A CRITICAL STUDY ON PREVENTIVE DETENTION IN INDIA: A BLIND SPOT OF DEMOCRACY?

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INTRODUCTION

The Indian law is no alien to the fact that the colonial rule has poured an unfathomable amount of contribution in its judicial framework. Laws, which were in existence in the pre-colonial era were systematized and laid down in a more efficient and methodical manner in addition to the newly fangled laws of the British rule. The history of Preventive Detention laws also dates back to the era of the British governance in India.

Back in the days of English rule, the British government ruthlessly enacted laws which made the government stronger and more fearsome. The tyrannical rule gave the powers to the British officials to detain any person under the custody of the state if his activities were found to be detrimental in nature, to the state, irrespective of violation of human rights, even on just mere suspicion. The Rowlatt Act, 1919 was one of the classic examples where mere suspicion could lead to arbitrary arrest without adhering to the concept of a fair trial.[2] Thus, preventive detention emerged as a negative concept in its early stages. It was only later, when the Indian Constitution was adopted in the year 1950 that the provisions of preventive detention were structured in consonance of human rights.

Later, during The Emergency (1975-1977), the extremely disputed Maintenance of Internal Security Act, 1971 was relentlessly used in order to detain people during the prime minister ship of Indira Gandhi, violating the human rights of many, yet again.[3] The Constitution was massively responsible for the evolution of the concept of preventive detention, however, the in entirety, it needed more polishing. Thus, the Criminal Procedure Code, 1973 also came up with the provisions relating to detention, leading to a smoother mechanism under the criminal justice

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[2] Ranbir Vohra, *The Making of India: A Historical Survey*, M.E Sharpe , 126 (2001).
[3] Priti Saxena, *Preventive Detention and Human Rights*, Deep & Deep, 99 (2007).

system. Under the Constitution of India, Article 22(1), (2) and (3) lay down that if a person has been detained under any law in respect to preventive detention, then he shall not be protected by the provisions of this Article. Under the CrPC, the police officer is given the power to arrest such an element without a warrant when there is a possibility of commission of a cognizable event in future.[4]

Thus, it can be observed that preventive detention under the Constitutional and the criminal justice framework can be associated with possible measures for preventing the commission of crimes. It is observed as a rather *precautionary provision*, essential for protecting the State from deleterious activities of elements who are threat to its wellbeing.

Chapter I: Preventive Detention- A Historical Perspective

Preventive Detention, as the name suggests, is a type of seclusion in order to thwart someone from doing something which can prove to be detrimental to the State. This concept has not emerged out of the blue at all. Taking instances from the British rule over India, it can be observed that the British were very keen on keeping their power on its zenith. Amid maintaining this power throne, there were often occurrences of sheer violations of liberty and freedom of the native Indian population.[5]

The pre-independence set-up

In the year 1818, the first official law in reference to preventive detention came up, changing the entire dynamics of the land. This was the Bengal State Prisoner's Regulation, III of 1818 which was enacted by the East India Company.[6] This law certified the government to make arrests on the basis of mere suspicion on individuals in a State which proved to be a drastic change for the people. Also, later on, similar laws were enacted even in the Bombay and Madras presidencies.[7] In spite of these laws being regulated by the authorities of British, the manner in which they were executed was mostly vague, rampant and arbitrary, causing much criticism and dissatisfaction

[4] Code of Criminal Procedure, Section 151 (1973).
[5]6 Naseer Hussain, *The Jurisprudence of Emergency: Colonialism and Rule of Law*, 65 (2003).
[6] Omar, Imtiaz, *Rights, Emergencies, and Judicial Review*, Martinus Nijhoff Publishers (1996).
[7] Harding, Andrew; Hatchard, John, *Preventive Detention and Security Law: A Comparative Survey*, Martinus Nijhoff Publishers (1993).

amongst the public. Even after numerous instances of passive revolt against the entire notion of preventive detention, the conditions only worsened in the years to come. Rule 26 of the Defence of India Act, 1939 also gave the State blind authority to capture people based on presumption of guilt. All these instances were setting a field for the execution of stricter laws in terms of the evil that preventive detention was.

The post-independence set-up

Maintenance of Internal Security Act, 1971, which was passed during The Emergency is also a classic example as to how preventive detention laws kept terrorising Indians even after years of blatant violations during the British regime in India.[8]

In 1950, the parliament of India passed a very controversial law, Preventive Detention Act, 1950, shaking the country's democracy to its core. This Act was later challenged on grounds of validity in the Madras High Court and further, the Supreme Court believed,

"*The provisions of the Act were invalid, except some...*"[9]

Thus, it can be observed that the laws which govern preventive detention have a series of incidents and incidents attached to them. From the Bengal laws, to the Rowlatt Act, the history of detention laws in India has seen major ups and downs in terms of acceptance and reception.

