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Preventive Detention-A Constitutional Hazard?

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Introduction

Preventive Detention means the pre-judicial confinement of a person on the mere suspicion from the assumption that his/her activities might harm the society at large.

This is a preventive measure taken against the person to obstruct him from conducting any offence that may prove fatal for others. The action might arise if the person is already in custody and his release is considered to be detrimental for the state. It entirely depends if a person has the capacity of committing crimes in future based on his past criminal behaviour without any trial or charge.

The objective of preventive detention is to be used when there is a grave apprehension, reasonable possibility of a prejudicial act to the state. It is put in action not to punish the person but as a preventive step for the protection of the nation. Therefore, it is preventive and not punitive in nature.

Brief Historical Background

The first Preventive Detention Act came into force on 26th February, 1950. The constitution framers resolved to add these laws in the constitution's fundamental rights chapter which was even considered as fundamental dangers in a democratic India for the freedom and liberty of citizens. No other civilised country including the Britain, USA or other European Countries had such type of law during peace times. Such legal provisions were only meant for emergency situations.

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Constitutional Provisions for Preventive Detention

The Preventive Detention Laws are enshrined in Article 22[1] of the Indian Constitution and in List I (Entry 9) and List III (Entry 3) of the Seventh Schedule, where Article 22(1) & 22(2) have the rights for the arrested persons which says to provide them with the information and reasons for arrest as soon as possible[2], the rights of such person includes to have a legal representative and will have to be produced before the magistrate within 24 hours of arrest.

However, Article 22(3) does not provide any of the above rights if any of such person is arrested under any preventive detention laws. This would imply that those people will not have access to the provisions mentioned in Article 22(1) & (2).

Therefore Article 22(4)-(7) contain the safeguards against the arbitrary abuse of this power:

- Any preventive detention law shall not authorise detention for more than a period of 3 months. Further such extent must have a clearance from the Advisory Board consisting of persons qualified to be appointed as Judges of High Court.
- The authority has a duty to communicate the reason or the grounds of arrest to the detenue except such details which if disclosed are considered to be against public interest.
- The authority shall also provide the person to make representation against the order.

A.K. Gopalan v. State of Madras[3] was the very first case to challenge the constitutional validity of the preventive detention laws and it was decided that it is not in contravention of the fundamental rights rather Article 14 is ultra vires and invalid. Moreover, it allowed

[1] Protection against arrest and detention in certain cases.
[2] Surjeet Singh V. Union of India, A.I.R. 1981 2 SCC 359
[3] A.K Gopalan v. State of Madras, A.I.R. 1950 SC 27.

detention over a period of three months without the obligation of consulting with the advisory board.

Preventive Detention was included with the main intention of B.R. Ambedkar to provide the State with a necessary evil to protect the Constitution, State and the individual liberty in a limited and correct manner.

Research Questions

- What is the measure of executive power over the enforcement of preventive detention laws?
- Whether preventive detention and personal liberty coexist or not?

Methodology

The methodology adopted for this legal Research is Elastic. The problem is analysed in the light of the social, political and legal issues, Constitutional provisions and other relevant statutory materials along with relevant case laws touching on the topic. The method of research is Critical Research Method with Descriptive search design. The data is collected from secondary authoritative sources.

Study of Executive Power through Central Legislations

The National Security Act, 1980.

This particular Act was introduced for extraordinary situations by the constitution makers. It was first introduced as Maintenance of Internal Security Act, 1971 by Indira Gandhi's

Government which later came up with National Security Act, 1980 popularly known as "no vakil, no appeal, no daleel[4]".

These preventive detention laws cannot be imposed for minute breach of law and order and termed as threat to public order. This distinction was cleared in the case of Ram Manohar Lohia v. State of Bihar[5], where it was a theory about three concentric circles were given to be able to understand the situation where such laws should be applicable. Law and order is the largest circle, then comes public order and the smallest is national security.

