



PREVENTIVE DETENTION LAWS IN INDIA AND USA: A CRITICAL ANALYSIS

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ABSTRACT

Preventive detention is a detention of a person which is used by the government for stopping the criminal activities. Preventive detention, the act of imprisoning charged people before preliminary with the understanding that their release would not be in the interest of public order. Explicitly, that they would probably carry out crimes further on the off chance if they will be released. Preventive detention is additionally utilized when the release of the accused is felt to be inconvenient to the state to complete its investigation. In various countries this practice has been criticised on the ground that the preventive detention laws are clearly denial of human rights of the offender in the society.

INTRODUCTION

The procedure for preventive detention has been initially used in civil-law countries specifically in France and Belgium—the rights of individual persons who has been detained before trial were more carefully protected. During the period of 1970 in France courts were having exclusive power of preventive detention. But In Belgium the Preventive Detention was reviewed monthly for every individuals who has been detained under Preventive Detention for determining whether, the release of that individuals will still constitute threat to the society¹.

Initially, the countries where there was dictatorship the Preventive detention was used often and on frequent basis. That in the Soviet Union were the person who was found politically and securitl threat to the government that person used to charged under preventive

¹ The United Nations (Office of the High Commissioner for Human Rights)- Handbook for Parliamentarians N° 26, Printed by Courand et Associés, ISBN 978-92-9142-657-7 (IPU), HR/PUB/16/4 (UN)



detention. In these types of countries, the preventive detention was exclusively vested with Police authorities and the protection of Individual rights were ignored.

In the year 1984 the U.S. Congress has given power to the federal courts for preventive detention of those criminals or individuals whose trial is still pending and any conditions for granting bail will not secure the safety of any particular person or community at large. But in the year 1987 the act which has been passed by US. Congress was challenged before before the Hon'ble Supreme Court of United states in the case of United States v. Salerno², in which the Hon'ble Supreme Court was of the opinion that Preventive Detention Act, 1984 is neither violative the excessive bail language of the Eighth Amendment nor violative of the due process clause of the Fifth Amendment. Subsequently, after the judgement pronounced in the case of Salerno, number of U.S. States have adopted the laws of preventive detention.

For the first time the Preventive Detention laws gets its recognition at Theoretical level after the decision of the Salerno judgement. So far as practical level was concerned, after the decision of U.S. Supreme Court in Salerno case the bail to the individual could be rejected or restricted and where there is a possibility that individual will again commit such type of crime, in that condition the individual ought not to have been given benefit of bail. Thereafter, the laws of preventive detention were used for detention of such kind of persons who are threat to the society at large. In that time the bail was granted by courts to the individual by imposing such harsh conditions so that the person charged under preventive detention will not think of again doing again such crime for which he has been charge. That at that point of time courts were used to put conditions for granting bail to the person who has been charged under preventive detention laws like confining the person in the particular area with surveillance upon him and putting a condition of huge amount for release of the detenu.

Position in USA

So far as USA is concerned in the 5th amendment made under US Constitution is praise to the Magna carta which means the law of the land or in the other words it can be said that law of the emperor. The courts of United State having the power to test that whether the law enacted by the U.S. Congress was valid, just, legal and fair and whether such law is in accordance with law or not.

That the perception differs from person to person similarly the perception of judges who were judge of Supreme Court of United State differs in their perception with respect to due process of law. Due to different views of the judges of the same court the preventive detention was not so effective so that it will serve the purpose of Preventive Detention Laws. Due to

² United States v. Salerno, 481 U.S. 739 (1987)



divergent views in the judgement which can be traced before the enactment of Bills of Right, 1791 the concept of preventive detention was found in a narrow compass, and various decision were running parallelly and were leading to an escape gate for the offenders who have been charged under Preventive Detention laws. At that point of time the dimension of the preventive detention laws was not unidirectional but only focusing for a particular crime, but the real purpose of the prevention laws in the real sense was to prevent the crime in the all areas where there is a possibility that such crime will be repeated again which leads to detrimental to the society at large. In America the cases of detention with respect to sexual predators and detention with respect to immigration specifically after September 11 incident are on rise but detention with respect to mental illness were seen very less in numbers from past decades. with respect to mental illness was not found. Before there was an attack on World Trade Center, New York, America on September 11, 2001 the preventive detention laws with respect to terrorism was not holding the field in the preventive detention laws. The Supreme Court has made this clear: “by universal agreement and practice, these powers are important incidents of war”.³

The concept of the preventive detention laws was evolved in the American laws by the legislatures was to restrict/prevent grave harm to the public at large. The preventive detentions laws were enforced to continue detention of the wrongdoers who are threat to society and security of the state but limited to those who are in position to harm. Initially, in America there was a restriction on the procedure in the doctrine of Due Process of Law, but thereafter the scope of the doctrine of Due Process of Law was elaborated on the activity which was controlled by the government therein. Thereafter, the US Courts were given power to review the legislation and revise the same.

