charges against the accused.[356] While deciding the above case, the ECtHR, has taken into account the following evidences: a) statement(s) made by the arresting officer, detection constable, b) the circumstances under which the applicant was arrested, and c) the opportunity of the applicant to cross-examine the above witness. It observed that these evidences are sufficient to provide protection of applicant against 'arbitrary arrest. [357] Therefore, it is not a violation of Article 5 (1)(c) of the ECHR[358]. However, this conclusion of the ECtHR is based on limited materials produced before them by the respective parties[359]. In addition, ECtHR also considered the fact that the applicants failed to bring the issue of 'reasonable suspicion' before the national jurisdiction and missed to use the opportunity to cross-examine the witness[360]. Further the ECtHR also observed that proceedings of national jurisdiction is neither found biased towards the police nor it found to be provided any immunity to the police for their act of arrest[361].

In the case mentioned above, the descending judge, *Justice Loucaides*, disagreed with majority on the non-violation of Article 5(1)(C) of the ECHR.[362] *Justice Loucaides* argued that, '…standard of the evidence presupposed before the arrest should not be as required to bring conviction or frame charges against the accused.[363]' He is not carrying the common

[354] O'Hara v The United Kingdom, Application no.37555/97, Para36
[355] Ibid
[356] Ibid, Para36
[357] Ibid, Para38 and page no 16
[358] Ibid, Para 44
[359] Ibid, Para 44
[360] Ibid, Para 44
[361] Ibid, Para 42
[362] Ibid, Page 19
[363] Ibid, Para 36

opinion regarding the applicability of the said principles to the facts of this case.[364] Further, *Justice Loucaides* argued that the burden of proof to provide the evidence in the form of facts and information before arrest the person is vested on the national Government rather than the person arrested.[365] He also pointed out that the National Court itself found that, in the said case, the materials produced before the Court by police was insufficient[366]. Moreover, he stated that the Court had to decide on the material produced by the police rather than calling for further information.[367] Subsequently, he also noted that this case is more close to the *Fox, Campbell and Hartley v The United Kingdom* [368] than *the Murray v The United Kingdom*[369] because in this case the facts or information provided were limited to the statement of a constable[370]. The statement of the constable in this case was that the applicant was arrested on the direction of a senior office[371]. However, according to *Justice Loucaides,* Police used such statement that constable acted on the direction of senior officer as a trick.[372]

ECtHR in the case of *Labita v Italy*[373] observed that hearsay evidence submitted by the 'petiti' without any corroboration is not sufficient because such evidence is open for manipulation, taking advantage of personal revenge[374]. In contrast, ECtHR in the case of *Talat Tape v Turkey*[375] observed that withdrawing statement made by applicant before investigating agencies during the trial can be suspicious[376]. While deciding on the same case, ECtHR recalled that 'reasonable suspicion' does not mean that guilt of person must be

[364] Ibid, Page 18
[365] Ibid
[366] Ibid
[367] Ibid, Page 18-19
[368] Fox, Campbell and Hartley v The United Kingdom, Application no. 12244/86, 12245/86, 12383/86
[369] Murray v The United Kingdom, Application no. 14310/88
[370] See Supra note 354, Page 19
[371] Ibid
[372] Ibid
[373] Labita v Italy, Application no. 26772/95, paragraph no 156-158
[374] Ibid
[375] Talat Tepe v Turkey, Application no3147/1996, para 57-62,
[376] 'Guide on Article 5 of the Convention; Right to Life and Security', 'European Court of Human Rights 2014' 'Council of Europe', www.echr.coe.int, para 72

established, but should be a 'presupposition of investigation' to prove the reality of an offence against the applicant[377].

4.1.2 Purpose of arrest on reasonable suspicion

Article 5(1) (c)
"1. [...](c) 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;[378]"

To fulfil the requirement of arrest and detention in conformity with subparagraph (c) of Article 5 (1) of the ECHR, the 'reasonable suspicion' of 'committed offence' is not sufficient[379]. In addition, the 'reasonable suspicion' must be accompanied with any one of the purposes of deprivation of liberty[380]. For example, the purpose of deprivation of liberty must be to 'bringing a person before the competent legal authority', to prevent a person from committing an offence and/or to prevent a person from 'fleeing' after committing the offence[381]. However, *Techsel* argued that there are very limited grounds available along with suspicion to fulfill the need of jsutificaiton of detention[382]. Although not mentioned under subparagraph (c) of the Article 5 (1) of the ECHR, there are some additional grounds that are indirectly accepted by the ECHR[383]. The source of these grounds is primarily in the domestic legislation[384]. For example to avoid tempering with the evidence, 'reoffending' or 'absconding' etc[385]. However, studying the appropriateness of these grounds is out of the scope of this thesis. The present section will discuss the some grounds of deprivation of liberty which are required along with the 'reasonable suspicion'.

