
A CRITICAL ANALYSIS ON LEGALITY OF SEARCH AND SEIZURE – INTERNATIONAL OVERVIEW

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ABSTRACT

This paper aims to critically analyse the procedural law as to search and seizure of various countries and make an empirical study on the validity of search and seizure in various countries. This paper is structured in a three-fold manner.

The first part deals with the legality of search and seizure pertaining to USA, UK, FRANCE, THAILAND AND AFRICAN COUNTRIES- SAUDI ARABIA. The second part of the papers delas with the Constitutional validity and Evidentiary value of search and seizure in INDIA. The third part of the paper analyses the concord between Human Rights and the procedure of search and seizure.

The main aim of the paper is to provide a comparative analysis on laws pertaining to search and seizure globally. The global approach provides for a better understanding as to jurisprudence of search and seizure.

INTRODUCTION

“It must always be remembered that what the Constitution forbids is not all searches and seizures, but only unreasonable searches and seizures.”

~ Potter Stewart.

The Admissibility of Search and Seizure is one of the most discussed and disputed concepts under the Criminal Justice system around the world. This paper makes a comparative and empirical study on the Procedure for search and seizure and the legality of search and seizure globally. A comparison based on the rules of few selected countries like USA, ENGLAND, FRANCE, GERMANY, THAILAND, SOUTH AFRICAN COUNTRIES AND SAUDI ARABIA provides a better view of the concept of search and seizure, the jurisprudential aspect behind it and the ideology of search and seizure as a whole.

Criminal law like every other law is fluid as well but it has been especially slow in keeping pace with advances in technology. Both courts as well as legislatures are unable to anticipate how police and suspect should interact. To what extent the enforcement of law can invade an individual's privacy in order to prevent or stop a crime? And if an accused of a crime is carrying a device which has a crucial evidentiary value to what extent his rights can be violated? This paper will explore a nation's attitude towards privacy and correlates with the law enforcement's ability of a country to warrantlessly conduct search and seize the relevant and significant evidence from the suspect.

A coercive search of any place infringes the basic rights of the individual occupying that place. Even in a free society like India, such encroachments will have to be tolerated in the larger interests of the society. The provisions in the Criminal Procedure Code, 1973 strive to strike a balance between the interests of the individual and of the society by providing certain safeguards in favour of the individual.

"An Indian citizen's house, it must always be remembered, is his castle, because next to his personal freedom comes the freedom of his home. Just as a citizen cannot be deprived of his State has a prerogative right to forcibly enter a citizen's house except under personal liberty except under authority of law, similarly, no officer of the authority of law."¹

¹ State V. Bhawani Singh, AIR 1968 Del 208, 211(FB)

The following paper divided into three main heads the legality and admissibility of search and seizure in various countries, the jurisprudential value of search and seizure and search and seizure with regard to human rights.

Search and Seizure- International Overview.

THE UNITED STATES OF AMERICA

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures." It states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The US Supreme Court viewed that every police action which constitutes a "search" for criminal evidence must be based on *probable cause*, to a level of certainty close to a more-likely-than-not standard.² The court in *Henry V. United States*³ opined that arrests must be based on probable cause. Furthermore, "subject to a few well established and delineated exceptions," all searches must be authorized by a *warrant* issued by a court that meets both probable cause and particularity criteria.⁴

A warrant is not necessary for contemporaneous searches of a validly arrested person or the area within the "armspan" of that person⁵ and also to conduct search of the premises where the arrest took place on reasonable suspicion that confederates are there.⁶

In *Mapp V. Ohio*, it was held that if the procedural rules related to search and seizure are violated it results in the exclusion of evidence gathered from such a search from the prosecution's case and the charge against the defendant is often dismissed in such scenarios.⁷

The concept of reasonable expectation of privacy was initially discussed in *Katz v. United States*⁸, "police activity constitutes a search only if it implicates reasonable expectations of privacy. This is a two-prong test, first the person manifests a subjective expectation of privacy,

² CRIMINAL PROCEDURE Sec. 3.3(b) (1984); *Griffin v. Wisconsin*, 483 U.S. 877 (1987).

³ *Henry v. United States*, 361 U.S. 98, 100 (1959).

⁴ *Katz v. United States*, 389 U.S. 347, 357 (1967).

⁵ *Chimel v. California*, 395 U.S. 752, 763 (1969).

⁶ *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

⁷ *Mapp v. Ohio*, 367 U.S. 643, 648 (1961).