The grounds on which National Security Act can be applied for are:

- Defence of the State
- Relation of State with foreign power
- Security of the State
- Public order
- Maintenance of supply of services essential to the community

But time and again the government has misconstrued the fundamental concept of the same where: (1) preventive detention is intended to stop future crimes and (2) it is not meant to stop the violation of ordinary law and order situations.

Few instances to gauge the misuse of NSA by the executive authorities in 72.5% cases[6].

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[6] Shoaib Danyal, *The use of National Security Act to keep the Bhim Army's Chandrashekhar in prison is draconian*, SCROLL.IN (June. 17,2020, 11:40 P.M.) https://scroll.in/article/856631/uttar-pradesh-the-use-of-nsa-to-keep-the-bhim-armys-chandrashekhar-in-prison-is-draconian.

[5]Ram Manohar Lohia v. State of Bihar AIR 1966 SC 709

[6]Arjun Sharma, *Time to end abuses,* SEMINARIST (June. 17,2020 10:50 P.M.) https://www.india-seminar.com/2002/512/512%20seminarist.htm.

Dr. Kafeel Khan was detained for giving anti-CAA speeches in Aligarh Muslim University by the Uttar Pradesh Government and charged with section 153A and 295A of IPC, where it was a clear case of vendetta and there was no need of applying preventive detention over the charges too[7].

In a small village of Purbaliyan near Muzzaffarnagar, Uttar Pradesh a minor quarrel broke out between kids over a cricket match where NSA was imposed because later it took the form of communal violence[8].

Kishorechandra Wangkhem, a Manipur journalist was detained for criticizing N. Biren Singh and his party, Bharatiya Janta Party but when he was produced before the court it was found illegal[9].

Conservation of Foreign, Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA)

This act was formulated to keep a check on the smuggling of goods and violation of foreign exchange activities which pose a threat on the economic security of the nation. Section 3 of the Act empowers the Central Government or the State Government to detain a person if satisfied that his activities are prejudicial to the conservation of foreign exchange or prevent him from:-

(a) Smuggling or abetting the smuggling of goods, or,

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[7]Divya Trivedi, *The targeting of Dr. Kafeel Khan: A case of vendetta,* FRONTLINE, INDIA'S NATIONAL MAGAZINE (June. 17,2020 10:49 P.M.) https://frontline.thehindu.com/politics/article30912135.ece.

8Aas Mohd Kaif, *Misuse of National Security Act has become a nightmare for the Muslims in Muzaffarnagar,* NATIONAL HERALD (June. 17,2020 11:04 P.M.) https://www.nationalheraldindia.com/india/misuse-of-national-security-act-has-become-a-nightmare-for-the-muslims-in-muzaffarnagar.

9Soutik Biswas, *The Indian journalist jailed for a year for Facebook posts,* BBC NEWS (June 17,2020 - 11:08 P.M.) https://www.bbc.com/news/world-asia-india-46631911

(b) Engaging in transporting or concealing or keeping smuggled goods or dealing in smuggled goods or harbouring persons engaged in smuggling goods, make an order directing that such person be detained.

But in such cases the law does not recognises the innocence of the person and he is detained without representation or trial because in some cases the person carrying the smuggled goods or contraband might have been duped out of the goodwill of his friends or relatives.

Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act, 1982.

This particular act was brought in existence to be invoked against frequent and habitual offenders. Rather it is being used in petty conditions in the name of prejudicial to maintenance of public law and order which is to justify the draconian power of the executive and to shift from strenuous and long procedural criminal system to resort to easy way out to buy time for investigation without any charge on the detainee meanwhile.

There was a detention against a man selling spurious chilli seeds in Telangana which was invoked to stop the selling of such seeds that proved to be fatal for society but it was struck down and termed as gross abuse of statutory powers.

There are many other preventive detention laws such as Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980, Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 with similar provisions and powers.[10]

10Derek P. Jinks, *The Anatomy Of An Institutionalized Emergency: Preventive Detention And Personal Liberty In India*, HEIN ONLINE CITATION: 22 Mich. J. Int'l L. 311 2000-2001.

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Preventive Detention and Article 21

There is a fine line between Article 21 and Article 22. While the exercise of Article 22, a person is absolved from his right to life and personal liberty under Article 21 since the protection of National security comes above the individual liberty. Though Article 22 has no aspect of judicial review, the Court has the power to review cases under Article 32 and 226 because it is aware of the State's potential to misuse their extraordinary powers on their discretion[11].

Since the principles of Preventive Detention include subjective satisfaction it is necessary that the measures adopted for the prevention of the prejudicial matter there must be a distinction from punitive detention when it comes to the person detained and his rights and satisfy the reason of his restriction[12].

Thus, every person so detained who offends or impairs the public order and harm dignity of the society will automatically loose his right to live and liberty as regards his deprivation is on a fair, reasonable and just procedure which is established by law and is on the line of other fundamental rights. Therefore Article 22 has to pass the test of Article 21[13] in some or the other manner and to protect this draconian power from abuse there are certain safeguards mentioned in the constitution which have already been discussed.

[11] Maneka Gandhi v. Union of India, A.I.R. 1978 SC 587.
[12] Raj kumar Singh v. State of Bihar, A.I.R. 1986 SC 1334.
[13] Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors,(1981) SCC 608.

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Case Study

Enforcement of Jammu & Kashmir Public Safety Act during abrogation of Article 370 valid or not.

The habeas corpus petitions in the court were challenged by various eminent political entities to question the misuse of preventive detention laws of the State. After the scrapping of Article 370 it was filed by Rajya Sabha MP and MDMK leader Vaiko in the Supreme Court which seeks to summon Farooq Abdullah, former chief minister of J&K who was under detention.

The preventive detention laws are meant to prevent persons from harming the security of the State, law and order or public order pertaining to a suspicion of a criminal activity that may take place in future rather it was being used against political opponents and critics who showed their dissent by the majority ruling party. It was also invoked against a bureaucrat turned politician, Shah Faesal after the dilution of Article 370.

This is not the real purpose of the preventive detention laws where the executive power is being used arbitrarily to silence the critics and curbing the people from their fundamental right to protest under Article 19 of the Indian Constitution, where they sweep them off of their fundamental rights as detainees without right to legal assistance, right to seek bail or gain information of arrest. The government has the authority under National Security Act and JKPSA to detain the arrested persons for up to 10 days without disclosing information considering against the public interest. This is done for the executive functional easement and thereby making it difficult for the detainees to challenge the charges. The Advisory board does not work efficiently to provide fair reports without scrutinising the situation and gives acceptance for further detention orders. All chaotic and baseless abandonment of rules are just done to suit the political agenda of the majority party. According to the information

by Right to Information Act over 99% of detentions during April 2016-December 2017 were flagged by the J&K Advisory board but 81% of them were quashed by High Court of J&K[14].

This shows the inappropriate use of the powers given to the state curbed the civil liberties and are a fear to the political ideologies of the people. Therefore, they should be critically re-examined.

Needs of the Society as Important as Personal Liberty

Though Article 14, 19 and 21 of the Indian Constitution do not affect the application of the Preventive Detention laws until and unless they are applied within statutory limitations and abide by the fundamental rights of arrested person they are considered to be supreme over the liberty of an individual to commensurate the needs of the society and its well-being.

The liberty of an individual is of utmost priority for the Constitution but it should not supersede the national security issues and this is where the preventive detention laws should strike a balance with the personal liberty of an individual and societal needs.

An illustration in the above context has a mention in the case where Bombay High Court quashed the detention orders against Nisar Aliyar, the alleged key player of one of the biggest gold smuggling syndicates, and his aide Happy Dhakad. But Directorate of Revenue Intelligence appealed in the Apex court since he had detained Aliyar and Dhakad along with 13 others, under COFEPOSA in connection with the alleged smuggling of 3,396 kilograms of gold worth over Rs 1,000 crore.[15] Therefore it was considered that the detaining authority had

[14] Harsh Bora, *The Long Arm of the Law*, INDIA TODAY MAGAZINE (June.14, 2020 12 PM), https://www.indiatoday.in/magazine/up-front/story/20190930-the-long-arm-of-the-law-1600675-2019-09-20.

