PREVENTIVE DETENTION: AN EVIL OF ARTICLE 22

Harshit Sharma¹

ABSTRACT

Preventive Detention laws are repugnant to any democracy and is not found to exist in democratic countries of the world. It is unknown to America, it is resorted only during war time in England but nowhere in the world has this formed an integral part of the Constitution, as in the case of India. The personal liberty of the individual is guaranteed to the citizens under Article 21, Part 3 of the Constitution of India and curtailed to considerable limits in the sub-clauses of the very next Article i.e. Article 22 of the Constitution of India. It is the time that the Parliament must analyse the validity of these laws on the anvil of Constitutionality and make necessary amendments to its provisions to safeguard the liberty of the individual from being subjected to the interests of the State.

Keywords: Article 21; Constitution of India; Preventive Detention; Democracy

¹ 3rd Year BBA LLB Student, ITM University, Raipur
INTRODUCTION

Preventive detention, the practice of incarcerating accused individuals before trial on the assumption that their release would not be in the best interest of society—specifically, that they will be likely to commit additional crimes if they were released. Preventive detention is also used when the release of the accused is felt to be detrimental to the state’s ability to carry out its investigation. In common parlance, Preventive Detention means detention of a person without trial and conviction by a Court, but merely on suspicion in the mind of an executive authority. To make it easier to understand, a person can be put in jail/custody for two reasons:

1. One is that he has committed a crime, and
2. Another is that he has potential to commit a crime in future.

The custody arising out of the latter is preventive detention. The Preventive Detention laws are repugnant to modern democratic Constitutions. They are not found in any of the democratic countries except India. These preventive detention law raises substantial questions on the safeguards of citizens as provided by Article 22 and liberty of an individual arrested on a mere suspicion.

METHODOLOGY

The methodology adopted for this legal Research is Doctrinaire. 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.

HISTORICAL BACKGROUND OF PREVENTIVE DETENTION IN INDIA

Pre-Independence (British Regime)

Before independence, the British government took recourse to it to suppress nationalist movements. The first statutes which contained specific provisions for preventive detention were the East India Company Act, 1784 and the East India Company Act, 1793 aimed solely to detain anybody who was regarded as threat to the British Settlement in India.

---

2 Norton Jerry, Preventive Detention, Encyclopaedia Britannica.
Post-Independence

In the normal course of things preventive detention laws should have lapsed after India attained Independence; but the founding fathers of our Constitution decided to retain preventive detention to curb anti-national activities. One of the first Acts of independent India was the Madras Suppression of Disturbances Act (1948) that authorized the use of military violence against the peasants in Telangana. The first Preventive Detention Law passed by the Parliament in 1950 was The Preventive Detention Act, 1950. The Constitutional validity of this act was challenged in the Supreme Court in the A.K. Gopalan’s Case\(^3\) whereby, the Supreme Court held this Act constitutionally valid except some provisions. This Act extended till 31 December 1969, being re-enacted seven times in the process before it expired, to make it valid for 3 more years.

After the expiry of this Act in 1969, the Maintenance of Internal Security Act (MISA) was enacted in 1971, followed by its economic adjunct the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) in 1974 and the Terrorism and Disruptive Activities (Prevention) Act (TADA) in 1985. Though MISA and TADA have been repealed, COFEPOSA continues to be operative along with other similar laws such as the National Security Act (NSA) 1980, the Prevention of Black marketing and Maintenance of Essential Commodities Act 1980 and the draconian Prevention of Terrorism Act (POTA) 2002; not to mention laws with similar provisions enacted by the State governments.

CONSTITUTIONAL PROVISIONS FOR PREVENTIVE DETENTION

At present the provisions pertaining to preventive detention in the Indian Constitution are contained in Article 22\(^4\) and in List I (Entry 9) and List III (Entry 3) of the Seventh Schedule. The first two provisions of the Article 22 are to be applied in cases of general rights of arrested persons. Both these parts provide that the arrested person should be informed about the reasons for arrest as soon as possible, such person will have the right to consult a legal attorney and within 24 hours will have to be produced before a magistrate.

However, part 3 of Article 22 provides that the safeguards and provisions presented in the first two parts of Article 22 are not to apply to people who are arrested under any preventive

---

\(^3\) AIR 1950 SC 27

\(^4\) Protection against arrest and detention in certain cases.
detention laws. This implies that the persons who will be detained under preventive detention will not immediately have the right to know the reasons for the detention (unless decided otherwise), nor will they have the right to have an attorney and nor will they be produced before a magistrate within 24 hours of arrest.