⁸ *Katz v. United States*, 389 U.S. 347 (1967).

and second, that the expectation of privacy “be one that society is prepared to recognize as ‘reasonable.’”⁹

Federal Courts use trespass and reasonable expectation of privacy test to determine if violation of Fourth Amendment has occurred.

The right to be free of unwarranted search and seizure is not absolute and there are several exceptions to it. The first exception is clear from prima facie of the amendment that if law enforcement attains a warrant, they can search things that are otherwise protected.¹⁰ The warrant must be supported by probable cause and must be authorized by a judge.

As per Sec. 2.2f (Rules of Criminal Procedure) the exceptions to the warrant requirement include search of the person incident to arrest; search of the area incident to arrest; stop-and-frisks; searches conducted during hot pursuit of a fleeing suspect; searches prompted by fear for the health or safety of one or more individuals; searches conducted to prevent the impending destruction of evidence; searches of vehicles; searches of containers in vehicles; consent searches; and an impressive variety of inspection, regulatory, and other “special needs” searches.”¹¹

*Boyd v. United States*¹² was an early case before the Supreme Court where the admissibility of evidence obtained by an illegal search and seizure could be used in criminal or quasi-criminal proceedings to render a judgment. Hon’ble Justice Bradley on behalf of the bench declared the evidence obtained by an illegal search and seizure as inadmissible evidence because the statute authorising the order to produce them violates both the Fourth Amendment and that part of the Fifth Amendment which declares that no person “shall be compelled in any criminal case to be a witness against himself.”

ENGLAND, FRANCE AND GERMANY

In all the three European Countries warrants are not as important as they are in the United States, either because they are not required as often, or because they are issued on a showing

⁹ Burke, Consent Searches and Fourth Amendment Reasonableness, at 517-18 (applying the Katz standard, the Court has held that when people make otherwise private information available publicly, governmental inspection of that information does not implicate reasonable expectations of privacy and therefore does not constitute a search).

¹⁰ Payton v. New York, 445 U.S. 573 (1980).

¹¹ Criminal Procedure—Pretrial Sec. 2.2f (2013)

¹² Boyd V. United States, 116 U.S. 616 (1886).

of less than probable cause, or both. European countries don't rely much on exclusion as a means of sanctioning illegal searches and seizures, they rather resort to other remedial devices and don't sanction police misconduct whatsoever.

In England, as per The Police and Criminal Evidence Act of 1984 (PACE), search warrants must be based on the equivalent probable cause and may only be issued if the police can show that such a search is essential to obtain significant evidence for an offense with not less than five years of imprisonment or drugs or stolen property. The police may conduct a *full* search of the arrestee's house without judicial authorization (although in some cases they must obtain a supervising inspector's authorization), so long as the search is related to find evidence significant to offense under trial.¹³

In France most rules governing searches and seizures are found in the Code de Procédure Pénale (CPP). French police who are investigating a major felony need not obtain a judicial order unlike the American law. They generally seek no authorization at all or the investigating judge delegates a search authority through a rogatory commission which need not meet any degree of suspicion or specify the parties or places to be searched or things to be seized.¹⁴ For non-flagrant offenses, either consent or permission from a judge or his delegate is needed to conduct a search, but "no actual warrant or other detailed order needs to be issued"; furthermore, the "delegate" can be a prosecutor or upper level police officer who then supervises the investigation. French law does, however, limit search authority to specialized "judicial police," and requires that either the person whose premises are searched or other civilians be present during the search.

Under the German Code of Criminal Procedure (CCP), the premises of an arrestee may be searched without a warrant.¹⁵ The German Code permits forgoing a warrant not only in cases of "hot pursuit," but also when there is "danger in delay."¹⁶ A "vague suspicion is a sufficient basis for search."¹⁷ However just like the French system the target of the investigation or an adult relative is entitled to be present during the search.

In European Countries it is to the discretion of the judge whether to admit the evidence obtained from illegal search and seizure. European countries depend upon internal police discipline, to

¹³ Police and Criminal Evidence Act, 1984, c. 60 §§ 18(4-5), 32(2)(b) (Eng.).

¹⁴Code de Procédure Pénale, 1987, arts. 151-55.

¹⁵ CODE OF CRIMINAL PROCEDURE, § 102.

¹⁶ CODE OF CRIMINAL PROCEDURE, § 104.

¹⁷ Stellungnahme Nr. 22/2017

ensure police adherence to investigative rules. However, to date, virtually no information exists concerning how often, or even whether, police are disciplined for violations of search and seizures rules, as opposed to other types of transgressions.

