



A CRITICAL ANALYSIS ON PREVENTIVE DETENTION IN INDIA

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Introduction

Indian courts, during the past few decades, has come forward as a champion in protection of the fundamental rights of the individuals, especially that of right to life and personal liberty ensured under article 21. This has ensured several basic and important rights to the individuals and has especially helped the poor and the down-trodden to ensure that they get the proper dignity that they deserve. In spite of such activism put forth by the courts, they have failed to ensure and protect the personal liberties of the detainees when it comes to preventive detention (PD) laws. The last judgement dealing with the constitutionality of the PD laws was that of *AK Roy v. Union of India*¹ where in the courts had upheld the validity of such laws. This judgement was passed after the “due process” clause was incorporated into the Constitution². This has placed the Constitution in a very peculiar position as two adjacent articles of the Constitution are contradictory in nature.

This therefore makes it very important to have a greater understanding of the detention laws from the time of colonial rule in India.

It is important to understand the need for incorporation of such laws into the Constitution and to look at judiciary’s role in defending these laws by keeping the scope of judicial review to a minimum. It is imperative to look into all the arguments that have been put forth against the PD laws and ponder upon the importance of such derogatory laws seventy years after the completion of the Constitution.

What is Preventive Detention?

It has been explicitly provided in the Constitution that the Parliament is empowered to sanction laws to provide for preventive detention³. The term “preventive detention”, when referred by our Constitution, typically means detaining a person without criminal trial⁴. This means that there is no charge formulated and no criminal offence is proven⁵. Such detention can be done for “the security of the state, maintenance of public order, or maintenance of supplies and services essential to the community”⁶ among others. The Constitution also clearly states that the preventive detention laws need not comply with “fundamental procedural rights guarantees”⁷. Such laws are in stark contrast to the law in the regular criminal justice system wherein it tries to minimize the custody and arrest. Under the ordinary criminal law, proper and valid arrest by the police requires securing credible evidence. Pre-trial detention is not

¹ AIR 1982 SC 710

² *Maneka Gandhi v. Union of India*, 1978 AIR 597, 1978 SCR (2) 621

³ There are several preventive detention laws enacted by the central government. See *infra* Part III.

⁴ See, Constitution of India, Article 22(5)

⁵ Courts in India emphasise the importance of the distinction between *punitive* and *preventive* detention regimes. On this view, rights recognised in

constitutional criminal procedure are inapplicable to the preventive detention process because *preventive* detention does not involve the adjudication of criminal charges. See, e.g., *State of Bombay v. Atma Ram* (1951) S.C.J 208, 212; *Ashok v. Delhi Admn.* (1982) 2 SCC 403, Para. 14.

⁶ See, National Security Act (NSA), 1980

⁷ See, India Const., Article 22(3)



extended beyond 24 hours without any “investigative purpose” and the same is subjected to “periodic review”. There are also certain safeguards that are given under the ordinary criminal law to the arrested person⁸. The PD laws however allow for an arrest to be made upon the subjective satisfaction of the executive officer that a person may pose a threat to the society. No grounds are required to be mentioned for up to 5 days and in some rare occasions even 15 days after the arrest has been made. There is no production of the detainee before the judge and there is no “periodic review”. The detainees are also not given the right to an attorney. Intervention by advisory boards only exists upon detaining an individual for more than 3 months and even in such situations there is no legal assistance, no periodic review and no trial.

The main objective of any PD law is to prevent an individual from doing a prejudicial act against “the defense, security of any state in India, security and foreign affairs of the nation, supplies and services essential to the community or maintenance of public order” among others⁹. In *Marichapan v. The District Collector and Others*¹⁰, the court held that the main objective of any PD law is not *punitive* but *preventive*. In *Alijan Mia v. District Magistrate, Dhanbad*¹¹, the court held it to be a purely anticipatory measure without any relation to a crime. The court

also opined that subjective satisfaction of the administrative authority warrants such a detention¹². The act of *preventive* detention is purely administrative.

The Constitution provides an exhaustive list of grounds¹³ upon which a person can be detained under such laws. They are: –

- Security of India
- Foreign Affairs
- Defence
- Maintenance of supplies and essential services
- Maintenance of public order
- Security of the State

The detainee under such laws is not entitled to the rights provided under article 19 or 21.

There are also certain safeguards¹⁴ that have been provided to the detainee upon being arrested under such laws. They are: –

- A maximum period of three months is permitted for detention. If the detention period is to be transgress beyond 3 months, approval of the advisory board is required.
- The detainee needs to be communicated the ground for his detention which may only be refused by the state in public interest.
- Earliest opportunity must be given to the detainee to make his representation before the detaining authorities.

These aforementioned safeguards aren't available to an enemy alien¹⁵.

⁸ The safeguards include “the right to be informed of the grounds of arrest as soon as possible, to be presented before a judge within 24 hours and to be defended by a lawyer of one’s choice” among others.

⁹ Supra Note 1

¹⁰ 2014 SCC OnLine Mad 5741

¹¹ AIR 1983 SC 1130

¹² *Ankul Chandra Pradhan v. Union of India*: AIR 1997 SC 2814

¹³ India Const., Schedule VII, List I, Entry 9 (Central Government Powers); List III, Entry 3 (Concurrent

Powers). The Supreme Court states that the language of these entries must be given the widest possible scope because they set up of machinery of government and not mere acts of a legislature subordinate to the Constitution. See *Hans Muller of Nuremberg v. Superintendent, Presidency Jail, Calcutta*, AIR 1955 SC 367.