[377] See infra note 375, para 59
[378] 'European Convention on Human Rights', 'European Court of Human Rights, Council of Europe'F-67075, Strasburg Ceder, page 7-8
[379] See also Supra note 38, page 425
[380] Ibid
[381] Ibid
[382] Ibid: See also subparagraph (c) of the Article 5(1) of the ECHR
[383] See supra note 379
[384] Ibid
[385] Ibid

4.1.2.1 To bring before the competent legal authority

ECtHR, in the case of *Jecicus v Lithuania,*[386] observed that the detention of a person under subparagraph (c) of Article 5 (1) of the ECHR is only permissible in the 'context of a criminal proceeding'. In another words, person detained for suspicion of committing the crime must be before the competent legal authority[387]. Further, ECtHR in the case of *Brogan and Other v The United Kingdom,*[388] observed that although the purpose of arrest and detention under subparagraph (c) of Article 5(1) of the ECHR is to bring the person before the competent legal authority;[389] however, neither bringing a person before the competent legal authority nor not charging a person for any offence violates the subparagraph (c) of the Article 5 (1) of ECHR[390].

Because ECtHR observed in the case of *Brogan and ohters v United Kingdom*:

> *...[the] existence of such purpose must be considered independently of its achievement and subparagraph (c) of Article 5 paragraph 1 (art. 5-1-c) does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody.*[391]

Trechsel and some other authors also share the common view as discussed above by arguing that there is no violation of the subparagraph (c) of the Article 5(1) of the ECHR, if detained person is released 'promptly' and discontinued their investigation[392]. However, such a deprivation of liberty must be ordered in a good faith for the purpose of interrogation[393].

386 Jecicus v Lithuania, Application no. 34578/97,
387 Ibid, para no. 50
388 Brogan v the United Kingdom, Application no 11209/04, 11234/84, 11266/84 and 11386/85
389 Ibid, para52
390 Ibid, para 53
391 Ibid
392 See supra note 38, page 428-429; see also Supra note 120, page 23-24: See Supra note 54, Page 146
393 See Supra note 38, page 428-429; see also Supra note 120, page 23-24: Horris , O'Bojhe and Warbircy, David Harris and others, 'Law of European Convention on Human Rights' Third Edition, Oxford, 2014, Page 146

4.1.2.2 Necessary to prevent the offence

Along with 'reasonable suspicion', the prevention of further offence is one of the reasons for deprivation of liberty of a person. For example, the ECtHR in the case of *Ciulla v Italy,*[394] observed that a person who has been arrested, though having the history of committing the crime, his detention is not justifiable in the absence of specific facts or information, which shows that his arrest is necessary to avoid a specific offence[395]. In addition, *Horris et al.* argued that detention of a person or extending the period of detention of person based on suspicion that such person will commit an offence if released, are not acceptable under Article 5(1) (c) of the ECHR[396]. Similarly, *Trechsel* referring the case of *Jecius v Lithuania* argued that there is no substance in the reason of detaining the person to avoid further offence[397].

4.1.2.3 Prevent a person from fleeing after having committed an offence

According to *Trecshel* though this reason of deprivation of liberty is not added to the above discussion, it may be the intention of the drafters to "cover a scenario where the suspect was 'caught in the act' of 'flagrant.'[398]" Therefore, it is not considered to be a 'legitimate exception' on the point of view of the 'presumption of innocence'[399]. Similarly, *Horris el al.* argued that this reason for arresting is 'redundant' since the person trying to flee is getting arrested, a similar interpretation as Trecshe argued[400].

[394] Ciulla v Italy, Application no 11152/84;
[395] See Supra note 120, page 24-25:
[396] Supra note 54, Page 147
[397] See supra note 38, page 427
[398] Ibid, page 428
[399] Ibid, Page 147
[400] See Supra note 54, Page 147

4.2 Power of police to arrest on 'reasonable suspicion' under Code of Criminal Procedure, 1973

There are several objective grounds under which police have the power to arrest a person with or without warrant. In addition, there are also some subjective grounds under which police can arrest a person without a warrant. For example, Section 41(1) of the CrPC, 1973 states that police can arrest a person without warrant acting on a 'reasonable compliant', 'credible information' or 'reasonable suspicion' of committing a cognizable offence[401]. However, according to 152nd Law Commission Report of India, many instances of misuse the power to arrest by the police on the ground of suspicion[402] has been observed. Hence, the following section of the chapter will discuss the interpretation of 'reasonable suspicion' in the Indian context.

