

Pertinence of Preventive Detention with Changing Dynamics

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Abstract

Preventive Detention is a tool, although a rare one, that was formed to benefit society by removing people who seemed to be a danger to society and is kind of based on the saying, "Prevention is better than cure." With our research paper, we have tried to analyze if the law is trying to protect or cause more violations of the rights of people and the protection provided in Article 22. The Constitution framers, while drafting the Constitution, had in mind national safety, but it has resulted in the debate over whether it is necessary to create national security laws in India and how seriously those laws may affect human rights and civil liberties, which has heated up in the wake of the September 11, 2001 attacks in New York and Washington, D.C., as well as the attack on the Indian Parliament on December 13, 2001.

Keywords: Preventive detention, rights of people, Article 22, national security laws, human rights and civil liberties

INTRODUCTION

Preventive detention means the detention of a person without trial or conviction by a court. The government has long emphasized dealing with criminals who are deemed dangerous. For protecting society from harm from certain extreme dangers, this is used as a medium. Although sentencing is the typical tool for safeguarding society against a convicted criminal, governments have, however, occasionally also experimented with unique preventative detention regimes that are either activated in place of or after the completion of a term. It all began when the Indian Constitution was written with the intention of incorporating a chapter on rights from the very beginning. The members of the Constituent Assembly, who were active in the independence movement themselves, were aware of the issues that would develop if rights were left up to the government's will. For instance, the British enacted a number of "preventive detention" regulations that are still in effect today. Even though there were many instances where preventive detention was used arbitrarily, the British defended it on the grounds that there were grave threats to public order and national security. The least draconian method of attaining the government's public safety objectives must be detention for preventive reasons, and even then, it may only be used if a significant probability of serious harm is established using the best available scientific evidence.

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POST-COLONIAL CONSTITUTIONAL VALIDITY OF PREVENTIVE DETENTION LAWS IN INDIA

In South Asia, regulations governing preventive detention have a long and contentious political history. Preventive detention was a widespread practice in India's colonial legal system. Detainees were denied the opportunity to petition courts for

writs of habeas corpus during the nineteenth century due to a complex web of legislation that allowed for detention and imprisonment without charge in certain circumstances [1].

England passed emergency legislation allowing for preventative imprisonment during both World Wars I and II [2]. “In the interest of public safety and security, the government may hold somebody without a hearing under the Defence of the Realm Act of 1946 and the Emergency Powers (Defence) Act of 1947 [3]. These laws became invalid with the conclusion of the relevant wars. Similar safeguards were included in India’s Defence of India Act for the protection of British India.

Although this Act was repealed at the end of World War I, preventive detention legislation such as the Rowlatt Act 49 and the Bengal Criminal Law Amendment Ordinance quickly took its place. Following the start of World War II, the Defence of India Act and the Defence of India Rules were adopted. These clauses gave the government the right to detain anyone deemed to be a danger to the community’s supply and services, public order, or overall national security [4].

The “class or classes of instances” in which a person may be held for more than three months without the Advisory Board’s consent may be specified by law by the Parliament. The Constitution also grants Parliament the power to specify the format for the meetings of the Advisory Board [5].

Despite the fact that Article 22(3) to (7) establishes the minimal procedural protections for all preventive detention regulations, it is advisable to interpret these clauses as limitations on fundamental rights. The progressive protections granted by Clauses (1) and (2) of Article 22 do not apply to anyone detained or arrested under a law that mandates preventive detention, according to Clause (3) of the same Article. Under Clause (1) of Article 22, everyone detained has the right to consult with and be represented by a lawyer of their choice [6].

PREVENTIVE DETENTION AND HUMAN RIGHTS

Preventive detention is included in Articles 22(4) to (7) of the Indian Constitution. The first instance of preventive detention involved the case of Gopalan [7]. According to Article 22 clause, unless an advisory committee reports that there is sufficient justification for such detention, no law authorizing preventive detention may keep a person in custody for more than three months. Also included in Clause is the right to communicate the reason for the detention as soon as practicable.

In every case since *Tarapada De V. State of West Bengal* [8], up till *P.U. Abdul Rahiman V.*

U.O. I., [9] the court has ruled that failing to disclose the reason for the arrest violates the privilege granted by Article 22(5).

Not only must the reason for the arrest be disclosed to the accused but it must also be in a language that the detainee can understand in order for him to be able to make a meaningful and persuasive argument. If the reason is provided in a language that the detainee cannot understand, the intended outcome will not be achieved. The detainee has the right to argue that a person’s personal liberty is in jeopardy under Article 22(5). Giving the detenu a chance to make a representation has been emphasized. It not only gives individuals the opportunity to make a representation, but that representation also needs to be taken into consideration and dealt with as quickly as possible to avoid losing its significance.

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The Supreme Court's ruling in *Kartar Singh v. State of Punjab*, [10] included a wide range of topics, including preventive detention and other issues related to it. It highlighted the idea that laws should afford someone of average intelligence a chance to know what is unlawful so that he can act accordingly. The Court also established some rules for confessions. It further emphasized that designated Courts should quickly resolve any matters that are pending in accordance with "speedy trial," which is a crucial aspect of fundamental rights.

In *Sanjay Dutt v. CBI Bombay (I)* [11], the Division Bench held that the provision to Section 167 (2) of the Code r/w Section 20 (4) (f) of TADA creates an unassailable right in an accused person on account of the "default" by the Investigating Agency in the completion of investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. Another duty imposed by the Court is to make the accused aware of his entitlement to be freed on bail so that he can take the necessary action in that regard.

If the logic and reasoning behind the observation in *Hitendra Vashu Thakur* [12] are expanded, it could imply that every time a magisterial order authorizes the detention of an accused person in custody for a period longer than 15 days, the accused person must be notified and given a chance to be heard. A similar path might neither be necessary nor warranted. The perspective adopted likely needs to be reconsidered.

Preventive Detention is typically based on alleged and vague prospective suspicion rather than, as for detentions in the criminal judicial system, accusations resting on a specific criminal offence retrospectively proved. The suspicions which result in the issuing of detention orders originate in secret and intimately political decision-making processes. Detainees are seemingly often suspected criminals and political dissidents, rather than those who pose a genuine threat to public order or national security. Only few details of the grounds for detention are likely to be disclosed to the detainee. Nor is it intended that detentions should be reviewed by genuinely independent administrative or judicial agencies before whom a defense can be offered with a real hope of release from potentially indeterminate confinement. As Stavros states, "there exists a point in time beyond which the administrative deprivation of liberty sheds the character of preventive measure and is transformed into a sanction imposed without due process."

GROUND TO JUSTIFY PREVENTIVE DETENTION

Indian law permits the imprisonment of someone even when no illegality is allegedly present to stop conduct endangering "public order" and "national security." However, neither the Constitution nor the legislation governing preventive detention makes an attempt to define either the range of behaviors considered a threat to "public order" and "national security" or the range of behaviors (or associations) supporting the assumption that a person is likely to commit such behaviors. Of course, the absence of any explicit restrictions prevents people from changing their conduct to meet the standards set by the ruling system. This flaw presents a crucial obstacle to the legitimacy of preventive detention.

Courts have carefully examined executive claims of dangers to "public order" or "national security" as justification for specific detention orders in light of this challenge. Unfortunately, courts have not been able to develop a coherent body of law giving these ideas some real substance. The Supreme Court attempted to make a distinction between the ideas of "security of state," "public order," and "law and order" in *Ram Manohar Lohia v. State of Bihar*. Justice *Hidayatullah* [13] emphasized that only the most serious of offences might justify preventive detention in an astonishingly frequently repeated passage:

"One has to imagine three concentric circles. Law and order represent the largest circle within which is the next circle representing public order and the smallest circle represents security of state. It is then easy to see that an act may affect law and order but not public order just as an act might affect public order but not security of state."

The Court came to the conclusion that conduct affecting merely “law and order” without falling under either of the other two categories could not serve as a sufficient basis for a detention order [14]. Aside from its heuristic advantages, this analysis, of course, offers little clarification of the disputed ideas since it simply hints that courts may look into the executive's judgments of security dangers.

These imprecise statements reveal the Court's reluctance to develop specific, enforceable norms. In reality, the Court underlines numerous times how situation-specific and case-by-case decisions regarding “public order” must be made. One analyst came to the conclusion that these developments “do not accept of any exact definition” for the terms “law and order” and “public order” under Indian preventive detention statutes. Even after so many years, it is impossible to predict with precision whatever illegal action will fall under the purview of the term “public order” because the courts have provided such different interpretations.

PREVENTION DETENTION AND NATIONAL SECURITY ACT

Executive officials may order detention of a person “if satisfied with respect to any person that such an order is necessary,” according to the NSA. It is obvious that this clause permits preventive detention if—and only if—the detaining authority is convinced that the detention is required to stop threats to the rule of law or the nation's security. Additionally, the “subjective satisfaction” of the detaining authority is the statutory requirement for the exercise of this power, according to the prevailing legal theory.

In *Anil Dey v. State of West Bengal* [15], the Supreme Court ruled that the courts “cannot substitute [their] own opinion in place of the imprisoning authority by applying an objective test to decide the necessity of detention for a specified purpose” However, the courts do review whether the satisfaction is “honest and real, a necessary condition for the satisfaction to be considered objectively sufficient.” The courts compel the executive branch to “apply his intellect” to the decision to impose a detention order.

An essential revision to the NSA restricted the reach of the “‘nonapplication of mind’ criteria by instructing courts to view the identified ‘grounds of detention’ as separable.” Therefore, a detaining order must be upheld if at least one valid reason is stated. The amendment was enacted in reaction to a number of court decisions in which detention orders were vacated because one or more of the listed reasons for detention were ambiguous, non-existent, irrelevant, or invalid. Such detention orders were deemed unconstitutional since the subjective satisfaction of the detaining authority was based on the stated grounds in the order. Prior to the modification, courts refrained to speculate as to whether the detention decision was the consequence of the combined impact of the stated causes or whether each listed ground was considered to be an independently plausible basis for detention. The revision exempts judgments from review on this basis, leaving no opportunity for judicial discretion on the matter. This inability to examine detaining orders on a case-by-case basis has resulted in countless perplexing decisions.

In short, it is impossible to precisely identify the nature and scope of judicial review in preventive detention situations. In the majority of instances, however, the courts conduct a thorough review to determine if detention orders comply with basic constitutional and legislative criteria. As was previously mentioned, India's constitution expressly enables preventative detention and provides the complete range of basic rights applicable in such circumstances. Given the substantive and procedural obligations of the constitutional and statutory law, Indian courts have limited ability to prohibit preventative detention in a meaningful manner.

COMPARISON WITH INTERNATIONAL LEGISLATIONS

Preventive detention as per the United States is detention of any person by the state or federal authorities that:

- Is not carried out after being found guilty of a crime and
- Done to stop some future harm. Preventive detention may take either inside or outside of the criminal justice system, and the harms it aims to prevent include harm to people, the state, or

even the detained person. To put it another way, we classify as preventative detention any circumstance in which government imprisons an innocent person (or someone who has served their time for a crime) in order to protect a person or a vital interest of the government [16].

It is common practice for the federal government and all 50 states to deploy a variety of statutory preventative detention regimes, many of which are not subject to significant societal or legal debate. The several laws and policies that permit the preventative detention of people who have not been found guilty of a crime in order to stop harms they might do vary greatly in their objectives and scope:

- The Constitution's Suspension Clause expressly contemplates that Congress may suspend regular constitutional presumptions limiting detention in times of crisis; this power has been used numerous times in American history.
- Wartime detention powers cover not only prisoners of war and unlawful enemy combatants but also the citizens of nations with which the United States is engaged in armed conflict.
- Pretrial custody and the incarceration of important witnesses who are not even charged with a crime fall under the purview of detention agencies related to the criminal justice system; The immigration legislation allows for the detention of foreign nationals who are expulsion and refusal of entrance to "arriving aliens" in the United States;
- Seriously mentally ill people may be detained under state and federal legislation, when they become a threat to themselves or the general population, as well as sex offenders' incarceration even after they have served out their prison terms;
- Federal and state laws grant extensive authority to quarantine individuals with contagious illnesses; and
- Localities and states have a range of protective custody authority, approving non-criminal incarceration, frequently for their own benefit protection, including for drug users, alcoholics, and drunk addicts. the homeless, and pregnant drug users.

Preventive detention capabilities in America did not develop as unpleasant, and consequently constrained, side roads branching off a major road of criminal justice detentions. Instead, a lot of them date back to the Bill of Rights and have coexisted with it for the whole history of the nation. Many have become increasingly restrictive over time in response to abuses, which include both personal injustices and prejudice against socially marginalized groups, as well as worries that the relevant authorities permit more incarceration than is actually necessary. For instance, quarantine and detention for mental illness are much less common today in America than they were decades ago. However, there has been a large (and contentious) increase in the imprisonment of material witnesses since September 11, as well as a rise in the detention of sexual predators and immigrants.

After considering both the countries stand on preventive detention, it can be seen that India lays more emphasis on "Public Order"; where public Order can be adversely affected. Whereas the United States without mentioning the "Public Order" directly states what acts come under preventive detention. The United States directly addresses the class of people that can be held under preventive detention like; seriously mentally ill, drug addicts, and so forth. And in case of India, it states community or public in large, India having the provision for psychological help to prisoners under National Human Rights Commission. Which can be considered to be as more lenient as compared with the United States. Preventive detention actually has a significantly more mundane role in American law. The courts uphold preventive detention authorities when judges determine that the statutes or their application only permit as much detention as is actually required to address a serious public danger. Congress and state legislatures create preventive detention authorities without apology where they deem them necessary. While Indian Constitution itself has Article 22 incorporated in it, so it's stand is pretty clear. The Constitution of India, was written with the intention of having a chapter on rights have always been protected by the constitution. The Assembly members, who were active in the freedom movement themselves, were recognizing the issues that would occur if "rights" were left up to the governmental body [17]. And India being the only democratic country in the world to have an article for preventive

detention and the time for preventive detention being 3 months, which is also not clear in the United States. However, the “class or classes of instances” in which a person may be held for more than three months without the Advisory Board’s consent may be specified by law by the Parliament. We contend that the scope of preventative detention powers actually expands and reduces in accordance with the actual and perceived need for those powers. And throughout time, the majority of legislative and judicial reforms and refinements of these legislation have endeavored to create categorization procedures to more clearly concentrate detention powers on those circumstances in which detention is the sole option for preventing serious public or private harm.

RECOMMENDATIONS

If attorneys are not permitted to appear before the Review Board, how can a layperson make his case to the Board without the assistance of counsel? The Hon. Apex Court has already ruled that administrative officials cannot assert total immunity when it comes to defending persons’ fundamental rights, including their ability to move around and pursue a normal life and liberty.

The required changes should be made in accordance with The National Commission’s suggestions for assessing the functioning of the constitution in order to include all currently serving High Court Judges as the Chairman and Members of the Advisory Board.

The confinement should not, however, last longer than 6 months. High standards of proof are required for preventative detention because legislation must balance human rights with national security to protect public order, among other things. Although it is inadequate to cover detainees’ mental agony, harassment, and reputational damage, the State should make provisions for substantial monetary compensation.

Habeas corpus or its equivalent should be available to all detainees so that they can contact the courts quickly. Independent Courts should use the objective tests for considering detentions, with the onus of proof squarely on the executive branch to support its detention judgement.

CONCLUSION

This ought to be declared in accordance with rules from around the world and ought to be reviewed by domestic legislative and judicial bodies. Except in strict agreement with and necessity to satisfy legal procedure requirements while taking into account the gravity of the offence and the absence of unfairness, antisocial activity cannot ever provide a sufficient justification for violating citizens’ personal liberties. Therefore, the court must safeguard individuals from the state’s egregious and abusive use of power to preserve human dignity and the fabric of society. The judiciary is responsible for defending individual rights and liberty from onerous state laws.

The analysis of constitutional validity and comparison with international legislation in the context of preventive detention reveals the complex nature of this issue. It emphasizes the need for careful constitutional scrutiny, the incorporation of human rights principles, and the consideration of international best practices. By approaching preventive detention with a commitment to protecting individual liberties and upholding the rule of law, societies can strive to strike an appropriate balance between security imperatives and human rights concerns.

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