¹⁴ See, Constitution of India, Article 22(4)- 22(7)

¹⁵ See, id. Article 22(3)(a)



The detailing is also allowed to challenge such a detention order in a writ proceeding. Interference by the writ court in such matters is only warranted under limited grounds.

History and development of Laws Surrounding Preventive Detention.

I. Preventive Detention Laws before Independence

Preventive detention laws have been prevalent in India since colonial rule by the British. In the 19th century itself there were a framework of regulations in force to enable the Britishers to arrest and detain individuals without trial in certain cases. The writ of *Habeas Corpus* was also denied to the detainees¹⁶. Preventive Detention laws were sanctioned through emergency legislations during both World War I and II in British India¹⁷. During World War I, the Defence of the Realm Act¹⁸ and the Defence of India Act¹⁹ had been enacted to preventively detain individuals to secure the nation's security and safety. These laws had expired at the close of the war but was soon replaced by peacetime

PD laws such as the Rowlatt Act²⁰ and Bengal Criminal Law Amendment Ordinance²¹. The Defence of India Act and Defence of India Rules were enacted shortly after World War II²². These laws enabled the government to arrest and detain any individual who was considered as a threat to "maintenance of essential supplies and services, national security or public order"²³.

II. Article 22

The provisions relating to PD are clearly mentioned in Article 22. Article 22 was initially called Draft Article 15-A during the drafting phase. This Draft Article was introduced by the constituent assembly into our constitution due to the dilemma over whether "*due process of law*" or "*procedure established by law*" should be a part of Article 21 and the latter taking the final step. The "due process of law" provision was initially a part of the draft article 15 which ultimately formed article 21. Sir BN Rau, being the "Official Constitutional Advisor", after having a discussion with Justice Frankfurter over the said matter was

¹⁶ See, e.g., 1 Burma Code 209, Bengal Regulation III (Apr. 7, 1818) (Gov't of Burma 1943). The history of this regulation is quite complex, and its extension and amendment is outlined in 2 Frederic G. Wigley, *Chronological Tables and Index of the India Statutes 775- 77* (Calcutta 1897). It was extended to most of British India by the State Prisoners Act (No. 34) of 1850.

¹⁷ See A.W. BRIAN SIMPSON, *IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN* (1992).

¹⁸ See Defence of the Realm Act, 1914, 4 & 5 Geo. 5. c. 29 (Eng.)

¹⁹ See Defence of India (Criminal Law Amendment) Act, 1915 (Act No. 4) (Ind.), *found in* 8 *THE UNREPEALED ACTS OF THE GOVERNOR-GENERAL IN COUNCIL* 102-08 (1919).

²⁰ See Anarchical and Revolutionary Crimes Act, 1919 (Act No. 11) & 34(b) (Ind.), *found in* 8 'The

Unrepealed Acts of the Governor-General in Council 330 (1919)'

²¹ See Bengal Criminal Law Amendment Act, 1930 (Act No. 6) § 2(1) (Ben.), *found in* 4 *West Bengal Code* 171-172 (1955). See generally CHARLES TOWNSHEND, *BRITAIN'S CIVIL WARS: COUNTER INSURGENCY IN THE TWENTIETH CENTURY* 145-49 (1986) (describing these provisions).

²² See Defence of India Rules 1939, *reprinted in* B. MALIK ET AL., *I ENCYCLOPAEDIA OF STATUTORY RULES UNDER CENTRAL ACTS* 513 (1963). These rules were passed under the Defence of India Ordinance, 1939 (No. V of 1939) under powers preserved by § 21 of the Defence of India Act, No. XXXV (1939).

²³ Defence of India Rules, 1939, Rule 26



convinced that the said provision should be eliminated from draft Article 15. His formal report on this matter was accepted by the constituent assembly and the phrase “*due process of law*” was replaced by “*procedure established by law*”. This replacement was also done to support *Preventive Detention* legislations.

This change did not sit well with Dr BR Ambedkar, which ultimately led him to introduce article 15-A in the assembly. This article was mainly introduced by the drafting committee as a means of compensation for what had been missing in article 15. Dr BR Ambedkar foresaw the tyranny that would be prevalent with the unfettered power of the executive to detain and arrest individuals and that of the legislature to pass oppressive *detention* laws without the blanket protection provided by *due process*. Therefore, draft article 15-A was introduced to provide safeguards to individual’s personal liberty. However, to enable the Parliament to pass preventive detention laws, there was a proviso attached to Article 15-A indicating that the rights recognized therein did not extend to preventive detention cases²⁴ but included certain procedural rights²⁵ for preventive detention cases. Article 22 was therefore enacted to be complimentary to article 21 and not to suppress it. Historian Granville Austin stated that, “the story of due process and liberty in the constitute assembly was the story of preventive detention”²⁶.

The Parliament is empowered to prescribe the “class or classes of cases” in which the

advisory boards approval is not required for detention beyond three months²⁷. The Parliament can also prescribe the requisite procedure for the advisory board in the detention process²⁸.