THAILAND

Under the Thai Criminal Procedure Code, 1934 a search warrant must be shown to the occupant before conducting search and shall be conducted in the presence of the owner or any competent member of the owner's family.¹⁸ In case of absence of the owner and his family members the police must secure the presence of at least two independent and competent witnesses before the search is conducted. The items found in the search must be shown to the witnesses, who must acknowledge the items found through such search.

Police can conduct searches and seizures without a warrant if they reasonably believe that the suspect has in his possession the fruits of a crime (illegal items) which prove to be significant evidence.

An order or warrant of search may be issued by the court either proprio motu or upon application. In event of an application made by an administrative officer or police official, only an administrative official ranking as or from third class or a police official ranking as or from police sub-lieutenant who is competent to make the application.

In the case of urgent need where the applicant for a warrant search is unable to make his presence before the court, he may make the application by means of mobile phone, facsimile, electronic or any other appropriate means of communication. In this respect, the court questions the applicant until it ensures that there are grounds for issuing a warrant search pursuant to section 59/1, and the court shall then send a copy of warrant by any means of communication such as fax to the applicant.

SOUTH AFRICAN COUNTRIES

The *Criminal Procedure Act (hereinafter mentioned as CPA)*¹⁹ embodies the general provisions with regard to searching. Section 19 of the CPA states that Chapter 2 of the Act shall not derogate from any power conferred by any other Act to enter any premises or to search any person, container or premises or to seize any matter, to declare any matter forfeited or to

¹⁸ Sec. 59, Thai Criminal Procedure Code, 1934.

¹⁹ The Criminal Procedure Act, 1977; South Africa

dispose of any matter. Thus, any law that confers powers of search and seizure co-exist with CPA and is not straight away repealed by the CPA.

In National Director Public Prosecutions V. Mahomed, the court held that the right to enter, search, and remove goods from a premises is a significant invasion of the rights of an individual, henceforth such a right must be exercised within the clearly defined limits so as to keep the interference with the rights and liberties of the person concerned to a minimal extent.²⁰ Search and seizure will be constitutional if it is authorised by a law of general application.

The terms search and seizure are not clearly defined anywhere as such in the South African legal framework.²¹ The question as to what constitutes a search is left to common sense of the judge and is determined based on the facts and circumstances of each case.

As per Sec. 23 of CPA a peace officer may without a warrant search an arrested person and seize any article found in the arrestee's possession, custody or control, which may afford evidence of the commission of an offence.²² The peace officer should place in safe custody any object so found on arrestee.

In *Ntoyakhe v Minister of Safety and Security*²³, the court held that the word 'seize' encompasses not only the act of taking possession of an article, but also the subsequent detention thereof. In terms of section 21 of the CPA, unless the circumstances set out in section 22, 24 and 25 of the CPA exist an article may be seized only in terms of a search warrant.

Once a criminal trial has started the judge or any judicial officer conducting the trial shall issue a search warrant that finding of such article is significant to the judgment as it deems fit²⁴. A search warrant must be executed by day unless the police official is specifically authorised therein to execute it by night.²⁵

The search warrant authorizes a police officer to seize the article in question or search any person identified in the warrant or to enter and investigate any premises mentioned in the warrant and search any person found on or at the premises.

²⁰ *National Director Public Prosecutions V. Mahomed* 2008 (1) SACR 309 (SCA)

²¹ Swanepoel 1997 *CILSA* 374-391

²² S 23, *Criminal Procedure Act*.

²³ *Ntoyakhe v Minister of Safety and Security*, 2000 (1) SA 257.

²⁴ S 21, *Criminal Procedure Act*.

²⁵ *Ibid*.

Non-compliance of the above provisions renders the search illegal.

SAUDI ARABIA

The Basic Law of Governance, Art. I.²⁶ **The basic law clearly states that the constitution consists of scripture and prophetic tradition.** This definition includes traditional religious law- Sharia, which is the default criminal law of Saudi Arabia, albeit without actually being codified. The religious scripture provide that Muslims should not enter the homes of other Muslims, whether empty or not, without permission, Muslims should not spy on one another, and if Muslims do enter others believers' homes, they should use the main entrance. The above scriptural verses, are the starting point for Islamic search and seizure law, at least so far as Sharia law is concerned.