4.2.1 Reasonable suspicion in the Indian Context

The Supreme Court of India, in the case of *Subodh Chandra Roy Choudhary v Emperor*[403], discussed Section 54 of the Code of Criminal Procedure (CrPC)1889 under which the British Indian Police had power to arrest. The Section 54 of CrPC, 1889 empowers police to arrest a person against whom a 'reasonable complaint has been made' or 'credible information has been received' or 'a reasonable suspicion exist of his having been concerned' of committing the offence[404]. Where the Supreme Court in the case of *Subodh Chandra Roy Choudhary v Emperor*[405] observed that:

[401] Section 41(a) of the Code of Criminal Procedure, https://indiankanoon.org/doc/1899251/
[402] See Supra note 28, para 14
[403] 1925 ILR 52 Cal 319 retrieve form (Indian Kanoon - http://indiankanoon.org/doc/365225/) paragraph 19
[404] Section 54 of Code of Criminal Procedure 1889 *"Any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of British India, which if committed In British India, would have been punishable as an offence, and for which he is under any law relating to extradition or under the Fugitive -Offender's Act, 1881, or otherwise, liable to be apprehended or, detained in custody in British India."*
[405] See infra note 403

> *[W]hat is a reasonable complaint or suspicion must depend on the circumstances of each particular case, but it must be at least founded on some definite fact tending to throw suspicion on the person arrested and not on mere vague surmise or information. A general definition of what constitutes reasonableness in a complaint or suspicion or credibility of an information cannot be given; both must depend on upon the existence of some tangible proof within the cognisance of the arresting Police Officer and he must judge whether it is sufficient to establish the reasonableness or credibility of the charge, information or suspicion.*[406]

After the above observation, the Supreme Court of India in the case of *Subodh Chandra Roy Choudhary v Emperor*[407] held that two telegrams mentioning extradition of the applicant to Malaysia were not sufficient to qualify the test of reasonable complaint. Since the telegram did not provide even the basic facts which established the complaint and the applicant's involvement in the crime.[408]

The above discussed case of *Subodh Chandra Roy Choudhary v Emperor*[409] interpreted in its judgement Section 54 of the CrPC, 1889 in 1925. This Section was applicable in India even after the new Code of Criminal Procedure 1973 came into force[410]. The interpretation to the said Section read that it is not sufficient to arrest a person 'concerned' with any offence but the said arrest must pass the test of 'reasonability' and 'credibility' of suspicion and information[411]. Moreover, it sets requirement of some facts or information that may substantiate suspicion[412]. The wordings of the above mentioned judgement shows that it is the police officer who possesses the discretionary power to arrest a person[413].

[406] Ibid
[407] Ibid
[408] Ibid
[409] Ibid
[410] Code of criminal Procedure 1973 came into force in 1st April1974, https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814340.pdf
[411]Ibid
[412]Ibid
[413] Ibid

The new provision of arrest under Section 41 of the CrPC, 1973 is the reflection of Section 54 of the CrPC, 1889.[414] Hence, Section 41 of the CrPC, 1973 also interpreted in the same view as its earlier counterpart. For example, the High Court of Delhi in the case of *M. Baskaran v State*[415] discussed Section 41 (1) (g) of the Code of Criminal Procedure (1973), which used a similar term as discussed previously in the above section. It reads that the police can arrest any person without warrant for an offence committed outside India if such act is also the offence within territory of India. [416] The High Court of Delhi while interpreting the same recalled the test laid down by the Supreme Court of India in the case of *Subodh Chandra Roy Choudhary v Emperor*[417] the police had to satisfy 'some definite facts to throw a suspicion on the person arrested and not on mere vague surmise conjunction and *information*[418]*'*. The Supreme Court observed that just 'telex message' requesting Indian Police to initiate an inquiry against the applicant and extradite him to the Malaysian Government for an offence of a 'breach of trust' under Malaysian penal law is not tenable[419]. The Court observed that the said telex message was silent on the circumstances under which an offence was committed[420]. Hence it is insufficient to initiate an inquiry against the applicant because the reason allotted for extradition falls short to the notion of 'reasonable complaint/information' of committing a cognizable offence[421].

[414] See Supra note 26, Page no 46

[415] M. Bhaskaran V State, 27th December 1988, retrieve from Indian Kanoon - http://indiankanoon.org/doc/1223017/ para no 12 and 13; equivalent situation 37(1989) DLT 298

[416] Section 41 (1)(g)of the Code of Criminal Procedure 1973 '*41. When police may arrest without warrant- (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person- (g) who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India;'*

[417] See Supra note 405

[418] M. Bhaskaran V State, 27th December 1988, retrieve from Indian Kanoon - http://indiankanoon.org/doc/1223017/ para no 12 and 13; equivalent situation 37(1989) DLT 298

[419] Ibid

[420] Ibid

[421] Ibid

The High Court of Guwahati in the case of *Kajal Dey and Other v State of Assam*[422] while hearing the applicant for a bail, discussed the power of police to arrest under Section 41of the CrPC, 1973[423]. The Section 41of CrPC 1973 states that the police can arrest a person *'*who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned[424]*.'* The High Court of Guwahati, in the above mentioned case, restricted the power of police to arrest by invoking the limitation laid down under Section 41 of CrPC, 1973[425]. Further, the High Court of Guwahati said that even in serious cases like murder, the police cannot exercise the power of arrest 'arbitrarily' which hamper the 'dignity' and 'liberty' of a person[426].The High Court of Guwahati also clears that the police cannot arrest a person under mere suspicion, unless the suspicion is well founded[427]. For example, the High Court of Guwahati, in above case, observed that arresting the applicant in the absence of any 'incriminating' material in the first information report (FIR) or any record of previous arrest is insufficient to pass the test of 'reasonable suspicion' under Section 41 of CrPC 1973[428].

The Guwahati High Court, in its judgment of *Kajal Dey and Others v State of Assam*[429] although applied the similar test of 'reasonable suspicion' as discussed earlier, it makes clear

[422] 1889 Criminal Law Journal 1209; See also Sanjay Kumar and Choudhary Viplav Kumar, 'Law Relating to Power of Arrest A Critical review', 'The Indian Journal of criminology and criminalization', Vol XXXIV, No.1, Jan-June2015, page 84, para 13; See infra note 425

[423] Section 41 (1)(a) police can arrest the person.. "who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned"

[424] Ibid

[425]Kajay Day and Others v State of Assam, 22nd February 1989, Indian Kanoon - http://indiankanoon.org/doc/488586/ 1, para 4

[426] Ibid

[427] Ibid, para 3 and 4

[428] Ibid

[429] 1889 Criminal Law Journal 1209; See also Sanjay Kumar and Choudhary Viplav Kumar, 'Law Relating to Power of Arrest A Critical review', 'The Indian Journal of criminology and criminalization', Vol XXXIV, No.1, Jan-June2015, page 84, para 13; See Supra note 425

that the seriousness of an offence cannot override the person's right to [430]protection from 'arbitrary arrest'. The Court here observes that an 'arbitrary arrest' would hamper the 'dignity' of individual persons, which is ensured by the constitution of India[431].

4.2.2 Difference between the reasonableness and the *prima facie* evidence

The Court in the Case of *Gulab Chaand v State of Madhya Pradesh*[432]observed that 'reasonableness' is the minimum requirement for arrest. However, the Court further recalled the case of *Shaabin Bin Hussein v Chong Fookkam[433]and* observed that 'suspicion' is not equivalent to 'prima facie case'. At the starting point of investigation, 'suspicion' arises and that would exist until finding of some 'prima facie' evidence.*[434]* The Court further observed that granting the police an 'executive discretionary power' is necessary to facilitate the investigation process[435]. However, the Court also notices that under the common law system, the judiciary have the discretionary power to judge the act of an executive[436]. The Court directs that while using this discretionary power, the police have to consider all those factors which the Court considers while deciding a bail application[437]. The factors considered for bail include, the possibility of the accused to escape from the trial and prevention of crime[438]. On the other hand, police need to have some substantive facts or information before arresting a person[439]. Another distinction between 'reasonable suspicion' and 'prima facie proof' is the evidential value of material collected by the police. For example, the information required to

[430] Ibid
[431] Ibid
[432] 1982 Cri L j 665; http://lawfinderlive.com/jlink.aspx?q=40143&p=1&pos=0&qType=6&tidp=119127&tid=272324
[433] *Shaabin Bin Hussein v Chong Fookkam (1969)3 All England Reporter 1626 (PC)*
[434] Ibid para no 14
[435] *Ibid*
[436]*Ibid* para no 14
[437] http://lawfinderlive.com/jlink.aspx?q=40143&p=1&pos=0&qType=6&tidp=119127&tid=272324, para no 14
[438] Ibid
[439] Ibid

satisfy 'reasonable suspicion' may not be admissible as evidence[440]. However, in the case of '*prima facie* proof', the material before Court must be admissible as evidence[441].

The Supreme Court of India heard the writ for habeas corpus in the case of *Joginder Kumar v State of Uttar Pradesh,*[442] where a young lawyer was summoned by the Senior Superintendent of Police (SSP) for an inquiry and held him for a couple of days in police station without producing before the magistrate[443]. On asking the reason for detention, the police explained that the applicant was not detained rather he was willingly helping the police to trace a case of kidnapping[444]. Though it was not a part of the petition, the Supreme Court of India, considering the increasing number of 'incommunicado' detention willingly took the issue of the power of police to arrest under discussion[445]. The Supreme Court of India, in this discussion, observed that the police should not use the power to arrest mechanically and must be able to justify any action of arrest made.[446] Further, the Court observed that the police can arrest a person only after,