William Bennett Munro has mentioned in his book Constitution of United States⁴ that the doctrine of due process of law means fair play of laws. As per the texts of Munro fair play will be binding and will be applicable on each and every legal proceeding before the courts or outside the courts to strengthen the principle of liberty while insuring public good. Munro explained that Lord Denning understands the due process of law as a measure incited by the law to keep the pure essence of justice: to keep an eye on all the legal proceedings including inquiries, trials are being conducted fairly, and the detentions and investigation are being just and proper and in accordance with the laws, so that not a single individual may be deprived of exhausting every legal remedies which are available in their hand and unnecessary delays not causing harm to personal liberty.

PREVENTIVE DETENTION LAWS POSITION IN CONSTITUTION OF INDIA:

³ Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (quoting Ex parte Quirin, 317 U.S. 1, 28, 30 (1942)

⁴ William Bennett Munro, The Constitution of the United States 98 (The Macmillan company, 1st edn., 1930).



Providing Safeguard to individuals against the powers misused by the police for arrest and detention the Indian Constitution envisaged the Article 22.

The clause(2) of Article 22 reads, “Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.”

The meaning of arrest is to curtail the liberty of a person and movement of that person is restricted. The legality of the arrest can be questioned but for preventing the commission of the crime again the person who has been detained can be charged under preventive detention laws.

That any person who has been detained under preventive detention laws the detaining authority shall communicate the grounds for detention of such person and the authority shall give the opportunity for representation against the order of the detention. In India the period for detention cannot be longer than 3 months except when an advisory board is of the opinion that the detention is required after 3 months also necessarily and there is a sufficient cause for the same. However, if the detaining authority deems fit will not disclose the facts for detention if the authority considers that the same is against the public interest to disclose.

When there was British rule in India at that point of time when the Bengal Regulation III of 1818⁵ (the Bengal State Prisoners Regulation) in which the power was vested with the government for detaining any individual on mere grounds of suspicion. Similarly, The Defence of India Act 1939⁶ under Rule 26⁷ the power was vested with the government that if any person which seems to be threat for safety of the country⁸ as well as it can be threat for defence that person can be detained under defence act.

After independence when India enacted and adopted the Constitution of India in the year 1950 the framers of the constitution thought that constitutional recognition to preventive detention laws and thought fit to incorporate the preventive detention laws in the Fundamental Rights chapter to prevent the society from wrongdoers as well as safeguarding against the misuse of powers of preventive detention. So far as Article 22⁹ is concerned that

⁵ <https://www.latestlaws.com/bare-acts/state-acts-rules/punjab-state-laws/bengal-state-prisoners-regulation-1818/>

⁶ http://legislative.gov.in/sites/default/files/legislative_references/1939.pdf

⁷ <https://www.iwm.org.uk/collections/item/object/1500109747>

⁸ Faizur Rahman, “Preventive Detention an Anachronism”, The Hindu, Sep 07’2004, New Delhi

⁹ <http://legislative.gov.in/sites/default/files/COI-updated.pdf>



it is not a Fundamental Rights but it is incorporated to prevent the crime again and again and which will be in the interest of the society. That Shri Sardar Vallabhbhai Patel in the year 1950 introduced Prevention Detention Act before parliament of India, and strongly in the opinion that it is required to introduce such Bill.¹⁰

A politician A.K. Gopalan was charged under the Preventive Detention Act¹¹, it was the case of A.K. Gopalan that this law violates Article 19(1) of the fundamental rights provided under the constitution but the apex court of India was not convinced with this argument and held that the fundamental rights guaranteed under Part III of Constitution of India must be read disjunctively.

The basic principal for Preventive detention as envisaged in Article 22 of Indian Constitution are, Security of state, maintenance of public order, maintenance of supplies and essential services and Defense, foreign affairs or security of India.

A person may be detained without trial only on any or some of the above grounds. A detainee under preventive detention can have no right of personal liberty guaranteed by Article 19 or Article 21

Apex of Court of India in the case of Ankul Chandra Pradhan v. Union of India¹², held that the purpose of detention is to restrict the individuals from committing such crime again and again which is contrary to the law.. In the subsequent judgement of Ahmed Noor Mohmad Bhatti v. State of Gujarat¹³, the Hon'ble Supreme Court dealt with the constitutional validity of Section 151 of Criminal Procedure Code, 1973, which has been upheld by the Hon'ble Supreme Court. Section 151 of CrPC gives power to Police to arrest and detain any individual on mere suspicion without warrant to prevent him from committing any cognizable offence. In the case of ADM Jabalpur case¹⁴ the constitutional validity of the MISA Act¹⁵ was challenged before the Hon'ble Supreme Court of India whereby the court held the Act was Constitutional.

Another Act namely "The National Security Act, 1980"¹⁶ was being misused by the government for preventive detention, the said act has not defined the "public order" and "state security" which were the grounds of detention under preventive detention laws.

¹⁰ <http://egyankosh.ac.in/bitstream/123456789/39085/1/Unit-1.pdf>

¹¹ PREVENTIVE DETENTION ACT, 1950, 25th February, 1950

¹² AIR 1997 SC2814

¹³ 2005 (3) SCC 647

¹⁴ Additional District Magistrate, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521

¹⁵ Maintenance of Internal Security Act, 1971

¹⁶ http://legislative.gov.in/sites/default/files/A1980-65_0.pdf



There were various legislations enacted in India by the parliament like the Maintenance of Internal Security Act (MISA)¹⁷ was enacted in 1971, Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) in 1974¹⁸, Smugglers and Foreign Exchange Manipulators Act (SAFEMA) in 1976, the Terrorism and Disruptive Activities (Prevention) Act (TADA) in 1985, National Security Act (NSA) 1980¹⁹, the Prevention of Black-marketing and Maintenance of Essential Commodities Act 1980, Prevention of Terrorism Act (POTA) 2002. But Prevention of Terrorism Act (POTA) 2002 was subsequently repealed on 21.09.2004. Now, preventive detention in India is governed by Unlawful Activities (Prevention) Act with amendments made in 2008 and 2019²⁰.

“Confinement imposed generally on a defendant in criminal case who has threatened to violate the law while awaiting trial or disposition or of a mentally ill person who may harm himself or others” – Black’s Law Dictionary.

The Apex Court of India in Ahmed Noormohmad Bhatti V. State of Gujarat²¹, held that merely on the ground that the power under section 151 of Criminal Procedure Code 1973 of the police cannot be unreasonable merely on the ground that police authorities might misuse such power of arrest and detention.

That under Article 22 any person who has been detained under Preventive detention laws can make representation to the advisory board and the advisory board shall be consisting of person who are or have been or are qualified to be appointed as judge of High Court, and the advisory board will review whether the detention is justified or not. And if the advisory board is of the opinion that the detention is required of the individual then the government will fix the period of detention vice-versa if the advisory board is of opinion that the detention is not proper then the detenu will be released forthwith.

That in the matters of Sambhu Nath Sarkar V. State of West Bengal²², vagueness of the grounds of detention under the Maintenance of the Internal Securities Act, 1971 which envisaged five grounds for preventive detention which may lead to a detention period of 21 months without any reference to advisory board which was held unconstitutional and further the apex court held that Section 17A of the Maintenance of the Internal Securities Act, 1971

¹⁷ https://www.indiacode.nic.in/bitstream/123456789/11097/1/maintenance_of_internal.pdf

¹⁸ <https://dor.gov.in/sites/default/files/Conservation%20of%20Foreign%20Exchange%20and%20Prevention%20of%20Smuggling%20Activities%20Act%201974.pdf>

¹⁹ https://www.indiacode.nic.in/handle/123456789/10850?view_type=search&sam_handle=123456789/2505

²⁰ https://www.indiacode.nic.in/handle/123456789/1470?view_type=browse&sam_handle=123456789/1362

²¹ 2005 (3) SCC 647

²² (1973) 1 SCC 856



is not satisfying the requirement laid down in Clause 7(a) of the Article 22 of the constitution of India.

In the case of A K Gopalan Vs. State of Madras²³, Mr. Gopalan filed a writ of Habeas Corpus under Article 32 of the constitution against his detention in Madras Jail. He challenged his detention mainly on the ground that the detaining authority did not disclose the grounds for detention which is violative of Art 14, 19, 21 and 22 of the Constitution of India. The issue was whether Preventive Detention Act 1950 ultra vires Fundamental Rights under Constitution. It was held that the Preventive Detention act was intra vires the Constitution of India with the exception of Section 14 which is illegal and ultra vires. It was further held that Article 21 is applicable to preventive detention and Preventive Detention Act 1950 permits detention beyond a period of three months and excludes the necessity of consulting an advisory board. It is not obligatory on the Parliament to prescribe any maximum period.