Under the criminal procedure law²⁷ searches are prohibited without force of law. Homes are specially protected and may not be searched without a warrant (although warrants are issued by investigators, rather than the judiciary). Searches are limited in scope to the crime for which the subject is accused and homes may not be searched unless the owner or an adult family member is present.²⁸

In order to enforce these rules, the criminal procedure requires that records be kept of each warrant search, including the text of the warrant, the date, time, and location of the search, a description of the items seized, and the signature of the home's owner or witnesses²⁹. Arrestees must be informed of the reason for their arrest and be given an opportunity to inform family members of their detention.³⁰

Police and prison officials are not familiar with criminal procedure standards, and even "judges are not very conversant in the criminal procedure code."³¹

INDIA

The Criminal Procedure Code of 1973(*hereinafter mentioned as CrPC*), is founded upon the principles of fairness and justice. Indian jurisprudence on privacy differs very broadly

²⁶ Basic Law of Governance, Art. 1. Art. 7 further emphasizes that "...the Book of God and the Sunna of the Prophet...are the ultimate sources of reference for this law and the other laws of the state.

²⁷ Law of Criminal Procedure, Art. 41, Royal Decree No. (M/39) (2001).

²⁸ Arts. 45-46, Law of Criminal Procedure.

²⁹ Arts. 47, Law of Criminal Procedure.

³⁰ Arts. 35, Law of Criminal Procedure.

³¹ Human Rights Watch, *supra* at note 43, 18

compared to that of United States of America. Although it is practically impossible to define the scope and compartmentalize the all facets of right to privacy, the Constitution of India neither expressly nor impliedly mentions such a right.

Chapter VII (Sec.91 to 105) of the CrPC deals with provisions related to the procedure to be followed by police while conducting Search and Seizure. Section 91 and 92 deal with procedure to issue summons by court or any officer in-charge of police station to produce a thing or a document as they deem fit. Section 93- 98 deal with provisions relating to search warrants. Section 93 deals with the general procedure relating to issue of search warrant. It authorizes a magistrate to issue a search warrant to authorize search of any document or a thing including general search of an area when such search is required for the purpose of investigation of the offence. It is not mandatory for the search warrant to be specific under S. 93(2) and a warrant may be for general search of a place. Section 94 deals with search of a suspected place in cases of stolen property, forged documents etc. Section 95 deals with power to issue search warrant and to declare certain publications forfeited.

Section 99-101 provide with general provisions related to Searches. Section 100 further provides for the procedure for search of a closed place and includes safeguards such as presence of witnesses and mandatory requirement of warrant to ingress into the closed premises. There are circumstances provided S. 165 and S. 51 CrPC where the requirement of search warrant is exempted. As per S. 165 the requirement of warrant can be dispensed when an *officer in charge of police station*, or any other officer authorised conduct search of any place on *reasonable grounds* and genuinely believe that such a search would be significant in investigation of an offence and that a warrant cannot be issued without *undue delay*. Also, the officer conducting such a search must record the reasons for such belief in writing before conducting the search. Section 102 to 105 provides miscellaneous provisions as to production of things.

The Indian Constitution provides the accused with certain rights that are protected at all costs. Article 20(3) of the Constitution of India protects the accused from giving a testimony against themselves which implies that the evidentiary value of unreasonable searches stands questioned in most cases. Coming to the constitutional validity of a search warrant the court is prohibited from conducting any kind of search that encroaches the right of accused guaranteed under Article 20(3) of the Constitution. When the question as to whether issue of search warrant infringes fundamental right of the accused arose before the Hon'ble Supreme court, the court

held that a search & seizure is mere temporary hindrance with the rights of the accused and that they do not infringe the fundamental right guaranteed under Article 20(3).³²

The constitutional validity of search and seizure has always been a topic of discussion in various cases. The court in *V. S. Kuttan Pillai v. Ramakrishnan*³³, opined that search of the premises occupied by accused does not amount to self-incrimination and is not violative of Article 20(3).

Justice Mathew in *Govind v. State of Madhya Pradesh*³⁴ viewed that privacy is not an absolute right and is subject to restrictions based on compelling public interest. He also opined that right to privacy deals with persons not places.

A search of any person's house is an encroachment of privacy of that person which shall be conducted when the search is a must for the greater interest of the society.

The evidentiary value of search and seizure is laid upon the discretion of the court. In *State Of Maharashtra v. Natwarlal Damodardas Soni*³⁵, the court held that non-compliance of procedure with respect to search would neither by itself vitiate the proceedings nor would it suppress the evidence discovered, it would amount to a irregularity which must be simply considered as a factor while evaluating the evidence.

Search and Seizure & Human Rights.

"It is power that places the liberty of every man in the hands of every petty officer."

