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Preventive Detention & Its Constitutional Safeguards

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ABSTRACT

The Framers of the Indian Constitution who suffered the most because of Preventive Detention Laws did not hesitate to grant Constitutional sanctity to the Laws of Preventive Detention and that too in Fundamental Rights. Preventive Detention is all about detaining a person on apprehension that he might commit an unlawful act. These provisions came into being so as to prevent people from undermining society's peace and security. The Constitution of India provides for various safeguards for Preventive Detention such as review by an Advisory Board consisting of Judges of High Court, communication of grounds of detention to the detenu and the detenu's right of representation. The authorities have been vested with a lot of power by the Preventive Detention Laws making it a subject to misuse. This article also talks about the post-detention conditions that should be provided to the detenu.

I. INTRODUCTION

Eminent jurist M.C. Setelvad observed that "The builders of the Indian Constitution not only drew largely from the collection of British ideas and institutions which was India's heritage from British rule, but they also took care to maintain continuity with the Governmental system which had grown up under the British. They believed not in severing their links with the past rather in treasuring all that had been useful and to which they had been accustomed. The structure which emerged was, therefore, not only British in its framework but took the form of an alteration with extension of what had previously existed." The laws relating to preventive detention also followed similar trend. Laws authorizing preventive detention existed in British colonial rule in India since 1818. Many members of the freedom movement spent years in jails without ever being tried and convicted.It is exceptional that the framers of the Indian Constitution, who suffered most as a result of the 'Laws of Preventive Detention', did not hesitate to grant constitutional sanctity to the 'Laws of Preventive Detention' and that too in the chapter of the Constitution on Fundamental Rights.

The term "preventive detention" had no authoritative meaning in Indian Law. This term originated in the language used by law lords in England, when describing the essence of

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detention pursuant to Regulation 14-B, Protection of Realm Act, 1914, passed on the outbreak of the First World War, and the same terminology was replicated in conjunction with emergency regulations made during the Second World War. However precious a subject's freedom may be, there may be something for which it can, to some degree, be sacrificed by statute, namely national success in war or the escape from national plundering or enslavement.[2] The word 'preventive' is the antithesis of the word 'punitive'. To quote Lord Finley in ***R. v. Halliday***[3], " *It is not punitive but a precautionary measure*".

II. WHAT IS PREVENTIVE DETENTION?

Preventive detention is defined under Section 151 of The Code of Criminal Procedure. Clause (1) of Section 151 states that Preventive detention is an action taken on grounds of suspicion that the person involved could be carrying out any wrongful act.A police officer can apprehend a person without a Magistrate's orders and without a warrant if he gets any details that a person may commit offence.[4]

Preventive detention differs from the ordinary or punitive detention both in respect of its purpose and its justification. The object of preventive detention is not to punish a man for having done something but intercept him before he does it and to prevent him from doing it. No offence is proved nor any charges formulated.The justification of such detention is suspicion or reasonable probability of impending commission of the pre judicial act and not criminal conviction which can only be warranted by legal evidence.

In the lists of legislative powers allocated between States and the Union,the subject of preventive detention is listed in the Union List[5] as well as in the Concurrent List[6].Both the Centre and the States are free to have their own legislation except, in the event of a conflict, the laws of Centre shall prevail.However the Centre's ambit is larger than that of the States as the Centre can have a preventive detention law for reason connected with defence, foreign affairs and security of India as per Entry 9 of the Union List. In addition to the security of State, the maintenance of public order or of supplies and services essential to the community as per Entry 3 of the Concurrent List.

In ***A K Gopalan v. State of Madras***[7], Justice Patanjali Shastri in explaining the necessity of such a provision said that "*This sinister looking feature so strangely out of place in a*

[2]R v. Haliday, 1917 AC 260, 269
[3] 1917 AC 260, 269
[4]The Code of Criminal Procedure, 1973, (2 of 1974), 2020 edition
[5] Entry 9, List I, Schedule 7
[6] Entry 3, List III, Schedule 7
[7] AIR 1950 SC 27, 1950 SCR

democratic constitution which invests personal liberty with the sacrosanctity of a fundamental right and so incompatible with the promises of its preamble is doubtless designed to prevent the abuse of freedom by anti-social and subversive elements which might imperil the National welfare of the infant republic."

III. NECESSITY OF PROVISIONS RELATED TO PREVENTIVE DETENTION

The aim of the Constitution framers to bring this provision into being was to prevent people from undermining society's peace and stability. People were detained to prevent them from undermining the sanctity of the constitution, endangering the Security of State, disrupting India 's ties with foreign powers or hindering public order.India follows preventive detention even in times of peace, when there is no threat posed to the national security of the state, which is one of the main reasons of imposing and implementing provisions of preventive detention. While, no other civilized nation has this proposition during peacetime.

IV. CONSTITUTIONAL SAFEGUARDS AGAINST PREVENTIVE DETENTION

The Constitution provides safeguards to discourage excessive use of Preventive Detention and to mitigate its harshness by

- At first instance, a person can only be taken to preventive custody for 3 months. If the detention duration is extended beyond 3 months, the case must be referred to an **Advisory Board** composed of individuals with credentials for appointment as high court judges. It is implicit, that the period of detention may be extended beyond 3 months, only upon approval by the Advisory Board.
- The prisoner has the right to know the reasons for his arrest. However, if it is in the public interest to do so, the State can refuse to reveal the reasons for the detention. Needless to say, this power bestowed on the State gives the authorities space for arbitrary action.
- The detention authorities must provide the detained person with the earliest opportunity to appeal against the detention. These protections are intended to mitigate the abuse of preventive detention.

It is because of these protections that preventive detention, which is effectively a denial of liberty, finds a place on the Fundamental Rights list. Criminal aliens from enemy nations don't have these protections.[8]

[8]S. Ishfaq, Preventive Detention, http://www.legalserviceindia.com/legal/article-751-preventive-detention.html

1-Review by advisory board

A detinue under preventive detention is not detained after trial and conviction of an offence by a competent court.To provide safeguard against arbitrary detention clause (4)[9] states that no law providing for preventive detention shall authorize the detention of a person for a longer period than 3 months and less.An advisory board constituted by persons who are or have been or are qualified to be High court judges has reported before the expiration of the set period of three months that there is in its opinion sufficient cause for such detention.If the advisory board reports that the detention is not justified the government is duty bound to revoke the detention order. This was held in ***Shibban Lal Saksena v. State of UP***[10] . If the advisory board reports that the detention is justified then only the detaining authorities determine the period of detention.It is no business of the advisory board to express any opinion as to how much longer than three months the detinue should be kept in detention.[11]

In ***Abdul Latif v. B.K. Jha***[12] it was held that in case the opinion of the board is not obtained within three months of detention, the detention becomes illegal and the detinue is entitled to be released even though the opinion of the board has been obtained within three months of a second order of detention revoking the first on authorizing the continuation of detention on the same ground on which the original detention was made.

2- Grounds of detention and representation

Grounds-The detained person 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 may be as soon as possible. This was held in ***Durga Pada Ghosh v. State of West Bengal***[13]. Communication here means imparting to the detinue sufficient knowledge of all the grounds of detention which are in nature of charges against him. Thus, where the detinue did not know sufficient English to understand the grounds communicated to him,it was held in ***Harkisan v. State of Maharashtra***[14]that requirements laid down in the constitution were not complied with.The grounds for making the order are the reasons on which detaining authority was satisfied that it was necessary to make the order.These grounds therefore must be in existence when the order is made the grounds are conclusions of facts and not a complete detailed recital of all facts.

[9]Indian Const. Art 22, cl (4)
[10] AIR 1954, SC 179
[11]Mahendra P Singh, VN Shukla's Constitution of India 241-256, (Abhinandan Malik, 13th ed, 2019).

[12] 1987 2SCC 22, AIR 1987 SC 725
[13]AIR 1972 SC 2420
[14] AIR 1962 SC 911

There is an obligation on the part of the government to furnish grounds on which the order of detention is based.This constitutional obligation is not discharged if the grounds which are communicated to the detinue are vague. A ground will be vague when it does not enable the detinue to make effective representation against the order of detention.The grounds furnished are vague or not is ultimately a question that has to be determined on a consideration of circumstances in each case as was pointed out by the Supreme court in ***State of Bombay v. Atmaram Sridhar Vaidya[15]:***where it was held that "*the contention that the ground are vague requires some clarification. If the grounds which is supplied is incapable of being understood or defined with sufficient certainty it can be called vague. It is not possible to state affirmatively more on a question of what is vague.It must vary according to the circumstances of each case if on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention it cannot be called vague*."

It was held in ***A K Karmakar v. State of West Bengal[16]*** that the ground supplied to the detinue must not be irrelevant.The grounds are irrelevant if they have no probative force i.e. are extraneous to the scope or purpose of the preventive detention law. Put differently, the grounds must have a rational connection with the object mentioned in the act for which a person may be detained.[17]

Representation-The other right which the detinue has been given in Article 22 (5)[18] is that he should be given the earliest opportunity of making a representation against the order.But without getting sufficient information for representation against the order of detention it is not possible for the detinue to make a representation.Hence, the Supreme Court in ***Shibban Lal Saksena v. State of UP[19]*** has held that the detinue should be furnished with particulars of the grounds of his detention sufficient to enable him to make a representation which on being considered may give him relief.

3-Procedure of advisory board

The observation in ***Francis Coralie Mullin v. UT of Delhi*** that a detinue has the right to consult a legal advisor of his choice.For any purpose including his release from preventive detention has been left open by the court in ***A K Roy v. Union of India[20]*** without

[15] AIR 1951 SC 157, 164
[16] AIR 1972 SC 2259
[17]Mahendra P Singh, VN Shukla's Constitution of India 241-256, (Abhinandan Malik, 13th ed, 2019).
[18]Indian Const. Art 22, cl (5)
[19]AIR 1954 SC 179
[20] 1982 1 SCC 217, AIR 1982 SC 710, 747

confirmation or rejection.But it had been held that if the detaining authority of the government takes the aid of legal practitioner for advice before the advisory board the detinue must be allowed the facility of appearing before the board through a legal practitioner and denial of such facility invalidates detention.[21]

V. POST DETENTION CONDITIONS

Primarily, it is for the legislature and the executive to lay down a detailed code with respect to the treatment of persons under preventive detention.Considering this position in ***A K Roy v. Union of India*** the court has held that it can always examine individual complaints of a treatment and observed that "*we must impress upon the government that the detanus must be afforded for reasonable facilities for an existence consistent with human dignity we see no reason why they should not be permitted to wear their own clothes, eat their own food, have interviews with the members of their family at least once a week and last but not the least have reading and writing material according to their reasonable requirements*".[22]

VI. RECENT CASE

***NuzhatPerween v. State of UP and Anr*[23](Dr. Kafeel Khan's Detention case)**

The Supreme Court ordered the Allahabad High Court to make an expeditious decision on the habeas corpus petition filed by NuzhatPerween for her son, Dr. Kafeel Khan, on August 11, 2020. The petition challenged orders under the National Security Act of 1980 (NSA) that were passed on February 13, 2020 for his preventive detention.Initially filed before the Supreme Court in February itself, the petition was sent to the Allahabad High Court in March, where it was heard multiple times, a Two Judges' Bench passed a judgment on 01.09.2020 declaring the detention order illegal and directing Dr. Khan's immediate release.

The preventive detention of Dr. Khan under the NSA is just the most recent episode of the state machinery depriving him of his personal liberty, only for his release to be ordered by the judiciary. According to the state, what triggered the order on 13.02.2020 was a public speech given to a group of students on 12.12.2019 by Dr. Khan in Aligarh, an incident that was more than two months old.It was stated that the speech incited feelings of communal disharmony and also lent itself to violent protests by groups of students on 13th and 15th December in Aligarh District. The proposal for preventive detention, made on the same date as the order, stated that "*Since the fierce and communal speech given by him has had an adverse and*

[21]Mahendra P Singh, VN Shukla's Constitution of India 241-256, (Abhinandan Malik, 13th ed, 2019).
[22]Mahendra P Singh, VN Shukla's Constitution of India 241-256, (Abhinandan Malik, 13th ed, 2019).
[23][Habeas Corpus WP No. 264 of 2020 (decided on 01.09.2020)]

unfavourable impact on the public order of the District, ***therefore it is very important to keep this person detained in jail to maintain the public order.***"

The habeas corpus petition challenged the order of 13.02.2020 on three grounds: (i) there was no material for ordering preventive detention and it was intended to subvert the judicial process; (ii) the detenue was not supplied with all material thus denied a right to file an effective representation against his detention, and; (iii) the concerned government had unduly delayed the consideration of his representation against detention.

VII. CONCLUSION

As a provision, preventive detention has always lacked the feature of 'check and balance' over its establishment and its operation. This clause has never coincided with any international human rights legislation and appears to contradict them in some way or other till date. A major problem of preventive detention is that it is a very vague law, without any mention of requirements and restrictions, which opens it to a broader sense of interpretation, thus conferring considerable power in the hands of the authority.

The remarks by Alladi Krishnaswamy Ayyar, a respected jurist, are typical.He defined preventive detention as a necessary evil because, in his opinion, people were detained to undermine the sanctity of the Constitution, the protection of the State and even the freedom of individuals. What the Constitution makers sought to do was not to ban preventive detention, but to introduce protections against its misuse, into the Constitution by restricting the duration, granting the advisory board appropriate powers to review arrest warrants, etc. They failed to recognize the following. It was left to the Parliament to prescribe the time and even that limit was flouted in spirit by the method, often adopted, of issuing a fresh detention, order a few hours after release of the detained and the advisory boards had no power to go into the merits of the detention.

Hence, this provision in our constitution requires effective and deep rooted study and survey of the root cause and accordingly framing of an appropriate law which also provide for efficient and necessary check and limitation mechanisms to prevent its unjust and unconstitutional use in any scenario.

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