One of the very first cases to have been dealt by the Supreme Court is that of *A.K Gopalan v. State of Madras*²⁹, where in a Communist leader named AK Gopalan had challenged the provisions of the Preventive Detention Act, 1950 stating that the same were violative of Article 14, 19, 21 and 22. This led the court decide on the fact whether Article 22 was a ‘Complete Code’ or not. The majority had rejected the ‘Complete Code’ argument and had agreed that article 22 existed alongside article 21. There was however an error committed by the court in the latter cases where they had erroneously construed the minority opinion given by Mahajan, J. as the decision in *AK Gopalan’s* case wherein Article 22 is a ‘Complete Code’ and that validity of any detention order must be determined ONLY according to the provisions of Article 22³⁰. The same point was reiterated in *Haradhan Saha* case³¹.

The court in *RC Cooper*³² held that ‘Complete Code’ argument in *AK Gopalan’s* case is untenable and held that preventive detention laws are also to comply with provisions of article 19 along with article 21 and 22. The *Maneka Gandhi* case³³ helped in transplanting “*procedure established by law*” with “*due process of law*” without changing the verbatim in Article 21. The *Francis Coralie Mullin* case³⁴ helped in the

²⁴ India Const., art 22(3)

²⁵ Id, at art 22(4)- 22(7)

²⁶ See GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (1966), at 102

²⁷ India Const., Art. 22(7)(a)

²⁸ India Const., Art. 22(7)(c)

²⁹ (1950) SCR 88, AIR 1950 SC 27

³⁰ *RC Cooper* case: 1970 SCR (3) 530

³¹ (1975) 3 SCC 198

³² (1970) 2 SCC 298

³³ 1978 AIR 597, 1978 SCR (2) 621

³⁴ 1981 AIR 746, 1981 SCR (2) 516



introduction of the “just, fair and reasonable” logic into the fabric of Article 21.

III. Preventive detention Laws following the commencement of the Constitution

The VII schedule to the Indian constitution enumerates the subjects upon which the Parliament and the state legislature can enact laws. Entry 9³⁵ on the union list (List I) and Entry 3³⁶ on the concurrent list (List III) empowers the Parliament and state legislature respectively to enact laws on preventive detention. The Supreme Court observed the lack of need to mention in a statute dealing with preventive detention what issue of foreign affairs or defence it deals with³⁷.

Preventive detention act, 1950³⁸ was the very first PD law to be enacted by the Indian government. In the name of security and public safety, this act enabled the government to arrest and detain individuals without trial. *AK Gopalan v. State of Madras*³⁹ dealt with the constitutionality of the above Act and the court held that Preventive Detention Act (PDA) was constitutional except for those provisions of Section 14⁴⁰ which were held to be unconstitutional due to the digression from the exhaustive list of circumstances that has been mentioned in article 22⁴¹.

The Maintenance of Internal Security Act (MISA)⁴² was enacted two years after the lapse of the PDA, 1950 in the year 1969,. This act, which had provisions similar to the PDA, was grossly violated and used and used as a political weapon during the time of emergency in the mid 1970s. MISA had expired in the year 1978 and was quickly followed by the National Security Act (NSA) which, until now, is still in force. NSA allowed for preventively detaining persons acting “*prejudicial to the defence of India, the relations of India with foreign powers, the security of India, security of state, the maintenance of public order, or the maintenance of supplies and services essential to the community*”. In *AK Roy v. Union of India*⁴³, the constitutionality of the NSA was challenged and was upheld by the Supreme Court, mainly due to having objectives in verbatim as mentioned in the seventh schedule. Even the provision⁴⁴ in the Act which denied the right to counsel was upheld by relying upon Article 22(3)(b), in spite of the Court expanding the meaning of Article 21 in *Maneka Gandhi’s* case⁴⁵ and including the right to counsel within its framework.

Except for two brief periods⁴⁶, India has always had a preventive detention law after independence.

³⁵ List I, Entry 9: “*preventive detention for reasons connected with defence, foreign affairs, or the security of India; persons subjected to such detention*”.

³⁶ List III, Entry 3: “*preventive detention for reasons connected with the security of state, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention*”.

³⁷ *AK Gopalan v. State of Madras*, AIR 1950 SC 27

³⁸ Act No. 4, 1950

³⁹ AIR 1950 SC 27

⁴⁰ Prevented communication of grounds for detention in confidential matters and also prevented judicial scrutiny.

⁴¹ See India Const., Article 22(3)- 22(7)

⁴² Act No. 26, 1971

⁴³ AIR 1982 SC 710

⁴⁴ NSA, sec 11(4)

⁴⁵ 1978 AIR 597, 1978 SCR (2) 621

⁴⁶ No national preventive detention law was in operation from 1970-71 or 1978-80. The PDA expired on December 31, 1969 and the MISA was not enacted until July 2, 1971. The MISA was repealed in 1978 and the National Security Ordinance (precursor to the



The Supreme Court, in several instances⁴⁷, has held that the preventive detention laws must be strictly construed due to the extraordinary power that is granted by the same.

The national security act had authorized both the state and the central government to preventively detain individuals in certain situations⁴⁸. The central government, state government, district magistrates and police commissioners⁴⁹ are empowered to detain individuals “with a view to preventing him from acting in any manner prejudicial to” various state objectives including public order and national security. This act has garnered a rich and complex body of case laws covering almost every aspect of the said act⁵⁰.