> *...a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect an arrest.*[447]

In addition, the Supreme Court also observed that involvement in a crime is not sufficient to arrest a person. There must be some 'reasonable satisfaction in the opinion of the officer affecting the arrest that such arrest is necessary and justifiable.[448]' However, the Supreme Court of India, in the same case, gives an exception to the police from above requirement

[440] Ibid
[441] Ibid
[442] AIR 1984 SC 1349; (1994) 4 Supreme Court Cases260, SCC online Truerint
[443] Ibid
[444] See Supra note 18, para 7
[445] Ibid, para 8 and 9
[446] Ibid, para 20
[447] Ibid para 20
[448] Ibid

considering it as a 'heinous crime'[449]. However, it needs to be noted that the notion of heinous crime is not defined under the Code of Criminal Procedure (1973).

4.2.3 Critique on section 41 of the CrPC, 1973 by the 177th Law Commission of India Report, 2001

The 177th Law Commission of India Report (2001) criticised Section 41 (1) of the CrPC, 1973 which states that the police may arrest a person:

> *"who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned*[450]"

The 177th Law Commission of India Report criticised the same provision of the Code Criminal Procedure (1973) and observed that the terms 'concerned' are 'vague' and 'ambiguous'[451]. This provision was not expecting any subjective condition to be fulfilled by police before arresting any person who is concern with any cognizable offence..[452] On the other hand, it offers enormous power to the police to arrest any person believed to be 'concerned' with a cognizable offence. [453] However, while arresting person under this provision police did not consider some other factors such as 'reasonable complaint', 'credible information' and 'reasonable suspicion'[454]. What so ever, there is no practical remedy available for 'unlawful' and 'unjustifiable' deprivation of person liberty[455]. For example,

[449] Ibid
[450] Section 41 of the Code of Criminal Procedure 1973, before the amendment of 2008 and 2010
[451] See Supra note 19, page no 92
[452] Ibid
[453] Section 2 (c) of the Code of Criminal Procedure defines "'cognizable offence' means an offence for which, and 'cognizable case' means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;' in general terms cases which are punishable for imprisonment of less than 3 years are considered to be the 'cognizable' offence."
[454] See Supra note 19, page 94
[455] Ibid page 95

according to 177th Law Commission Report 2001 of India, less than one percent of police personnel had been convicted by Court for an act of 'wrongful' and 'unjustifiable' arrest.[456]

The 177th Law Commission of India Report 2001 also observed:

> *[i]n this connection, it is well to recalled that the Supreme Court of India has held repeatedly that predicting the fundamental right of a citizen on the subjective satisfaction of an executive official is impermissible under our Constitution and it would be a clear case of placing an unreasonable restriction upon the fundamental right of the citizen.*[457]

Further, 177th Law Commission of India Report 2001 observed:

> *... reasonableness or justification of an arrest is a matter for the police officer to determine in the given circumstances of each case and that it is not possible to lay down exhaustively what do the expression 'credible information' or 'reasonable compliant' or 'reasonable suspicion' in Section 41 (1) (a) mean*[458]

Therefore, the power of police to arrest under Section 41 of CrPC, 1973 'remains unchecked'.[459]Moreover, the report further notes that the police also use the power to arrest 'wrongfully' and 'unjustified' to extract money.[460]

4.2.4 Code of Criminal Procedure Amendment 2008 and 2010

Section 41 of the CrPC, 1973 was amended to formulate the Code of Criminal Procedure (Amendment) Act (2008), which came into effect from November 1, 2010[461]. Thereafter, in

[456] Ibid, page 96-97
[457] Ibid, page 95
[458] Ibid, page 96
[459] Ibid, page 96
[460] Ibid, page 97
[461] Code of Criminal Procedure (Amendment) Act 2008; See also Supra note 28, page 75, para 2; See Supra note 26;

2010, Section 41(a) and (b) was incorporated into the new Act, which lays down conditions under which the police can arrest a person without warrant and order of magistrate[462].

The new Act empowers the police to arrest a person who commits a 'cognizable[463]' offence in their presence[464]. In addition, the police can also arrest a person:

> *against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine,' if the condition mentioned below are 'satisfied*[465].

Firstly, when 'the police officer has reason to believe on the basis of such complaint, information or suspicion that such person has committed the said offence;[466]'and secondly after, '(…) *police officer is satisfy that such arrest is necessary;*[467]*'*

> ***(****a) 'to prevent such person from committing any further offence;' or*
> *(b) 'for proper investigation of the offence or*
> *(c) to prevent such person from, causing the evidence of the offence to disappear or tampering with such evidence in any manner;' or*
> ***(****d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or*
> *(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured; and the police officer shall record while making such arrest, his reasons in writing.*

[462] Ibid
[463] Section 2 (c) of the Code of Criminal Procedure defines "'cognizable offence' means an offence for which, and 'cognizable case' means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;" in general terms cases which are punishable for imprisonment of less than 3 years are considered to be the 'cognizable' offence.
[464] Section 41(a) of the Code of Criminal Procedure 1973 (2008 amendment)
[465] Section 41(b) of the Code of Criminal Procedure 1973 (2008 amendment)
[466] Section 41(b) of the Code of Criminal Procedure 1973 (2008 amendment)
[467] Section 41 (b)(II)(a) to (e)of the Code of Criminal Procedure 1973 (2008 amendment)

The police shall prescribe the reason for not arresting the person under the circumstances mentioned below:

> **(***ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death and the police officer has reason to believe on the basis of that information that such person has committed the said offence*[468]*;*

In addition to above-mentioned grounds to arrest without warrant, the Police can arrest a person under some subjective grounds mentioned under section 41(c) to (i) of the CrPC 1973 [469]. The subjective grounds mentioned under 41(c) to (i) is only protected under the test of 'reasonable suspicion'.

In addition, Amendment Act (2008) deletes Section 41(2) of the CrPC 1973, and substitutes the following sub-section (2):

> *(2) Subject to the provisions of Section 42, no person, concerned in a non-cognizable offence or against whom, a complaint has been made or credible information has been received or a reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate*[470]*.*

The Act amended in 2010 further lays down following provisions, which deals with appearance by notice:

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[468] Section 41(1)(b)of the Code of Criminal Procedure 1973 (2008 amendment)

[469] *"(c) who has been proclaimed as an offender either under this code or by order of the state government; or (d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or (e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape from lawful custody; or (f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or (h) who, being a released convict, commits a breach of any rule, made under sub-section (5) of Section 356{*}; or Arrest Powers of the State 45[{*} Under section 356 the Court may, in certain cases, Order for notifying address of previously convicted offenders. Sub-clause (5) empowers the State Government to make rules to carry out the provisions of this section relating to the notification of residence or change of or absence from residence by released convicts.] (emphasis added) (i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears there from that the person might lawfully be arrested without a warrant by the officer who issued the requisition."*

[470] Section 42 of the Code of Criminal Procedure 1973 (2008 amendment

41-A. Notice of appearance before police officer:

(1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer[471]

4.2.5 Notion of 'reasonable suspicion' after amendment of 2008 and 2010

Section 41, 42 and 151 of CrPC 1973 specified the objective situations under which the liberty of a person can be deprived. In addition, the amendments added to Section 41 (1) (b) of CrPC in 2008 and 2010, mentioned the alternative subjective conditions under which the police can arrest the person without a warrant[472]. These conditions include: first on '[a] reasonable complaint has been made against him of having committed a cognizable offence;[473]' second, '[c]redible information has been received against him of having committed a cognizable offence; [474]' and third, '[a] reasonable suspicion exist that he has committed a cognizable offence[475].' However, these terms such as 'reasonable complaint', 'reasonable suspicion' and 'credible information' are not explained under the CrPC, 1973 (amendments of 2008 and 2010)[476].

[471] Section 41 (A) of the Code of Criminal Procedure 1973 (2008 amendment)
[472] See also Supra note 28, para 9
[473] Section 41 (b) of the Code of Criminal Procedure 1973
[474] Ibid
[475] Ibid
[476] See also Supra note 28, para 9

The 152nd Law Commission of India Report on Custodial death argued that there are three subjective conditions for deprivation of liberty such as 'reasonable complaint', 'credible information' and 'reasonable suspicion'[477]. However, according to *Jain and Kuamr* the major reason for the deprivation of liberty is the 'reasonable suspicion' of committed the cognizable offence[478].

In the case of *Arnesh Kumar v State Of Bihar & Anr*[479] the petitioner approached the Supreme Court of India under Special Leave Petition (SLP) to secure anticipatory bail, although the bail petition was initially rejected by the Sessions and High Court of Patna[480]. The applicant was seeking protection of not being arrested under Section 498-A of Indian Penal Code and the Section 4 of the Dowry Prohibition Act, for which the maximum punishment is 3 years and 2 years, respectively[481].