Chapter II- The Constitutional Perspective of Preventive Detention

The Constitution of India, 1950, is a sacred document possessing the entire ideology on which the foundation of our country lies. The provisions which have been laid down in the Constitution are the guidelines on which the country runs.

Article 22 of the Indian Constitution

Article 22 of the Indian Constitution deals with "Protection against arrest and detention in certain cases". This Article provides the citizens of the country with the fundamental right to be protected from violation of their rights regarding cases provoking arrest and detention. Clauses (1) and (2) of the Article very favourably lay down the aspect of protecting the rights of the accused via choice of practitioner and production before magistrate within 24 hours respectively,

[8] Supra Note 2.
[9] A.K Gopalan v. State of Madras, 1950 SCR 88.

however, the most interesting clause of the Article is (3) which negates the above two clauses when certain specifications arise by stating that,

It can be noted that Article 22(1)(a) can be justified in the light of an alien enemy and the threat he poses to the safety and security of the country. However, the subsequent sub-clause justifies preventive detention and laws made in consonance with this concept to be of valid nature. A very crucial point to be taken note of in this constitutional mandate is as to how India, despite being a targeted victim of preventive detention laws, continues to take it forward in practice even today. After years of tyrannical rule of the British, unjustified detention in order to prevent a commission of something completely presumptuous is not what the Indian Constitution should stand for. It can easily be said that,

"*The Preventive Detention Act, 1950 was passed as a temporary measure to meet a specific situation. Today the Act (under a different guise) has acquired a permanent place in the law books.*"[10]

This makes preventive detention rather punitive in practice. It signifies that, a detention without trial, just on mere suspicion is wrongful.[11] Though, clauses (4) to (7) of the Article do lay down a few safety provisions for cases of preventive detention, they provide for minimum procedure regarding it. Under Article 22(5), it can be observed that the usage of "*as soon as may be*" for providing legal representation to the detenu raises concern. Since no proper time frame has been mentioned, it leaves a lacuna in the entire procedure. The Supreme Court has also stated that,

"*The right of representation under Article 22(5) is a valuable constitutional right and is not a mere formality.*"[12]

The Courts do monitor if there have been instances of violation when a person is taken under a detention which is not punitive in nature.[13] This makes it clear that under all circumstances, the Courts believe in protection of rights of the accused, ensuring a fair trial, however, the Constitution through its provision on preventive detention seems to make the job difficult. On the other hand, clause (4) speaks of an advisory board to be set up. A person can be detained

[10] 26, Economic and Political Weekly, 2608 (Nov. 16, 1991).
[11] State of Tamil Nadu v. Senthil Kumar, (1992) 2 SCC 464.
[12] Abdul Karim v. State of West Bengal, (1969) 1 SCC 433.
[13] Khudiram Das v. State of West Bengal, (1975) 2 SCC 81.

under Article 22 of the Constitution for over three months only if the Advisory Board opines that there exists sufficient ground for the detention so made and if not, such detention is deemed to be of illegal nature.[14] However, this still empowers the authorities to keep someone under preventive detention without the safeguard of an advisory board for three months, which is still a decent quantum for violation of one's personal rights. The 44th Constitutional Amendment enacted by the parliament in the year 1978 added a few more safeguards by defining the composition of the advisory board more distinctly. In spite of this Amendment been brought by the parliament, the procedure still remains very similar as to what it was before the amendment was brought in execution. This can be drawn out very easily from the fact that clause 22(7)(a) of the Constitution prescribes that, *"the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months without referring to the advisory board"* which makes it evident that the provision in itself is very non-conclusive and flexible in nature, violating the rights of the accused further.

Habeas Corpus and Preventive Detention

Habeas Corpus, under Article 32 and 226 of the Indian Constitution which empowers the apex court of the country and the High Courts, respectively, to issue a writ saying "*you may have the body"* It has been said to be *"a great constitutional privilege of the citizen"*[15]because it enshrines the right to be released from illegal detention.

In the infamous case of *A.D.M Jabalpur v. Shivkanth Shukla*[16] shook the foundation of the Rule of Law and the Indian Administrative Law as well. The decision laid down that all the judgments passed by the High Courts in cases of writs of *habeas corpus* would be overruled in reference to *locus standi* of the petitioners. This meant that the ones who had been wronged by illegal detention, non-disclosing of material facts in relation to their detention, could not approach the High Court under Article 226 to seek relief of the writ petition, marking a blot on the constitutional history of the country as a whole. This makes this case a landmark judgment in the legal history of the country, in addition to it being a black mark on India's liberty as well. Till date, this decision, known as the *Habeas Corpus* case, is known as one on the most wrongful and

[14] Abdul Latif v. B.K Jha, (1987) 2 SCC 22.
[15] Deepak Bajaj v. State of Maharashtra, (2008) 16 SCC 14.
[16] A.D.M Jabalpur v. Shivkanth Shukla, (1976) 2 SCC 521.

unlawful twisting in the constitutional history. It was only later that the rights of liberty as under Article 14, 19 and 21 of the Constitution were given the fundamental status[17] and further, developments could clearly be seen in terms of *malafide* detentions when a post-card complaining against the detention orders was treated as a *habeas corpus* petition.[18]

In relation to the laws relating to preventive detention, it can be observed that there are many instances in the Indian legal scenario, which depict how the concept has evolved from its emergence. There are certain central and state laws which authorize preventive detention laws in the country and states, respectively. Soon after the Indian Constitution was enforced, the Parliament enacted the Preventive Detention Act, 1950, which was later repealed because of its temporary measures which was due to the was due to this *A.K Gopalan Case*[19].

After this point, came the Maintenance of Internal Security Act, 1971, which gave the government authority to detain people on mere suspicion during emergency, leading to immense human right violations all across the country. This Act also lapsed in the year 1977. Finally, came into picture the National Security Act, 1980. This Act validated preventive detention on the grounds of defence of India, its security, maintenance of public order or services essential to its community. For the first time, constitutional validity of NSA was considered by the Supreme Court on grounds of "*uncontrolled discretion*" of the government. However, it was stated that,

"the concept of the Act is so which cannot be encased in a straight-jacket of a definition."[20]

When the Act was challenged on grounds of vagueness, it was held by the SC that when the issue of national security is raised, suspicion is a good ground for detention, which makes this Act stand tall even after series of allegations on its validity.

Besides NSA, the Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974 also was enacted in order to prevent a person from acting in a way violative to the foreign exchange regulations and to prevent activities pertaining to smuggling. The justification as to the enactment of this Act is in consonance with the effect such activities

[17] Maneka Gandhi v. Union of India, (1978) 2 SCR 621.
[18] Sunil Batra v. Delhi Administration, (1980) 3 SCC 448.
[19] Supra Note 8.
[20] A.K Roy v. Union of India, (1982) 1 SCC 271.

have on national security and economy. Any such act of a person which proves to be detrimental to the above two can lead to detention, which is not like prosecution. It was said that,

"Security of the State is affected by weak and vulnerable economy. A state with weak economy falls an easy prey to economic colonisers."[21]

The third very crucial law on preventive detention is the Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities (PBMSECA) Act, 1980. As the very name of the Act suggests, its provisions are used by the Central and even the State authorities to prevent the detenu from black marketing[22] and other illegal activities prohibited by the Act. This Act is remarkably like NSA and in equivalence with the provisions of Article 22 of the Indian Constitution.

Similarly, there exist several state laws as well which authorize preventive detention. For instance, The Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Goondas Act, The Gujarat Prevention of Anti-Social Activities Act etc are some examples.

CHAPTER III- The contribution of Criminal Procedure Code, 1973 in laws regarding Preventive Detention

Under the Code of Criminal Procedure, 1973, Sections 149 to 153 lay down the provisions for preventive action taken by the police officers regarding commission of cognizable offences. The Cr.PC states that:

***"Police to prevent cognizable offences**: Every police officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence."*[23]

This provision of the Code gives power to the police officer to take action which might be preventive in nature in terms of cognizable offences as defined under Section 2(c) of the Code. This indicates that the officer has the duty to abide by this provision, in the best of his ability to

[21] Attorney General for India v. Venkateshan, (2002) 5 SCC 285.
[22] Om Prakash Agarwal v. State of U.P, (1985) 22 ACC 133.
[23] Code of Criminal Procedure, Section 149 (1973).

prevent commission of a cognizable offence. This means that they can detain a person for prevention of a crime which can be detrimental to the state.

"display of photos of criminals is also a form of preventive action which the police could resort to under the Code."[24]

Similarly, Section 150 vests the power of acting against persons against whom information regarding commission of such offences has been found out. Such information is to be transmitted to the superior officer or in-charge and action is to be taken against the suspected. The most important Section is 151 since it deals with the power of police officer to keep a suspect of any cognizable offence under custody without a warrant and permission of the magistrate.

"*It is however necessary that the arresting authority follows the given preconditions to make such an arrest, namely, substantial knowledge about the offence, cognizable nature of the offence, arrest may not first recourse to prevent and reasonable belief*."[25]

Mutatis mutandis, the rule applies for sub-section (1) that the arrest should not exceed 24 hours, or else the arresting authority will face consequences. However, since this is practically impossible, the police have the power to seek permission of the Judicial Magistrate and extend the investigation period up to 15 days as per Section 167.

In addition to this, Section 152 can prevent injury to any public property and can have preventive powers in terms of usage of faulty weights and measure as per Section 153. This is to prevent the loss to public property and of the vendors and buyers, respectively.

CHAPTER IV- Preventive Detention: A Threat to Human Rights

A detention without a trial is a threat to one's liberty and freedom.[26] Since the Universal Declaration of Human Rights (UDHR) by the General Assembly of United Nations back in the year 1948, the humanitarian aspect of any concept has been an integral part of the justice

[24] Ayyappakutty v. State, 1987 Cri.LJ 1593 (Ker).
[25] Ahmed Noormohmed Bhatti v. State of Gujarat, (2005) 3 SCC 647.
[26] 2 Laura Whitehorn & Alan Berkman, *Preventive Detention: Prevention of Human Rights*?, Yale J. L. & Liberation (1991).

mechanism. The Human Rights organizations have been working strictly in order to keep their motto and spirits up in order to ensure that no person is deprived of their basic personal rights.[27]

In *R. v. Halliday*[28], the usage of the phrase "preventive detention" began, which marked the journey of a series of debates regarding the restraint on a person's liberty and freedom. But this decision justified the concept by saying it was done in "precaution" and "need". Later, after a complete evolution of the concept post its emergence, the governments believed preventive detention is not wrong in entirety, but just requires a better approach with a more definitive set of rules governing it.

The International Covenant on Civil and Political Rights, 1966 lays down that,

"Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation"[29]

This was reiterated in the landmark Supreme Court judgment, where the Court opined that,

"Respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."[30]

This highlights the aspect of compensation to whose rights were temporarily infringed by the authorities in respect of detention, which was not punitive in nature, but was rather preventive. Though this might seem a feasible option, it still cannot justify such a stiff approach on mere suspicion. Any act which violates the personal liberty of an individual without laying down proper grounds cannot be considered correct in law. Though it is rightly said that *prevention is better than cure*, it would be rather wrong to apply it in circumstances where an individual's human rights are in question.

Under any condition, the principle of *audi alteram partem* can never be forgone. It is the duty of the authorities to listen to both sides before any action is taken in respect of a suspicion. The

[27] 4 Md. Jahid Hossain Bhuiyan, *Preventive Detention and Violation of Human Rights: Bangladesh, India and Pakistan Perspective*, Bangladesh Law Journal (2004).
[28] R v. Halliday, [1917] UKHL 1.
[29] International Covenant on Civil and Political Rights, Article 9(5) (1966).
[30] Rudal Shah v. State of Bihar, (1983) 4 SCC 141.

National Human Right Commission (NHRC) of India also believes in the very same and India, as a country also should stand by its grounds. If we believe in a democracy, where everyone has the chance to showcase what they feel, the detenus cannot be shunned from their very same right.

CONCLUSION AND SUGGESTIONS

In order to keep a country safe, there a several measures which are to be taken, irrespective of the consequences they pose. Preventive Detention is such a measure to which the government in compelled to resort to in cases which pose threat the integrity and safety of India. However, the laws pertaining to preventive detention in India need to groomed and polished. Even after years of unashamed British Raj and the discrimination it fuelled in the British India, it is unjust to put the citizens of a free and independent country under the same agony.

The provisions relating to preventive detention are being misused. Rather than having several laws authorizing preventive detentions of different kinds, it would be better if the entire power is clubbed into one single law for better enforcement and execution. This is because of the reason that existence of varied laws on the same condition would lead to ambiguity and confusion. On top of that, legislature has undeniably been misusing its powers and enacting more laws pertaining to such detention on grounds of necessity.

It should be made clear that preventive detention is extremely different from what punitive detention is under the criminal law of the country. These two cannot be substituted for one another. The latter is the one which is prescribed in cases where a person is found guilty whereas the former is only a last resort.

Preventive Detention laws in India are unsteadily dangling between efforts to avert crimes and causing blatant human rights violation, making it a "necessary evil" in the country. With the concept being brought during the colonial rule, the idea has not evolved much over the times. Despite having unfathomable importance in the Constitution of India, the Code of Criminal Procedure of India and other integral central and state laws, there still seems to be an air of dilemma.