GROUND OF DETENTIONS AND REPRESENTATIONS

Clause (5) of Article 22 gives two rights to the detenu. First, he has the right to be communicated the grounds on which the order of detention has been made against him and that is to be done ‘as soon as may be’. Communicating here means imparting to the detenu sufficient knowledge of all grounds of detention which are in the nature of charges against him.

The other right which the detenu has been given is that he should be afforded the earliest opportunity of making a representation against the order. But without getting sufficient information to make a representation against the order of detention, it is not possible for a detenu to make a representation. In fact, the right will be illusory.

MISUSE OF PREVENTIVE DETENTION LAWS

Preventive detention laws in the country have come to be associated with frequent misuse. Such laws confer extraordinary discretionary powers on the executive to detain persons. In the absence of proper safeguards, preventive detention has been grossly misused, particularly against the Dalits and the minorities. Several States have a law popularly known as the ‘Goondas Act’ aimed at preventing the dangerous activities of specified kinds of offender. The Supreme Court in its order struck down the detention of a man who had allegedly sold spurious chilli seeds in Telangana, holding that the grounds of detention were extraneous to the Act.

Section 3 of NSA gives the Central Government the power to detain any person if the government is 'satisfied' that it is 'necessary' to do so with a view to prevent him from acting in any manner prejudicial to any one or more of the following interests of the State:

(i) Defence of the State
(ii) Relation of the State with foreign power
(iii) Security of the State

5 Surjeet Singh V. Union of India, (1981) 2 SCC 359
(iv) Public order; and
(v) Maintenance of supply of services essential to the community.

Since none of these concepts are capable of being defined with any great degree of certainty and definiteness, the scope of abuse is admittedly colossal.

The Preventive Detention laws are arbitrary in nature to the extent that the provisions under Section 15 of the TADA Act stand in complete contravention to the rule of evidence laid down under Section 26 of the Indian Evidence Act, 1872. While Section 26 of the Evidence Act clearly states that Confession by accused while in custody of police is not to be proved against him, however, the provisions under Section 15 of TADA Act stipulates that certain confessions made to police officers can be taken into consideration as evidence and be proved against him.

In Kashmir the Preventive Detention Laws have been blatantly misused and the arbitrary arrest and detention of those peacefully voicing dissent is continuing in Jammu and Kashmir, India, with the Public Security Act (PSA) increasingly being used to punish those who criticise the government.

Another law which is misused is the COFEPOSA, under which a person found in possession of contraband can be imprisoned without trial and bail for a period of one year despite the possibility that the person may have been duped into carrying the contraband, because, it is often seen that baggage carried by people in good faith on behalf of their friends or relatives contains smuggled goods and they end up in prison under COFEPOSA. Unfortunately, the law does not recognise innocence even in such genuine cases.

**PROCEDURAL LAPSES**

Normally before a preventive detention case is brought before the High Court, a three member Advisory Board headed by a sitting High Court Judge is constituted by the government to examine whether the detention is justified or not. Surprisingly, the proceedings of the Board are confidential except for that part of the report which expresses the opinion of the Board. But what is more appalling is the denial of the detenu's fundamental right to be represented by a professional lawyer before the Board. This is a blatant violation of human rights and goes against Article 22(1) of the Constitution.
It takes up to six months or sometimes even more before a habeas corpus petition is filed and is taken up by the High Court, and till such time the detenu languishes in prison under extremely trying conditions, as per the reports of Prison Statistics in India 2015 it a number of 2,599 inmates including 37 foreigners are detenu.

CONCLUSION

Man was born free and was left free by the Creator in this world. Therefore, right to personal liberty is the birth right of a man and this right should be free from any sort of restraint and coercion. Preventive Detention, as peacetime measure, is in itself an abhorrent power and it is quite unreasonable to resort to such measures for administrative convenience. Preventive Detention as enshrined under Article 22 strikes a devastating blow to personal liberties. It is therefore clear that preventive detention is harmful to a secular democracy like India as it is extremely prejudicial to personal liberty. As the existing laws are more than sufficient to deal with any offence, the government must seriously consider abolishing all preventive detention laws which have consistently exposed not only the shabby investigative skills of the sponsoring authority, but also their illogical and mechanical application by the detaining authority.
REFERENCES

Books:
- Shukla V.N., CONSTITUTION OF INDIA, Eastern Book Company, 10th Edn, 2001

Articles:
- Jaiswal Vijay, PREVENTIVE DETENTION IN THE INDIAN CONSTITUTION, Sept 02 2013, Important India.

Newspapers:
- PREVENTIVE DETENTION AN ANACHRONISM, September 07 2004, The Hindu (Online Edition)

Case Laws:
- Surjeet Singh V. Union of India, (1981) 2 SCC 359

Web links: