PREVENTIVE DETENTION: AN EVIL OF ARTICLE 22

ABSTRACT:

The Defence of **India Act**, 1915, prescribed special procedural rules including Provisions for' **preventive detention**. The Government of **India Act**, 1935 also contained the provisions for **preventive detention**; the **Act** empowered the Federal as well as Provincial Legislatures to enact **laws** providing for **Preventive detention**. Preventive Detention laws are repugnant to any democracy and are not found to exist in democratic countries of the world. Preventive detention laws are unknown to America, they are resorted only during war time in England but nowhere in the whole world has this formed an integral part of the Constitution, as in the case of Constitution of India. The personal liberty of the individuals in India 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 analysis the validity of these laws on the anvil of Constitutionality and make necessary amendments to its provisions to safeguard the liberty of the individuals from being subjected to the interests of the State.

KEYWORDS: The Defence of India Act,1915; Government of India,1935; Article 21; Constitution of India; Preventive Detention; Democracy.

INTRODUCTION:

Measures of preventive detention for certain purposes are expressly authorised by the Constitution of India, subject to certain safeguards. The range of such measures particularly when one takes into account some of the more recent legislation is not confined to national security or the maintenance public order, it extends also to social and economic offences. At present there are three central statutes dealing with Prevention detention-the two directed against economic offenders and the one against others. The Conservation of Foreign Exchange and preventive of Smuggling Activities Act, 1974 is concerned with the detention of a person to prevent him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or to prevent him from engaging in activities relating to smuggling of goods. The Prevention of Black marketing and Maintenance of Supplies of Essential Commodities Act, 1980 is directed against persons committing acts prejudicial to the maintenance of supplies of essential commodities, as defined by the Commodities Act, 1955, to the community. The National Security Act, 1980 covers such persons whose activities are prejudicial to defence of India, foreign relations, public order, and maintenance supplies and services essential to the community (except those commodities which are covered by the PBMSEC Act, 1980). 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[1]. Preventive detention is also

[1] Norton Jerry, Preventive Detention, Encyclopaedia Britannica

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 his 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 analysis 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.

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[2] 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

[2] AIR 1950 SC 27

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 government

CONSTITUTIONAL PROVISIONS FOR PREVENTIVE DETENTION:

At present the provisions pertaining to preventive detention in the Indian Constitution are contained in Article 22[3] 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 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.

Role of Courts in respect of Preventive Detention and personal liberty:

The area of preventive detention is very much administrative-ridden. The law of preventive detention has been so designed as to leave very broad discretion with administrative authorities to order preventive detention of a person, and leave only a narrow margin for judicial review. However, the courts have been conscious of the fact that preventive detention affects one of the most cherished rights of a human being, namely, the freedom of his person and have therefore gradually evolved a few principles to control administrative discretion in the area in order to safeguard the individual's freedom from undue exercise of power.

In the case of Kharak Singh V. State of Uttar Pradesh[4], the court stated that personal liberty was not only limited to bodily restraint or enforcement. Kharak Singh was charged in dacoity case but was released since there was no evidence available against him. However the Police monitored his movements and activities even at night. The court laid down that an unauthorised intrusion into a person's home and disturbance caused to him thereby violated his right to personal liberty enshrined in Article 21.

In Maneka Gandhi V. Union of India the court expressed 'personal liberty' under Article 21 of the widest amplitude. Protection with regard to Article 19 also included unlike in the case of Kharak Singh. 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. In Deepak Baja V. State of Maharashtra[5], Article 32 and 226 empowers the Supreme Court and High Court respectively to issue writs. Habeas Corpus which means "you may have the body" is a writ issued calling upon person by whom another person is detained to bring the Detenu before the Court and to let the court know by what authority he has been detained. The writ of Habeas Corpus is

[3] Protection against arrest and detention in certain cases
[4] AIR 1963, SC 1295
[5] AIR 2009 SC: 628

a device, requiring examination of the question of illegal detention. The writ has been described as "a great Constitutional privilege of the Citizen" or the first security of civil liberty".

In the case of Sunil Batra V. Delhi Administration[6] a post card written by the Detention from jail was converted into a writ petition for Habeas Corpus. The writ would lie if the power of detention has been exercised malafide or for collateral or ulterior purpose – as it was laid down in A.K. Gopalan V. State of Madras. Similarly if the detention is justified under the law, the writ would be refused. In Secretary to Government & others V. Nabila & others, High Court quashed the order of detention mainly on the ground that the detention was in remand in connection with the solitary ground case when there was no material before the detaining authority to show that either the Detenu himself or his relatives are taking steps to file application for bail in solitary ground case. Held the impugned order of the High Court quashing the order of detention on solitary ground case is erroneous and liable to be set aside. The Detenu was taken into custody in Sept 2012 and the order of detention was passed in Dec 2012. The same was quashed by high Court on April 2013. After a long time already expired and period of detention expired in April 2014 even if the impugned order passed by the High Court is set aside, the Detenu cannot and shall not be taken into custody for serving the remaining period of detention. Unless, there still exist materials to the satisfaction of the detaining authority.

GROUNDS 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'. [7] Communicating here means that giving sufficient knowledge to the detenu 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.

[6] AIR 1980 SC: 1579
[7] 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 detention 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[8] a number of 2,599 inmates including 37 foreigners are detention.

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.

[8] National Crime Records Bureau, Ministry of Home Affairs.

SUGGESTION:

On the basis of above study, I would like to propose the following suggestions:

1. The Government should take an initiative to hold awareness programmes through various means of communication like print and electronic media, public meetings and other suitable means, to make people informed about the detention law and the repercussions thereof, so that the people cannot indulge in such activities which may lead them in trouble.
2. The Public Safety Act, 1978 should be amended to accommodate provisions imposing severe punishments on the detaining authority who failed to upheld the safeguards laid down in Art. 22(5) of the Constitution of India.
3. Further, it is suggested that the time for the Advisory Board to submit its report to the Government should be reduced from eight weeks to three weeks so that the cases of detenues would be considered at the earliest and this will prevent the authority from detaining unlawfully persons against whom the Advisory Board finds "no sufficient cause for detention". This will help in the quick disposal of cases, so the ends of justice will be achieved.
4. The maximum period for which a person may be detained should be reduced from twelve months to six months from the date of detention in case of persons acting in any manner prejudicial to the maintenance of public order and from two years to one year in case of person whose activities may be regarded as a threat to the security of State.

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