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Administrative Law: A Tool Against Illegal Detention

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Abstract

The development of social-welfare has greatly affected the democracy. There has been a significant increase in the role of state and its operations. Today, the state has prime role in every aspect of human life. The modern administration is directly connected to the people and has in some way or the other affected the rights of the individuals. There is not a single string in human life that is not connected with the administration. The pivotal role of the administrative law to be specific, is to blur the inequalities and put the state or the government and the individual in the same page. But many a times such laws are highly misused. One of those aspects is the illegal detention, which has been prevailing since the pre independence era. This article aims to highlight the importance of administrative law and how it can be regarded as a weapon to safeguard any individual for that matter from illegal detention by invoking the writ of habeas corpus. Detailed study has been provided about the basic difference between arrest and detention, how arrest is made and who can do so, the vitality of the writ of habeas corpus is explained with the help of important case laws which has further clarifies the applicability of the writ and this is followed by a critical analysis of the uncodified administrative law with its role to avert illegal detention along with interpretation of the Preventive Detention Act, followed by conclusion.

KEYWORDS- ILLEGAL, DETENTION, ADMINISTRATION, CONSTITUTION, RIGHTS, WRIT, COURT, LAW, ARREST.

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Introduction

“Injustice anywhere is a threat to justice everywhere” Martin Luther King.

If the society in which we live is a bowl of milk, then any kind Injustice to anybody is like a drop of poison that makes the entire bowl toxic. A single act of Injustice to anybody can create a sense of insecurity and helplessness among all others. The citizens become suspicious upon the functioning of the government and further lose trust on the administration. To avoid such worse, conflicting and unstable situation administrative law ensures that no man is beneath or above law. Administrative law keeps the governmental actions within the periphery of law delimiting the checks, balances and licit area of exercising power, authority and jurisdiction of the administrative bodies to avoid arbitrary, unjust, flawed and partial governance of the state. Hence the concept of writ was introduced in Common Law for keeping a judicial eye on the work of administration. Writ jurisdictions are judicial reviews of the administrative actions. Judiciary always stands to ensure all administrative actions in conformity with the law of the land. Thus, the writ jurisdictions act as judicial restraints of policy decisions which are opaque, unjust, unreasonable, unfair and against public interest. A writ is a written official order issued by the court, the formal order of which may be in form of warrant, direction, command, order etc. Writs can be issued by the High Court Under Article 226 of the Constitution of India, 1950 and by the Supreme Court under Article 32 of the Constitution of India, 1950. Indian constitution has adopted the concept of prerogative writs from English common law. Writs were first used to describe a written command of the King. Whereas, these writs are now available to a person aggrieved by the decision of the inferior courts or administrative bodies.

One of the most menacing practice in democracy is that those who are meant to enforce and execute the law take the law into their own hands. Several citizens usually, the poor and those who belong to the weaker sections of the society are victims of custodial violation in India. Custodial Violation further includes unlawful detention, illegal arrests, custodial deaths, and torture. According to The Hindustan Times report, “1000 unlawful detention cases happen in India every year and UP and Delhi are at the lead”. Illegal detention is the arbitrary and unjustifiable imprisonment or the unlawful deprivation of liberty by the way of “arrest” for a wrongful cause or suspicion. It is a continued restriction of the freedom of an individual. The worst aspect of illegal detention is that it shakes the very foundation of the rule of law in a democracy and smashes the faith of the citizens on the administration and criminal justice system.

Arrest, Detention And Illegal Detention

All human beings have the right to enjoy the respect for their liberty and security. It is axiomatic that, without an efficient guarantee of the liberty and security of humans, the protection of other individual rights become increasingly vulnerable and often illusory. In the course of such arbitrary and unlawful deprivations of liberty, the detainees are also frequently deprived of access both to lawyers and to their own families, and also subjected to torture and other forms of ill-treatment.¹

An arrest requires taking someone into custody, against that person’s will, in order to prosecute or interrogate. It involves a physical application of force, or submission to an officer’s ‘show off’ force. In a nutshell, the arrestee must not be free to leave but the fact that this act by the police,

¹ UN doc. E/CN.4/1999/63, Report of the Working Group on Arbitrary Detention

termed as arrest under state law is not relevant.² Detention is a way of detaining someone for short period of time on the pretext of certain reasons. But arrest and detention differ at the point that whether the particular person is charged with a crime or not. When a person is detained he is not accused of committing any crime but is retained in the police custody on a justifiable surmise. After some kind of investigation, the person detained is released. The process of arrest is entirely different. A person can only be arrested if he is charged with any kind of crime. Illegal detention is the groundless restraint or unjustifiable imprisonment leading to loss of an individual's right by arresting him/her for an illicit or absurd reason.

Who Can Arrest And How Is Arrest Made

An arrest may not only be done by a police officer or magistrate but also by a private person provided it has to be made in accordance with some legal provisions permitting such arrest. A private individual may arrest a person only when the person is a proclaimed offender and if the person commits a cognizable offence or non-bailable offence in front of his eyes as per section 43 of The Code of Criminal Procedure (CRPC) but an executive or judicial magistrate may arrest a person without a warrant as per section 44 of the Code of Criminal Procedure (CRPC). Further Section 41 clarifies that arrest can be done without warrant in case of cognizable offence and in case of a non-cognizable offence the Police officer has to have a warrant.

Habeas Corpus: A Remedy Against Illegal Detention

The word 'Habeas Corpus' is derived from the latin phrase 'Habeas Corpus Subi Bi Cendum' which translates as 'Produce the body'.³ It is one of the five writs that the Supreme Court is empowered to issue under article 32 of the constitution. It is issued when the court gets to know that an individual has become the prey of unlawful detention. Further the Supreme Court has the power to command for the production of the aggrieved individual before the court immediately. Therefore, the writ of Habeas Corpus is in close proximity with personal liberty. The Supreme Court has connoted this writ as a special one: To protect individual liberty, the Judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India. The most effective way of doing the same is by way of exercise of power by the Court by issuing a writ of habeas corpus. This facet of the writ of habeas corpus makes it a writ of the highest constitutional importance being a remedy available to the lowliest citizen against the most powerful authority.⁴ The writ of habeas corpus is like a colour to the rainbow of right of personal liberty which is entrusted under the Indian Constitution with reference to article 21. Without this remedy the personal liberty is like a ship without destination. The vitality of habeas corpus lies in the fact that it is an inextensible part of administrative law which not only is a tool against unjustifiable detentions but also is symbolic to the dignity, integrity and liberty of the citizens. Starting from the case of AK Gopalan v. State of Madras⁵ in 1950 to the most recent case of S. '

² Janet Portman, What Is an Arrest?, NOLO, (Sept 13,2021, 6:50 AM)
<https://www.nolo.com/legalencyclopedia/justifies-arrest-probable-cause.html>

³Habeas Corpus, Merriam-Webster, (Sept 14, 2021, 6:30 PM) [https://www.merriamwebster.com/dictionary/habeas corpus](https://www.merriamwebster.com/dictionary/habeas%20corpus).

⁴ Ummu Sabeena v. State of Kerala, (2011) 10 SCC 781, 15-16.

⁵ AIR 1950 SC 27

Shivkumar v. State of Karnataka in 2021, the dimensions of habeas Corpus in Administrative law is worth understanding.

The proceeding of this writ not only evolves around the fact of detention but also the constitutionality of law. In the case of *AK Gopalan v. State of Madras*⁶ a question on the expression 'personal Liberty' was raised. Here the court had held that the preventive detention act 1950 was *intra vires* to the constitution of India and also article 21 comes under the preview of preventive detention. The case of *Maneka Gandhi v. Union of India*⁷ also highlighted the concept of personal liberty. In this case the Supreme court of India played a vital role to explain the constitutionality of preventive detention and electrified the whole concept of liberty by elucidating two major outcomes that has long running impact of constitutional decisions.

- I. The court gave a wider meaning to the term 'Personal liberty'
- II. The court empowered the element of fairness and justness to the 'procedures established by law' in order to protect a person being deprived of his personal liberty.⁸

The 44th amendment act 1978 prevented the suspension of article 21 during emergency situations prevailing in the country under article 359 (1). So, the courts before the existence of 44th amendment Act had no role play to question the legitimacy of any detention during the prevalence of emergency despite the detention being *ultra vires* and *mala fide* in nature. But after the 44th amendment Act coming into picture in 1978, the writ of Habeas Corpus works as a shield against any wrongful detention during proclaimed emergency under article 352. Therefore the constitutional amendment of 1978 revokes the Habeas Corpus case, *ADM Jabalpur v. Shivkant Shukla*⁹ which remains as a black sheep in the acclaimed treasure of the Indian Judiciary.