~ James Otis

Despite its extensive express commitment to human rights, the Rome Statute³⁶ and other collateral instruments, at first glance, appear to be silent on certain critical human rights. Those instruments fail to provide expressly for the right to privacy generally and in particular in the context of searches and seizures.³⁷ The absence of the express search and seizure right to privacy is conspicuous, given that the right is well established in international law and is

³² *M. P. Sharma And Others vs Satish Chandra*, AIR 1954 SC 300.

³³ *V. S. Kuttan Pillai v. Ramakrishnan* AIR ,185, 1980 SCR (1) 673.

³⁴ *Govind v. State of Madhya Pradesh* AIR, 1378, 1975 SCR (3) 946

³⁵ *State Of Maharashtra v. Natwarlal Damodardas Soni*, AIR 1980 SC 593; *Radhakrishnan v State of UP*, 1963 Supp. 1 S.C.R. 408

³⁶ *the Rome Statute of the International Criminal Court, 1988(hereinafter mentioned as Rome Statute).*

³⁷ Draft Rules of Procedure, ICC, rule 73.

incorporated into a wealth of domestic and international human rights legal instruments and jurisprudence.

The search and seizure right to privacy is incorporated into the constitutions or other domestic laws of virtually every nation that participated in the Rome Conference and that voted for, signed, and ratified the Rome Statute. It is provided for in the Universal Declaration of Human Rights (UDHR)³⁸, which applies to all nations that participated in the Rome Conference, and in the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by most nations.³⁹

Generally, the right to privacy is based on notions of autonomy in decision-making about one's own self, actions, relations, and existence. The right to privacy concerns the degree to which a person is or is not "left alone," a person is mandated to or restricted from existing or interacting with or without others, or a person's identity, integrity (bodily, territorial, psychological, or other), autonomy, intimacy, sexuality, or emotions are interfered with against their desires.⁴⁰

The right to privacy in the context of searches and seizures, as developed in domestic and international arenas, in its simplest form, provides that all persons shall be free from unreasonable, arbitrary, or unlawful searches or seizures of their persons or effects. Common characteristics of the various definitions of the search and seizure privacy right include the following: a respect for the sanctity and inviolability of the home; some permissible limitations on the right; recognition that any interference with the right must be reasonable and limited to the scope necessary to satisfy a legal purpose; rejection of arbitrary and unlawful interference with privacy and unfettered discretion to search or seize; respect for human dignity, as privacy invasions can be degrading and can undermine public trust; effective external supervision of law enforcement authorities; balancing of law enforcement needs against the right to privacy; judicially independent authorization of searches and seizures; and legally enforceable safeguards regulating the use of police powers.

In the context of the ICC, privacy interests will be implicated when arguably unreasonable, arbitrary, or unlawful searches occur, irrespective of whether they result in the seizure of incriminating evidence that the prosecutor seeks to introduce at trial. The search and seizure

³⁸ G.A. Res. 217A (III), art. 12, U.N. Doc. A/810 (1948) [hereinafter UDHR].

³⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 17, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

⁴⁰ *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (discussing the importance of privacy to human life).

privacy right is a due process right, as the introduction of "tainted" evidence can act to deny a fair trial to an accused person. All persons, whether innocent or guilty, and irrespective of the nature or seriousness of the crime charged, are entitled to search and seizure privacy rights. The right should be safeguarded regardless of the gravity of the crime in question.

Conclusion and Suggestions.

Should the international community be concerned about the privacy interests of alleged perpetrators of heinous crimes such as genocide, war crimes, or crimes against humanity? The omission of the express right to privacy from the Rome Statute and its ancillary instruments is of concern because suspects or accused persons are potentially subject to conviction based on evidence obtained through unlawful, arbitrary or unreasonable searches and seizures with no express remedy, in the perceived greater interest of promoting justice and eradicating impunity for heinous crimes.

The international community should be concerned because the rights of society as a whole, and the rights of law abiders, are threatened when the system impinges on the rights of suspects and accused persons, who may indeed be law abiders. The search and seizure privacy right is indeed a right, and as such, it is to be enjoyed equally by all persons. This right guards not only the privacy of ordinary, law-abiding citizens but also the privacy of criminals or suspected criminals, even those suspected of genocide, crimes against humanity, or war crimes.

Respecting the human rights of alleged criminals will not hinder the fight against impunity. affording suspects and accused persons full rights is consistent with eradicating impunity and with full human rights for all, and will ultimately impact society positively. Respecting rights of suspects and the accused will educate officials and the public about the sanctity of human rights, and will encourage human rights compliance. Human rights education at the international level will likely trickle down to the grassroots.