[15] Utkarsh Anand , *Needs of Society as Important as Personal Liberty, Says SC Ruling on Preventive Detention* ,NEWS 18 (June. 14,2020 12:30 PM), https://www.news18.com/news/india/needs-of-society-as-important-as-personal-liberty-says-sc-in-ruling-on-preventive-detention-2248863.html.

full material and reasonable apprehension for the detenues that they had full capacity to indulge in similar acts in future which might prove fatal to the economy of the nation and in such case it is necessary to prevent them from smuggling goods.

Analysis

From the above research, the analysis to be drawn is very clear. Though the preventive detention laws were framed for the protection of the Constitution from internal forces and the State itself there has been clear misuse of this statutory power and thereby it will be justified to call it a Constitutional hazard. Apart from the safeguards mentioned there are several ways in which Article 22 main objective and intention is distorted. The police officials and the executive machinery is using these laws as an alternative of the established criminal system to escape the long procedural haul and degrading the power of normal legal process as they find it lacking and also it includes rights of an arrested person unlike that given to a detainee which helps them to stall the investigation process and buy them more time to file a charge sheet. This is simply a disrespect and clear negation of the defined system put in order for the basic disturbance of law and order by replacing it with laws kept for extraordinary situations just for the ease of work. This is not only an abuse of the preventive detention laws but also of the life and liberty of the citizen under Article 21. The detention of the person without proper limitations provided in the statutes and according to the whims and fancies of the government is a sign of arbitrariness and this is against Article 14. There must be reasonableness and equality in the procedure defined by Article 21 to justify the laws of Article 22 and be in conformity with Article 14 where reasonability is its base. Otherwise it will affect citizens' right embedded in Article 14, 19, 21 and 22 of the Indian Constitution.

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International Criticism and Human Rights Violation

Also all these laws are condemned by the International fraternity and there is a lot of criticism against them in order for its elimination from the Indian Constitution. Since there has been unlawful detention and the rights of the prisoners are also subverted, a prisoner must be given reasonable opportunity to defend against such unlawful detention which is given by the principle of *Audi Alteram Partem* which states that no one should be condemned unheard.

Organisations which have been critical about preventive detention laws in India since its origin and its application include The South Asian Human Rights Documentation Centre (SAHRDC) to delete such provisions violating the human rights, The Commonwealth Human Rights Initiative (CHRI) gave a report on the draconian piece of legislation in India and even the International Covenant on Civil and Political Rights(ICCPR) and Universal Declaration of Human Rights(UDHR) mentioned the rights of the detainees and the asked to include clear lines of working for officials and provide judicial review.

After such detailed study it is clear that there is a grave misuse of the laws meant for the protection of the Constitution and State by its own government servants and for such penalties for which the punishments and remedies that are already mentioned a different yet and easy recourse is being taken without following the proper statutory limitations for collateral purposes is a colourable exercise of power and the damage is colossal.

Conclusion

Preventive Detention laws were added as a necessary evil by the Constitution makers and freedom fighters at that time because they themselves have faced the plights of such laws and there was a violent upsurge and criticism about the Constitution at that time. So in order to protect the State and Constitution from internal aggression it was an important step. But

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after 70 years of freedom and constant amendment of the laws there is no requirement of these laws since they are proving to be a curtailment of the citizen's basic fundamental right and are no longer used in a positive manner. The preventive detention laws are considered as peace restoration strategy within and outside the country but now they are resorted as a means of administrative convenience by the executives by side-lining the existing laws and blind-sighting their efficacy. These laws have the power to make the State cross their authoritativeness and boundaries of limitations harming the liberty of citizens. Therefore they must be eliminated and abolished as soon as possible by the government in near future. The erroneous detention have been exposed time and again and blatantly discover the executive machinery's incapability and lack of logical and mechanical applicability of the detaining authority.