The Habeas Corpus is one of the exceptional remedies provided by the Indian Constitution to its citizens however, the gravity of it can only be perceived if it is consequential rather than illusionary so timely adjudication is vital. But the Habeas Corpus petition is maintainable only when the dimension of illegal detention of the detainee is proved. Many cases in the past have had stressed the significance of habeas corpus to protect someone from the arbitrariness of law and help them meet the true essence of natural justice. As the Latin term 'Ubi Jus Ibi Remedium' rightly states, where there is a right there is a remedy, so when a person is illegally detained his right to life under article 21 of the constitution is infringed. Therefore, he is very well entitled to get compensation. In the case of *Bhim Singh v. State of Jammu and Kashmir*¹⁰, the court observed that when a person is detained illegally, he is not only entitled to be released but also is authorised to get compensation for the same. The legal system of India is based on the foundation 'Innocent till proven guilty'. Though the writ of Habeas Corpus enables a person to be presented before the court immediately but it is silent regarding the protection of the detainee during the time of his detention. An unlawful arrest or detention is in violation of article 21 which states, 'no human shall be denied of his right to life and personal liberty except if established by law'¹¹. This means the process involved must be fair, true and not shadowed by any arbitrary or oppressive actions. Therefore, there are numerous rights of an arrested person under the laws of the constitution which at any cost has to be obeyed by the administration.

⁶ AIR 1950 SC 27

⁷ (1978) 1 SCC 248: AIR 1978 SC 597

⁸ IP MESSEY, EBC's Administrative Law, 415(9TH edition Reprint 2021)

⁹ (1976) 2 SCC 521: AIR 1976 SC 1207

¹⁰ AIR 1986 SC 494, 1986 CriLJ 192, 1985 (2) SCALE 1117, (1985) 4 SCC 677, 1986 (1) UJ 458 SC ¹¹

Article 21

The Court in *Yoginder Singh v/s State of Punjab*¹¹ observed that for the execution of Article- 21 as well as Article- 22(1) it is imperative that The arrested person has the right to inform his friend, relative or any other person of his interest about the arrest made. It is the duty of the police official to inform the arrested person all about his rights after detainment/ arrest made. The entry of the arrest with proper details must be made added in the diary which must necessarily include the name of the person who has been informed about the arrest rightfully. Even in the case of *Joginder Kumar v. State of UP*¹², the court stated the rights of an arrested person which includes having a member of his family informed about his whereabouts i.e. the place and reason of detention or arrest.

In India where rule of law is inherent in each and every action and right to life and liberty is prized fundamental right adorning highest place amongst all important fundamental rights, instances of torture and using third degree methods upon suspects during illegal detention and police remand casts a slur on the very system of administration.¹³ Human rights become a benchmark in this alarming plot. Torture in today's time is shockingly considered as an inextensible part of the investigation process. The investigators have developed a wrong notion that if the pressure of torture is more then the person detained will confess. It is sad to say that custodial torture is more dangerous and grievous than terrorism because behind it is the people responsible for our safety who as a result make a joke of their authority by over exercising their power. It is evident from the case of *DK Basu v. State of West Bengal*¹⁴ that 'custodial torture' is another dimension of illegal detention. This case was a landmark judgment given by the court while considering the rampant issue of custodial death and violence in the country. The Supreme Court in this case, took significant account pertaining to custodial violence and death. It took a step forward to check and balance the arbitrary misuse of power as a result of which the lucidity and accountability of the administration can be maintained.

Critical Analysis Of The Administrative Law As A Weapon To Combat Illegal Detention

“You assist an administration most effectively by obeying its orders and decree. An evil administration never deserves such allegiance. Allegiance to it means partaking of the evil. A good man will therefore resist an evil system or administration with his whole soul” -Mahatma Gandhi

A democracy will be no better than a mere facade if the rights of the people are infringed with impunity without proper redressed mechanism.¹⁵ This makes the administrative law an integral aspect of the Indian society which prevails on the objective of its polity with an aim to build up a Socialist mosaic of Society. The society is dynamic in nature and administrative law is nothing but the by-product of the evolving socio economic functionalities of the state. It has proved itself to be an integral part in the development process of the society and as a result of which the bitter sweet relationship between the administrative authorities and the people has become intricate.

¹¹ 1963 AIR 913, 1963 SCR Supl. (2) 169

¹² (1994) 4 SCC 260

¹³ The Sikh Coalition, Custodial Deaths in Punjab; (20th Sept 2021, 6:14 PM)1997-2001, <http://www.sikhcoalition.org/HumanRights4.asp>

¹⁴ AIR 1997 SC 610

¹⁵ Dr. Swati Zalpuri, Training package on administrative law, J&K IMPA(Jammu)

Therefore, to keep a check on this ever-changing correspondence, some binding laws are obligatory which can not only bring certainty and regularity but will also act as a check and balance to the misuse of powers vested in the administrative authorities.

Under Entry 9 of the 'Union List', The Parliament has the exclusive power to enact a law for preventive detention in the aspect of defence, foreign affairs, or security of India. Whereas, under Entry 3 of the 'Concurrent List', both State Legislature and the Parliament have the power to enact such laws with respect to maintenance of public order, supplies or services inevitable for the community. Recently the Supreme Court in one of its judgement ruled that Preventive detention order can only be invoked if the detainee is likely or about to trigger the public order. The extent of public order must certainly involve the public at large. The state has no right to arbitrarily adduce preventive detention on the pretext of an act assumed to be against the 'public order', which can merely be dealt by ordinary laws of the country and this irrational use of authority to detain people connotes illegal detention.

The object of Preventive Detention is not to Punish but to intercept, to prevent the detainee from doing something prejudicial to the State. The satisfaction of the concerned authority is a subjective satisfaction in such a manner.¹⁶ Preventive detention laws are designed to be highly administratively steered and restrict the scope of judicial interference. This, at times, places unfettered and largely unchecked powers in the hands of the executive without any liability, allowing the potential of grave misuse of such powers. The delay it usually takes to apply for, let alone get judicial relief, works to the advantage of the executive. Even in cases where such laws are found to have been misused, the ultimate purpose of keeping the person behind bars for a long period is ultimately served.¹⁷ Though preventive detention act is a tool for detaining the individuals and curtailing their right to liberty not by the reason of conviction or being under trial for an offence, but in the apprehension of them for likely committing an offence prejudicial to law, it is over exercised by the administrative authorities, bureaucrats, politicians and wealthy influential people to hide their wrong doings or the loopholes of the government. Hence, the law of administration and the writ of Habeas Corpus has always been a wall in between executives and injustice but the practice of 'justice delayed' has always been an obstruction to the clarity of it. The excruciatingly long time taken by our legal system to dispose of such proceedings, combined with the non-availability of any redress mechanism other than the filing of writ petitions for quashing of preventive detention orders ensures the continuous victimisation of the detainee. Thus, the ultimate purpose of political or personal victimisation of the detainee is served.¹⁸ In one of the recent cases of illegal detention, Dr. Kafeel Khan under NSA for protesting against the CAA was kept in jail for three days and then the detention order was submitted to him even after getting a bail. The court proceedings took seven months until when his family referred to the supreme Court.¹⁹ This is a burning example of the loopholes of our justice delivery system.

¹⁶ Anukul Chandra Pradhan v. Union of India AIR 1997, SC 2814

¹⁷ Jasir Aftab, Preventive Detention Laws in India: A tool for executive tyranny?, (Sept 30, 2021, 1:20 AM)

<https://www.theleaflet.in/preventive-detention-laws-in-india-a-tool-for-executive-tyranny/>

¹⁸ Ibid

¹⁹ Dissent and Detention: On Dr. Kafeel Khan (Oct 1,2021, 11:30 PM)

Conclusion

It is ironical that the makers of our constitution, who once were the victims of the illegal preventive detention have incorporated the same laws in the constitution without much improvisation. Illegal preventive detention is a direct insult to the appreciated standards of personal liberty, integrity and most importantly, to freedom of expression. This attempt to edge the government in order to confine the celebrated rights of its citizens. Even though the motive of the law of 'preventive detention' is to prevent the atrocities but the person being detained with the presumption of being the reason of such crime is also a citizen of the country and safeguard of his rights is as important as curbing any mishap happening in the society. Hence, the exercise of the preventive detention laws must be within the boundaries of certain unavoidable restrictions beyond which the definition of the law alters to illegal detention. The detainee should be properly put before the conduct of advisory board which is expected to be judicial in nature consisting of sitting judges of the High court. Therefore, it can be assumed that in order to decide the reasonableness of a particular detention there has been solicitation of judicially acclaimed minds. "You never change things by fighting the existing reality. To change something, build a new model that makes the existing model obsolete"

-Richard Buckminster Fuller

Change is evident to make the present laws reconcilable with the constitutional spirit and it is the duty of the parliament to keep a watch on the amendments made to protect the citizen and be a part of the free society.