The Supreme Court of India, in the same case, while granting bail observed that a large numbers of people arrested under this provision includes old parents or relatives who are not even residing with the victim or the accused[482]. Moreover, the Supreme Court of India also observed that the conviction rate of cases filed under Section 498-A of the Indian Penal Code is very low, when compared to other IPC crimes[483]. Furthermore, the Court observed that '[a]rrest brings humiliation, curtails freedom and cast scare forever'[484] and commented that the police has not yet come out of their 'colonial mindset' where arrest used as a tool for 'harassment' and 'oppression'[485]. Hence, the Supreme Court of India directed that while making an arrest, the police should be ready to answer question like '*why arrest? Is it really*

[477] See Supra note 28, page 84, para 14
[478] Ibid
[479] Arnesh Kumar v State Of Bihar & Another, (Criminal Appeal no.1277 of 2014, Special Leave Petition(Criminal) 9127 of 2013), 2nd of July 2014
[480] Ibid, page 1 and 2
[481] Ibid, page 2
[482] Ibid, page 2
[483] Ibid, page 2
[484] Ibid, page 2
[485] Ibid, page 2

required? What purpose it will serve? What object it will achieve?' according to the purpose mentioned under subclause of Section 41 of the Code of Criminal Procedure (amendment) 2008 and 2010[486]. In addition, the police's suspicion should be based on the information and materials that the accused has:

> '*…before arrest first, the police officers should have reason to believe on the basis of information and material that the accused has committed the offence.*[487]*'* *'Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 of Cr.PC.*[488]*'* *'The court observed that the power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner*.[489]'

Conclusion

As observed in the 177th Law Commission Report, 2001 Section 41of the Code of Criminal Procedure, 1973 was 'vague'. It also noted that Section 41 of CrPC 1973 was even not expecting any subjective condition to be fulfilled before arresting a person in cognizable offence. Therefore, it was not compatible with the principles of 'legality' and 'non-arbitrariness' as discussed in Article 5 (1)of ECHR, Article 9 (1) of ICCPR, and Article 21 of the Constitution of India[490]. Like the ECtHR, the Supreme Court of India had also established the test of 'reasonable suspicion' but the threshold currently set cannot be equated to the standard set by the ECtHR.[491] Both the Supreme Court of India and ECtHR expect the

[486] Ibid, page 2
[487] Ibid
[488] Ibid, page 3
[489] Ibid, page 12
[490] See Supra note 19, page 96 ; Maneka Gandh v the Union of India, AIR 1978 SC 597
[491] Fox, Campbell and Hartley V/s The United Kingdom, Application no. 12244/86, 12245/86, 12383/86;

fulfilment of some material or information towards 'reasonable suspicion'. The ECtHR requirement is to satisfy the 'reasonable suspicion' of a committed offence to an 'objective' observer. However, in the Indian context, the onus of suspicion of committed offence rests on the proofs submitted by the police. In another wards, it is the duty of the police to satisfy with the available information and material on matters contributing to reasonable suspicion. This view of Indian legislature and judicial interpretation is in contrast to the observation of the ECtHR in the case of *Fox, Campbell and Hartley v The United Kingdom.*[492] Which states that a 'honest' or 'bona-fide' suspicion is not sufficient for deprivation of liberty a persons.

Trecshel argued that reasonable suspicion is not sufficient to arrest a person. There need some additional grounds along with reasonable suspicion for deprivation of a liberty. In India, there is no need of any additional requirement for deprivation of liberty u/s 41 of CrPC 1973 before the Amendments of 2008 and 2010. Moreover, even after the said amendment to section 41, additional grounds along with 'reasonable satisfaction' of committed offence is limited to offences punishable with imprisonment, extended up to a period of seven years. In another words, the police can arrest a person suspected for an offence, punishable up to seven years, without mentioning the specific reason for arrest. Further more, on failure of making an arrest for an offence punishable for more than seven years; the police are liable for providing reason for not arresting. This requirement of ascertaining the reason for not making an arrest is contradictory to the presumption of innocence until proved the guilt of accused beyond reasonable doubt.

[492] Ibid

Conclusion

This thesis compared the jurisprudence discussing 'right to liberty' and protection from 'arbitrary and unlawful' arrest in three different jurisdictions, such as Article 5 of ECHR, Article 9 of ICCPR, and Article 21 of the Constitution of India. This thesis argues that all the above mentioned jurisdictions guarantees 'right to liberty' of a person, but the scope of term 'liberty' is varied under two international jurisdictions in comparison to its scope under the Constitution of India. For instance, the notion of liberty under Article 21 of the Constitution of India has been interpreted more widely[493]. That includes several other rights ensured under the scheme of fundamental rights which directly affects enjoyment of liberty. On the other hand, the notion of 'liberty' under Article 5(1) of ECHR and Article 9(1) of ICCPR has been restrictedly interpreted as the 'physical liberty' of a person. These international provisions, under the notion of 'arbitrariness' clear that the right to liberty must be compatible with other rights protected under the conventions. Therefore, the effects of the scope of 'right to liberty' under all three jurisdictions on remain the same. Further, this thesis elaborates Article 9 (1) of the ICCPR, which under the notion of 'security' brings both positive and negative obligations on a nation state to protect a person from a bodily and mental injury. In addition, this thesis identifies that the notion of 'security' under the Article 5 (1) of the ECHR does not add anything more than the protection of a person from 'arbitrary' and 'unlawful' deprivation of liberty[494].