In the case of Kharak Singh V. State of UP²⁴, the petitioner has challenged that although he was released in the case of Dacoity but he was under surveillance under regulation 236 of the UP Police Regulation and was also challenged that personal liberty was not only limited to bodily restraint or enforcement. The Apex court held that Regulation 236(b) which authorises “Domiciliary visits” is struck down as unconstitutional. an unauthorised intrusion into a person’s home and disturbance caused to him thereby violated his right to personal liberty enshrined in Article 21.

The Supreme Court’s role of explaining the constitutionality of preventive detention has been enormous and positive. The use of preventive measures from being victimised with unlawful use of preventive detention has been safeguarded massively by Writ Habeas Corpus. Double Jeopardy too stands consistent from Petitioner’s defence point.

Habeas Corpus – Article 32 and 226 empowers the Supreme Court and High Court respectively to issue writs. Habeas Corpus which means “to produce the corpus”. In the Habeas Corpus writ petition any person can file the writ even if the person who is filing the Writ Petition is not the relative of the person detained, this writ petition can be filed against state and also against an individual person who has detained the person for which the Habeas Corpus is filed. The writ has been described as “a great Constitutional privilege of the Citizen” or the first security of civil liberty” Deepak Baja V. State of Maharashtra²⁵.

²³ AIR 1950 SC 27

²⁴ AIR 1963 SC 1295

²⁵ AIR 2009 SC 628



In the case of State of Tamilnadu, The Secretary to Government, Public (Law and Order-F) and another V. Nabila & others²⁶, the Hon'ble Supreme Court has set aside the High Court's order quashing of detention order and the Hon'ble Supreme Court observed that the detained person was in custody since Sept 2012 and thereafter in Dec. 2021 the detention order was passed and in the month of April 2013 high Court has quashed the same. But in the meantime a long time was already passed. And further the apex court observed that even after setting aside the order passed by the High Court, the detained person shall not be arrested to serve the remaining period of detention as the detention period has already been elapsed in the April 2014.

In a recent case²⁷ the Hon'ble Supreme Court has held that in a question which was revolving around Section 3(2) of the Telangana Prevention of Dangerous Activities Act, 1986²⁸ which started a wider discussion on the true import of "public order" and the Hon'ble Supreme Court held that a possible apprehension of breach of law and order cannot be a ground to move under a preventive detention statute.

CONCLUSION:

That in India various legislation has been enacted to prevent crime again and again for which various preventive detention laws. But at the same time the constitutional courts are vested with the powers to see whether the detention is legal or not. Sometimes police authorities are misusing these laws by illegally detaining the individual under these laws. And sometimes even the legislatures enact certain provisions of laws which is violative of fundamental rights and unconstitutional. The constitutional courts are meant to check the balance between the personal liberty of a citizen guaranteed under Article 21 of the Constitution of India with law and order in the society. The Constitutional Courts have to see whether the detention is justified or not, whether the grounds for detention are tenable or not and also whether, the disclosure of the fact which authority considered to be against public interest to be disclosed is justified or not.

The laws of preventive detention in USA emerged in a different direction wherein after the 9/11 attack on world trade centre. The concept of the preventive detention laws was evolved in the American laws by the legislatures was to restrict/prevent grave harm to the public at

²⁶ 2015 (12) SCC 127

²⁷ Banka Sneha Sheela v. State of Telangana, 2021 SCC OnLine SC 530

²⁸ Telangana Prevention of Dangerous Activities of Boot-leggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders Land-Grabbers, Spurious Seed Offenders, Insecticide Offenders, Fertiliser Offenders, Food Adulteration Offenders, Fake Document Offenders, Scheduled Commodities Offenders, Forest Offenders, Gaming Offenders, Sexual Offenders, Explosive Substances Offenders, Arms Offenders, Cyber Crime Offenders and White Collar or Financial Offenders Act, 1986



large. The preventive detentions laws were enforced to continue detention of the wrongdoers who are threat to society and security of the state but limited to those who are in position to harm. Initially, in America there was a restriction on the procedure in the doctrine of Due Process of Law, but thereafter the scope of the doctrine of Due Process of Law was elaborated on the activity which was controlled by the government therein.

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