There is also the Defence of India Act and the Defence of India Rules that were enacted during the Sino-Indian war of 1962, which empowers the central government and the state government to detain a person if it is satisfied that the act of that person is in any manner prejudicial to the defence of India, civil defence, public safety, public order, relation with foreign powers, peaceful conditions in any part of India, military operations or supplies and services of

essential commodities⁵¹. There is also rule 152 which deals with preventive detention⁵², which has never been resorted to till date. The Supreme Court has held that PD provisions under these rules need strict compliance⁵³ and that an order detaining an individual can only be issued by a competent authority which cannot be lower than a district magistrate, hence doesn't include an additional district magistrate acting as a district magistrate⁵⁴. The court also observed the obligation of conveyance of grounds for detention by the detaining authority to the detenu in order to help make an effective defence and representation, failure of which violates “the principles of natural justice” and makes the detention illegal⁵⁵.

The central government had also enacted the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act⁵⁶ (COFEPOSA) which authorizes any officer of the Central or state government, not below the rank of joint secretary or secretary respectively, to detain any individual, including a foreigner, to prevent him from acting in a manner “*prejudicial to the augmentation or conservation of foreign exchange or to prevent him from – (1) smuggling or abetting the smuggling of*

NSA) was not promulgated until September 22, 1980. See C.M. Abraham, India: An Overview, in PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY (Andrew Harding & John Hatchard, eds. 1993); See also R.K Agarwal, THE NATIONAL SECURITY ACT 5-16.

⁴⁷ *Magan Cope v. State of WB.*, AIR 1975 SC 953, 954-55, which dealt with MISA; *AK Roy v. Union of India*, AIR 1982 SC 710, which dealt with NSA.

⁴⁸ See NSA, sec 3

⁴⁹ The executive may delegate the authority to issue detention orders to local district magistrates or commissioners of police for specified periods of up to 3 months at a time. See NSA, sec 3(3). Approval of the state government is required for such detention orders within 12 days. See NSA, sec 3(4)

⁵⁰ See R.K Agarwal, THE NATIONAL SECURITY ACT

⁵¹ Defence of India Rules, rule 30(1)(b)

⁵² The rule authorizes a police officer to arrest a person without a warrant if the person is reasonably suspected of having committed or about to commit a contravention of the rules directly connected with the defence operations and civil defence.

⁵³ *Ram Manohar Lohia v. State of Bihar*, AIR 1966 SC 434

⁵⁴ *Ajaib Singh v. Gurubachan Singh*, AIR 1965 SC 1619

⁵⁵ *Lakhan Pal v. union of India*, AIR 1967 SC 1507

⁵⁶ Act No. 52, 1974



goods, (2) engaging in transporting or concealing or keeping smuggle goods or dealing with them otherwise, or (3) harboring persons engaged in smuggling goods or in the abetment of the same". The constitutionality of COFEPOSA was also challenged and upheld by the Supreme court in *Attorney General for India v. Amratlal Prajivandas*⁵⁷ mainly due to the fact that it was placed in the Ninth Schedule⁵⁸. Even after the ruling in *IR Coehlo's*⁵⁹ case, the Supreme Court upheld the validity of COFEPOSA on the ground that it safeguards the security of India from economic harm⁶⁰. The Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act⁶¹ was enacted by the parliament in the year 1980, which permits detention⁶² for the prevention of "Black-marketing and maintenance of supplies of commodities essential to the community". The central government has also enacted The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act (SAFEMA)⁶³ which provided for administrative detention for a period of up to 6 months and the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act⁶⁴ which allowed for the preventive detention of an individual to prevent him from engaging in illicit traffic in psychotropic substances and narcotic drugs.

Many state governments have also enacted their respective preventive detention legislations:-

- i. "The Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act⁶⁵, 1986" wherein a 12 months period of administrative detention is provided.
- ii. "The Assam Preventive Detention Act⁶⁶, 1980" wherein a 6 months period of administrative detention is provided.
- iii. "The Bihar Control of Crimes Act⁶⁷, 1981" wherein a 12 months period of administrative detention is provided.
- iv. "The Gujarat Prevention of Antisocial Activities Act⁶⁸, 1985" wherein a 12 months period of administrative detention is provided.
- v. "The Jammu and Kashmir Public Safety Act⁶⁹, 1978" wherein a 24 months period of administrative detention is provided.
- vi. "The Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Grabbers Act⁷⁰, 1985" wherein a 12 months period of administrative detention is provided.
- vii. "The Maharashtra Prevention of Communal, Antisocial and other dangerous activities

⁵⁷ AIR 1994 SC 2179

⁵⁸ Initially, any legislation placed in the IX Schedule was barred from judicial scrutiny. *IR Coehlo v. State of Tamil Nadu* (AIR 2007 SC 861) however laid down that fundamental rights violations cannot be overlooked by the judiciary even if it is placed in the IX schedule.

⁵⁹ AIR 2007 SC 861, id.

⁶⁰ *Dropti Devi v. union of India*, (2012) 7 SCC 499

⁶¹ Act No. 07, 1980

⁶² Id, sec 3

⁶³ Act No. 13, 1976

⁶⁴ Act No. 46, 1988

⁶⁵ Act No. 1, 1986; enacted in the interest of public order, *see* sec 3

⁶⁶ Act No. 38, 1980; *see* sec 3.

⁶⁷ Bihar Act 7 of 1981; enacted in the interest of public order, *see* sec 12

⁶⁸ Gujrat Act No. 16 of 1985; enacted in the interest of public order, *see* sec 3

⁶⁹ Act No. 6 of 1978; enacted in the interest of security of the state or public order, *see* sec 8

⁷⁰ Act No. 12 of 1985; enacted in the interest of public order, *see* sec 3



viii. Act⁷¹, 1980” wherein a 12 months period of administrative detention is provided
 “The Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act⁷², 1982” wherein a 12 months period of administrative detention is provided.

Amendments have also been brought upon most of the state legislatures to include video piracy and digital offenders on the list of individuals who can be preventively detained. In *J.Ameergani vs State Of Tamilnadu*, the Tamil Nadu High Court upheld State Legislature’s power to enact laws on preventive detention relating to video piracy and digital offenders based on the doctrine of *Pith and Substance*. The validity of these amendments in light of article 21, 19 and 22 is still in the grey.

The writ of *Habeas corpus*⁷³ is considered instrumental in providing protection to the individuals from unlawful and erroneous detention. It has been described as “A great Constitutional privilege of the citizen” or “first security of civil liberty”⁷⁴. The court held that the said Writ could be used if there is a *Mala fide* exercise of the Detention power or if the same is done for ulterior or collateral purposes⁷⁵. The provision of *Double Jeopardy* has also been used for the protection of the detenu.

⁷¹ Act No. 7 of 1981; enacted in the interest of public order, *see sec 3*

⁷² Tamil Nadu Act No. 14 of 1982; enacted in the interest of public order, *see sec 3*

⁷³ Article 32 and 226 empowers the Supreme Court and High Court respectively to issue the writ of *Habeas Corpus*, which means “you may have the body”.

⁷⁴ *Deepak Baja v. State of Maharashtra*: AIR 2009 SC 628

Justification of Preventive Detention Laws in India

Preventive detention is drenched in controversy and is a highly disputed part of the constitution. The power of the Parliament and the state legislature to enact laws emulating provisions of preventive detention stems from Article 22(3)⁷⁶ of the Constitution. In fact, the members of the constituent assembly had always wanted to include a provision relating to preventive detention. Even though article 22 serves the purpose of providing safeguards from the abuse of preventive detention, it is often given constitutional recognition for the purpose of restraining the Right to Personal Liberty for “the good of the people”. The courts in India on numerous occasions have upheld the legality of PD laws. The power of PD can be used in the event of any reasonable doubt, apprehension or suspicion that there will be commission of a crime prejudicial to the state’s interest.

In *Ahmed Noor Mohamad Bhatti v. State of Gujrat*⁷⁷, the court upheld the provisions of section 151 of Criminal Procedure Code, 1973, which granted power to the police to arrest and detain individuals without warrant to avoid the commission of a cognizable offence. The court staunchly opposed holding a provision unconstitutional merely due to the unreasonable aspect which results from arbitrary exercise of the power.

⁷⁵ *AK Gopalan v. State of Madras*: (1950) SCR 88, AIR 1950 SC 27

⁷⁶ Art 22(3) denies protection against arrest and detention to an individual, as provided under art. 22(1) [right to be told the grounds for detention and counsel of choice] and 22(2) [right not to be detained beyond 24 hours without the authority of the magistrate], if the same is arrested under preventive detention laws.

⁷⁷ (2005) 3 SCC 647



To fully understand the justification of PD laws in India, four issues need to be deliberated upon: –

i. Grounds for Detention Order:

Preventive detention laws are mostly sanctioned on the ground of “public order” and “national security” among others. There is however no attempt made by these legislations nor the constitution to demarcate the limits of these terms and the acts which they include. Having a legislation defining these terms may prove to be inefficacious as it gives opportunity to an individual to alter his behavior but absence of the same has conferred a wide discretionary power to the legislature to include different acts.

The courts have also failed to establish a consistent jurisprudence to provide substantive content to these concepts. The court however did try to differentiate the terms “law and order” and “public order” and “security of the state”⁷⁸. The court stated that if *law and order* is considered to be a concentric circle, then *Public order* is a smaller circle within it and *security of state* is a much smaller circle within *public order*⁷⁹, thereby stating that only the most severe acts can justify preventive detention. Therefore, the court tried to state that any act affecting *law and order* cannot warrant preventive

detention. This however did not establish clearly defined boundaries and much of the scrutiny was left to the courts to examine the executive’s assessment of threats to public security⁸⁰. The courts usually refrain from questioning the executive’s determination of including any act as “security of state”⁸¹. The courts have however tried to distinguish between *public order* and *law and order* as was done in *Arun Ghosh v. State of West Bengal*⁸² where the court tried to define “public order” by describing the acts which contravene the same. This however proved to be a vague definition and the courts in the subsequent judgements have laid down that “public order” determinations are extremely case sensitive and need to be decided on case to case basis⁸³. Due to this muddled jurisprudence, the courts have endorsed a very broad interpretation of “acts prejudicial to the maintenance of public order”⁸⁴.

ii. “Subjective Satisfaction” of detaining authority:

The PD laws enables issuance of detention orders by detaining authorities on their satisfaction that there is a threat to “public order” or “national security”⁸⁵. The courts have also laid down that a detaining authority’s “subjective satisfaction” is a statutory prerequisite for the exercise of this power⁸⁶ and that the court cannot question

⁷⁸ *Ram Manohar Lohia v. State of Bihar*, AIR 1966 SC 740

⁷⁹ *Id.* at 757

⁸⁰ The scope of judicial review in these matters is quite limited

⁸¹ *See, e.g., Masood Alam v. Union of India*, A.I.R. 1973 S.C. 897, 905 (sustaining detention order issued to preserve national security based on executive’s determination that detainee had and would continue to “stimulate anti-Indian feelings”). In fact, the courts have ratified subtle but important extensions of the concept of “national security.” For instance, the Supreme Court has held that “national security” threats include internal disturbances and need not involve a

threat to the entire country or even a whole state. *See, Union of India v. Tulsiram Patel*, A.I.R. 1985 S.C. 1416, 1482.

⁸² AIR 1970 SC 1228-1230

⁸³ *State of UP v. Hari Shankar Tewari*, AIR 1987 SC 998

⁸⁴ *See* Derek P. Jinks: *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, Michigan Journal of International Law, Volume 22, Issue 2, pg. 330.

⁸⁵ *See, e.g., NSA*, sec 3

⁸⁶ *Anil Dey v. State of WB*, AIR 1974 SC 832



this satisfaction to appreciate its objective sufficiency⁸⁷. The courts however have the power to decide whether satisfaction is “honest and real, and not fanciful and imaginary”⁸⁸ thereby allowing the courts to use the “non-application of mind” standard to allow for judicial review. This enabled the court to revoke the detention order on the ground of improperly considered irrelevant factors⁸⁹, failure to understand the detainee’s circumstances⁹⁰ and failure to consider relevant material⁹¹. However, an amendment to the NSA limited the scope of the “non-application of mind” by directing the courts to consider the identified grounds of detention as severable⁹². This greatly reduce the scope of judicial review as one valid ground was held to be enough to sustain a detention order if the detention order was not given on the cumulative basis of all the grounds⁹³.

- iii. Quasi-Judicial review and Advisory Boards: The power of preventive detention, despite being an administrative action, does provide for quasi-judicial review of detention orders by the advisory board, rules for issuance and confirmation of detention orders. This helps in preventing the arbitrary exercise of the preventive detention power and also provides

an opportunity to the detenu for the fair and objective appraisal of his case⁹⁴. There is however no hearing or trial involved in the same.

Under NSA, the government authority issuing detention orders is obligated to refer all cases relating to PD before the advisory board within three weeks period from issuance of detention order⁹⁵. The detaining authority’s report and representation of the detainee must also be forwarded. The advisory board, after appreciating the detaining authority’s and detainee’s report, must, within 7 weeks period from issuance of the detention order, report as to whether there is a sufficient cause to detain⁹⁶. All proceedings are however confidential and cannot be disclosed publically⁹⁷.

This elaborate executive review process helps in giving structure and procedure for the issuance and confirmation of preventive detention orders and eliminates any sense of arbitrariness. These enquiries and procedures however digress from the traditional judicial proceedings and is not based on any factual findings in any formal sense⁹⁸. There is also no right to confrontation, compulsory process or Counsel.

- iv. Procedural Safeguards:

⁸⁷ Id, at 834

⁸⁸ Id

⁸⁹ *Piyush kantilal Mehta v. Commissioner of Police*, AIR 1989 SC 491, 496.

⁹⁰ *Binod Singh v. Dist. Magistrate*, (1986) 4 SCC 416, 420

⁹¹ *Ashadevi v. K. Shivraj*, (1979) 1 SCC 222, 227

⁹² See The National Security (Second Amendment) Act, 1984

⁹³ *Gayathri v. Commisioner of Police, Madras*, AIR 1981 SC 1672, 1673

⁹⁴ *AK Roy v. Union of India*, AIR 1982 SC 710, 743

⁹⁵ NSA, sec 10

⁹⁶ NSA, sec 11(4)

⁹⁷ Id.

⁹⁸ R.K. Agrawal, former Secretary of the Home Ministry, summarizes the nature of the Board's administrative task: “In proceedings before the Advisory Board, the question for consideration of the Board is not whether the detenu is guilty of any charge but whether there is sufficient cause for the detention of the person concerned. The detention, it must be remembered, is based not on the facts proved either by applying the test of preponderance of the probabilities or of reasonable doubt. The detention is based on the subjective satisfaction of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to certain stated objects.”



There are also certain procedural safeguards provided to an individual detained under preventive detention laws such as right to be communicated the detention grounds and to oppose the order at the earliest by making a representation⁹⁹. The Supreme Court has also elaborated on the procedural safeguards mentioned in article 22(5) by stating that the detainee has a right to be informed of his or her rights under the article and to make an effective representation with prompt supply of essential documents and copies for realization of the same¹⁰⁰. The denial of a right to counsel was however upheld by the court¹⁰¹, permitting the right to a counsel only in the event where the government is represented by legal counsel¹⁰². Hence safeguards have been provided for such procedure, albeit minimal and furnished in nature.

India has also asserted its stand on PD in the international human rights forum. This was done by India ratifying “the International Covenant on Civil and Political Rights (ICCPR)” with a reservation to Article 9 of the same¹⁰³. India has also taken a firm stance before the UN human rights committee on the issue of PD laws by stating that such laws have sufficient safeguards to protect the fundamental human rights and that liberty of the individual cannot be suppressed even at

the time of emergency and that there is no inconsistency with ICCPR¹⁰⁴.

Can Such Laws Be Justified In Our Present Times?

Provisions relating to preventive tension have been ingrained in our constitution from its very inception. It has been more than 70 years since India has drafted its constitution and has come a long way in realizing the basic fundamental rights of the individuals, especially the right to personal liberty which has been given a very wide scope by the courts. This therefore begs to answer the question as to whether preventive detention laws are still necessary in our democratic country where the role of the government is quickly shifting from a police state to that of a welfare state. It also begs us to ponder as to whether such restrictions on personal liberty, which is a core and basic fundamental right, can be warranted when the same cannot be done by the state even during a time of emergency¹⁰⁵. Supporters of the PD regime might state that these pre-emptive measures help in tackling extreme situations and provides safety to the society. This argument can be agreed upon in matters relating to national security but it fails to answer the question as to how this regime can be justified against acts of video piracy¹⁰⁶ where there is no threat to national

⁹⁹ Article 22(5)

¹⁰⁰ *Wasi Uddin Ahmed v. District Magistrate, Aligarh*, AIR 1981 SC 2173

¹⁰¹ *AK Roy v. Union of India*, AIR 1982 SC 745

¹⁰² To comply with art. 14

¹⁰³ India has stated that provisions of article 9 (right to personal liberty) will be applied in such a manner that it is in consonance with provisions of article 22(3) to (7) of the Constitution

¹⁰⁴ U.N. Human Rights Committee, *Third Periodic Reports of States' Parties due in 1992: India*

¹⁰⁵ India Const., art 359(1) states that art 21 & 22 are non-derogable rights even during emergency period (introduced by the *forty-fourth amendment act, 1978*)

¹⁰⁶ See, e.g., amendment to “The Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1985” introduced by Act 61 of 2013, which included the term *video and audio pirate*.



security and it can be barely considered as a threat to public order. The term “public order” has been given such a wide scope by the government that it has empowered them to include various acts under the PD regime which barely counts as public order, let alone national security. The arrest of journalists under NSA for their dissent against public figures is one such example. Therefore, the very objective of the PD laws, which is to prevent the commission of a crime, is lost as these laws are now being used to secure arrest and detention of individuals for a longer time and with less evidence.

It is pertinent to note that even Britain, the country which introduced PD laws in India, has disposed off such laws after the World Wars. Even during the time of war, many civilized nations including US and several other European nations, had never implemented any PD laws. The framers of our Constitution had incorporated the PD regime into Article 22 to mainly secure the detention of those individuals¹⁰⁷ who posed a danger to the security and existence of the newly formed nation. The framers believed that the sacrifices of so many individuals would be fruitless if the liberties for which they have fought and died for are not protected from individuals using ruthless and merciless tactics and whose methods, cultures and inspirations are all associated with foreign organisations¹⁰⁸. 70 years later however, there is no such grave danger to the security and existence of the nation which warrants such a regime. Even if the government wants to continue such laws, they should make sure that they are used in

the most extreme circumstances and with utmost restraint.

These laws are being abused and used against political opponents and dissenters. One recent example is that of *Mian Abdool Qayoom v. Union Territory of J&K* the court had rejected a temporary release application made by Qayoom¹⁰⁹ due to the Covid-19 outbreak. He was detained solely on the grounds of his ideology and the same had also been upheld by the court, even after affirming that the detention order was “clumsy”. This sets a dangerous precedent where people can be preventively detained on ideological basis, even upon the lack of evidence of any actual threat to public order due to the harboring of such ideology. This is a gross violation of the Human rights and personal liberties that are enshrined and enumerated in our constitution. It goes against the very nature of our preamble and the ideals that our democratic country shares. When courts refuse to question the detaining authority’s subjective satisfaction, stating that it is outside their objective assessment, it opens a Pandora’s box of absolute impunity to the government. The courts also stray from their duty of safeguarding personal liberties by subjecting themselves to the supremacy of executive, as was done in *ADM Jabalpur case*¹¹⁰. These laws are also increasingly being used to detain individuals without any high standard of burden required for the same¹¹¹, thereby normalizing the use of this power as a means for the betterment of the people rather than being used as in extreme and rare circumstances as a last resort. It is increasingly being used for the “incarceration

¹⁰⁷ These individuals mostly consisted of communists.

¹⁰⁸ India Parl. Deb., Vol. II, Pt. II, p. 874-876 (Feb. 25, 1950)

¹⁰⁹ Detained under Public Safety Act, 1978.

¹¹⁰ 1976 AIR 1207, 1976 SCR 172

¹¹¹ See, *Union of India v. Dimple Happy Dhakad*, CrI. Appeal No. 1064 of 2019.



of unwanted persons” with barely any procedural safeguards.

The scope of judicial review in such matters is very limited. The court has however tried to expand the fabric of judicial review in these situations to ensure that certain personal liberties can be provided to the detenu. This was done by the court by stating that stale allegations do not warrant such detention orders and that there should be a live danger to the public order¹¹². The court also observed that the order shouldn't be vague and arbitrary so as to make the challenge to the detention order impossible¹¹³. The court has however failed in expanding its judicial review to the detaining authority's subjective satisfaction and has even refused to do so when the possibility of release of detenu and commit a prejudicial act was used as a ground for passing the detention order¹¹⁴.

One might argue that the provisions under article 22 dealing with PD regime cannot be altered as it forms a part of the original text of the Constitution. They might state that it is only upon amendment that the same can be altered and the courts do not have the power to undermine the same. This was the main reason for the court in *AK Roy's case*¹¹⁵ to uphold the validity of NSA. This argument is however inherently flawed as there is nothing in the constitutional text which states that a separate treatment must be given to the original text and the amendments if the same is not in line with the values enshrined in our Constitution. It can also be stated that the

constituent assembly, which drafted the original text, was barely representative of the people and was devoid of a ratification process. This argument is also flawed due to the simple fact that in *Maneka Gandhi's case*¹¹⁶, the Supreme Court had transplanted “due process” clause into Article 21, which was essentially an original text. This judgement had greatly changed the dynamic of the provisions relating to PD¹¹⁷ as the only reason for introducing Article 22 was to supplement for the absence of the “due process” clause. As *Maneka Gandhi's*¹¹⁸ case has changed the nature of Article 21, there is no justification for Article 22 to exist to ensure harmony in the constitutional text. Existence of Article 22 also cannot be justified due to the fact that the scope of article 21, which ensures a right to free legal aid, counsel and appeal¹¹⁹, extends to article 22¹²⁰. The fact that emergency declared at the time of national crisis cannot derogate the rights guaranteed under article 20 and 21¹²¹ is enough justification to revoke the PD regime under Article 22, which is violative of provisions mentioned under article 21, as the same has been authorized for acts against public order, which is less severe compared to national security and also due to the fact that PD regime is an illegitimate and undeclared state of emergency as stated by the international rules pertaining to “states of emergency”. These laws also run afoul of the international standards such as “the International Covenant on Civil and Political

¹¹² *Bhawarlal Ganeshmalji v. State of Tamil Nadu*, (1979) 1 SCC 465

¹¹³ *Prabhu Dayal Deorah v. DM Kamrup* (1974) 1SCC 103

¹¹⁴ *See, Union of India v. Dimple Happy Dhakad*, Crl. Appeal No. 1064 of 2019.

¹¹⁵ AIR 1982 SC 710

¹¹⁶ 1978 AIR 597, 1978 SCR (2) 621

¹¹⁷ India Const, art 22(3)- 22(7)

¹¹⁸ 1978 AIR 597, 1978 SCR (2) 621

¹¹⁹ *Madhav Hoskot v. state of Maharashtra*, (1978) 3 SCC 544m

¹²⁰ *RC Cooper v. Union of India*, (1970) 2 SCC 298

¹²¹ India Const., art 359(1) states that art 21 & 22 are non-derogable rights even during emergency period (introduced by the forty-fourth amendment act, 1978)



Rights (ICCPR)” which India has ratified but failed to adhere to¹²².

Conclusion

Preventive detention laws have long been a part of the Indian legal system, even before India had gained independence. Having an association with such a law for such a long period of time, coupled with the legitimization of the same done by both the government and the courts in numerous circumstances, these laws have permeated into the society as something which is normal and something which is necessary for the societal benefit. This is something which is not good for any democratic nation and it needs to be addressed quickly because these laws have allowed for the government to bypass the ordinary criminal legal system and has allowed for the violation of numerous fundamental rights, especially personal liberty, which is sacrosanct to the constitution. The scope of these laws has also been extended under the guise of protection of public order, by including cow slaughter, video piracy and copyright violations into the list of acts which warrant preventive detention. Even the minimal constitutional safeguards provided under article 22 have become redundant after the incorporation of due process in the Constitution.

In light of the above stated points, it would be best if these detention laws are scrapped altogether from the Constitution. If these laws are however to remain a part of the Constitution, there are certain fundamental changes that have to be made to ensure that the personal liberty of the individual is secured. Some changes which are necessary include:-

- Protection of detainees from discriminatory treatment and torture.
- Safeguards to prevent the use of the detention laws to suppress any dissent from majority practice or government.
- Safeguards to prevent the use of these laws to bypass ordinary criminal legal system.
- Deletion of “maintenance of public order or maintenance of supplies and services essential to the community” grounds for passing PD laws.
- Limited circumstances to be mentioned for the use of this power and scope of judicial review to be expanded.
- To reduce the three-month detention period without any form of review.
- To include judicial involvement in detention review process.
- Periodic review of terms of detention and conditions to ensure that the detention is “strictly required”.
- Grounds of detention must be communicated promptly.
- Right to counsel.
- In case of unlawful detention, compensation to be provided, except during public emergencies.

It would be much more beneficial to do away with these rights altogether but if these rights are to stay, it can only be justified in the interest of security of the nation and also the procedural safeguards have to be drastically improved to prevent any violation of the fundamental personal liberties.

¹²² Article 4 of ICCPR provides for derogation from personal liberties during a state of emergency and the

standards set forth do not satisfy India’s current situation.