Although a nation state may deprive the liberty of a person, it is directed to be done according to the domestic legislation. In addition, the legislation under which liberty is deprived has to be compatible with the principles laid down by the convention. The two principles, the principle of legality and the principle of protection from arbitrary deprivation of liberty,

[493] See also See also 'Evolution of Article 21 of Constitution of India (1950 to 1978)' AIR 103 Vol, May 2016
[494] See also Nowak Manfred, 'UN Convention on Civil and Political Rights: Commentary on Civil and Political Rights, (2nd rev. ed.). Kehl am Rhein: Engel,2005 page 214,para 8;

evolved under Article 5 (1) of ECHR and Article 9 (1) of ICCPR were also discussed. The principle of 'legality' includes the notion of 'rule of law' and the 'quality of law'. The quality of law indicates the principle of 'foreseeability' and 'accessibility' to law. However, it indicates that the ultimate objective of both these international articles is to protect a person from 'arbitrary' deprivation of liberty. Moreover, the notion of 'arbitrariness' under these international jurisdictions is not only confined to the 'lawfulness' of the deprivation of a liberty but it includes the test of 'necessity' and 'proportionality'. However, the applicability of these tests is based on the circumstances of each case under which liberty is deprived. For instance, both these international jurisdictions applied the test of 'necessity' more strictly in civil cases compare to criminal cases.

In addition, this thesis indicates that the Supreme Court of India has a power to review the legislation and administrative acts of a State. That violates the 'right to liberty' of a person. Moreover, the Supreme Court of India evolved the jurisprudence around '…the procedure established by law[495]' as similar to both the international jurisdictions mentioned above. It protects the liberty of a person from 'arbitrary' and 'unlawful' arrest and detention. Moreover, this thesis highlights the test of 'reasonableness', 'necessity' and 'legality' under Article 21 of the Constitution of India.

This thesis also notes that Article 5(1) of ECHR has specified the grounds for deprivation of liberty. However, Article 9 of ICCPR does not assign any such grounds for deprivation of liberty but evolved the test of 'necessity' that is applicable for deciding the reason for deprivation of liberty. In addition, it is found that similar to the subclause (c) of Article 5 (1) of the ECHR; Section 41 (1) (b) of the Code of Criminal Procedure, 1973, (amendment 2008) assigned the test of 'reasonable suspicion'. The purpose of the same may be to restrict the power of police to arrest a person on 'reasonable suspicion' by establishing an objective test.

[495] Article 21 of the Constitution of India

However, this thesis argues that the threshold sets in the Indian jurisdiction provided more discretionary power to the police to arrest a person than its European counterpart. For instance, under the Indian jurisdiction, the requirement of facts and information to satisfy 'reasonable suspicion' is sufficient to satisfy the police themselves unlike their European counterparts, which insists to satisfy an objective observer. Moreover, under the jurisdiction of India, there is a requirement of an additional reason for deprivation of liberty along with the 'reasonable suspicion' similar to the ECHR and the ICCPR. However, the said requirement is restricted to offenses punishable by imprisonment for seven years or less than that is contrary to Article 5 of ECHR. On other words, while arresting a person suspected for an offense punishable by imprisonment of more than seven years, police do not need to specify the reason for arrest if a reasonable suspicion of commission of crime exists.

This thesis also argued that after the amendment of 2008 in the Section 41 of the Code of Criminal Procedure, 1973, the power of police to arrest a person is constrained by adding the requirements of specific reason for arrest along with 'reasonable suspicion'. However, the threshold sets under the notion of 'reasonable suspicion' to arrest a person are same as interpreted by the Supreme Court of India before the amendment of 2008 and enactment of the Code of Criminal Procedure 1973. Therefore, the requirement of any 'facts or information' to satisfy a 'reasonable suspicion' is restricted to satisfy the police themselves.

The Section 56 of the CrPC (1973) states that the police have to produce the arrested person before the magistrate within 24 hours of his/her arrest to review the legality of the arrest[496]. However, *Bhandari, Brinda* argued that the criminal justice system of India is many a times overburdened, corrupt, do not have appropriate resources, lack of awareness of rights among people, lack of trained lawyers and failure of coordination, which results in increasing the

[496] Section 56 of the Code of Criminal Procedure , https://indiankanoon.org/doc/1670784/

number of pretrial detention[497]. Hence, in such circumstances just to rely on the honest intention of the police is not appropriate.

Therefore, this thesis suggests the Government of India to initiate a detailed study, to find out the possibility to restrict the power of police to arrest a person on grounds of 'reasonable suspicion'. In addition, it is suggested that the requirement of submitting the reason for arrest along with 'reasonable suspicion' must be applicable to all cases, irrespective of the nature of the crime.

[497] See Supra note 29, page 1-28

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