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A CRITICAL STUDY OF PREVENTIVE DETENTION LAWS IN INDIA

***BHAKTI PAREKH**

INTRODUCTION

Preventive detention laws have been in existence in India since a very long time. They have existed even before India gained independence. Detention basically means the action of detaining someone in official custody. There are two types of detentions which exist, punitive detention and preventive detention. Punitive detention in when after committing a crime, the person is tried an if found guilty is detained. This kind of detention is called punitive detention where the person or criminal is being punished for committing a crime. Preventive detention on the other hand is when a person who is suspected to commit a crime in the future is detained even before he or she does something. Preventive detention is basically done to prevent or stop a person from committing a crime in the future. There is no authoritative definition of the term 'preventive detention' in India. Thus, through this paper, we will try to define and understand what the term 'preventive detention' means and how it developed in India along with how it came in contradiction and controversy with the Constitution of India and its philosophy.

RESEARCH OBJECTIVES

The objective of doing this research is to have a clear understanding of the preventive detention laws in India. For that, the objectives are as follows,

- To have a clear understanding of the meaning of Preventive detention
- To understand the history of how these laws developed
- To understand the need for such laws
- To have a clear understanding of what the judiciary thinks of these laws through relevant case laws.

RESEARCH METHODOLOGY

The research methodology used for this research is the doctrinal as well as the deductive method. The present laws in existence are going to be examined with the help of judicial pronouncements as well as legislations that exist.

RESEARCH QUESTIONS

The research paper aims to answer the following research questions:

- What does preventive detention mean? How is it different from punitive detention? What is the need for laws regarding preventive detention?
- How did the preventive detention laws emerge and come into existence in India?
- How does the judiciary view preventive detention laws through various judicial pronouncements?

LITERATURE REVIEW

There is a lot of literature available on this subject. The main literature has been taken from the Supreme Court judgements. Various judgements have been read and analysed. There are judgements which try to define preventive detention laws by stating their function and by differentiating preventive detention from punitive detention. There is sadly no authoritative definition of the term "Preventive Detention". The expression can be traced back to England where the Justices and judges used it to talk about detention done during war times. Constitutional Assembly debates also show that preventive detention laws have been discussed at length and their necessity is felt and agreed to though reluctantly. There are certain articles in the Constitution of India that also deal with preventive detention laws. The 14th Law Commission Report that deals with Reforms of Judicial Administration also deals with these laws.

CHAPTER 1: UNDERSTANDING PREVENTIVE DETENTION

What does preventive detention mean? How is it different from punitive detention? What is the need for laws regarding preventive detention?

Detention basically means the action of detaining someone or the state of being detained in official custody. Now, detention can be of two types; preventive and punitive. Punitive detention is when the state detains a criminal or accused who has been proven guilty in custody as punishment. Preventive detention is holding an accused or a suspect or a person in custody to prevent that person from committing a crime, or to prevent further harm or risk that is imposed on the accused. A constitutional bench in the case of Haradhan Saha articulated the concept of preventive detention in contradistinction to punitive action in the following words, "The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis of detention is the satisfaction of the executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. A criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. One is a punitive action and the other is a preventive act. In one case a person is punished on proof of his guilt and the standard is proof beyond reasonable doubt whereas in preventive detention a man is prevented from doing something."[1] The court further in this case drew a distinction between the power of preventive detention and punitive detention stating, "The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution in no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution."[2] In the case of Pushpa Devei M. Jatia vs. M.L. Wadhawan, (1987) 3 SCC 367, the court stated as follows, "Though the element of detention is a common factor in cases of preventive detention as well as punitive detention, there is a vast difference in their objective. Punitive detention follows a sentence awarded to

[1] (1975) 3 SCC 198
[2] Ibid

an offender for proven charges in a trial by way of punishment and has in it the elements of retribution, deterrence, correctional factor and institutional treatment in varying degrees. On the contrary preventive detention is an extraordinary measure resorted to by the State on account of compulsive factors pertaining to maintenance of public order, safety of public life and the welfare of the economy of the country."[3] As in the case of Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608, the court differentiated between punitive and preventive detention by stating, "There is a vital distinction between these two kinds of detention. In case of 'punitive detention', the person concerned is detained by way of punishment after he is found guilty of wrongdoing as a result of a trial where he has the fullest opportunity to defend himself, while 'preventive detention' is not by way of punishment at all, but it is intended to pre-empt a person from indulging in any conduct injurious to the society. In case of preventive detention, he is detained merely on suspicion with a view of preventing him from doing harm in the future and the opportunity that he has for contesting the action of the executive is very limited. Having regard to this distinctive character of preventive detention, the restrictions placed on a person preventively detained must, consistently with the effectiveness of detention, be minimal."[4]

In Sunil Fulchand Shah v Union of India (2000) 3 SCC 409, the court stated, "Since, preventive detention is a form of precautionary State action, intended to prevent a person from indulging in a conduct, injurious to the society or the security of the State or public order, it has been recognised as 'a necessary evil' and is tolerated in a free society in the larger interest of security of the State and maintenance of public order. However, the power being drastic, the restrictions placed on a person to preventively detain must, consistently with the effectiveness of detention, be minimal. In a democracy governed by rule of law, the drastic power to detain a person without trial for security of the State and/or maintenance of public order, must be strictly construed. This Court, as the guardian of the Constitution, though not the only guardian, has zealously attempted to preserve and protect the liberty of a citizen. However, where the individual liberty comes into conflict with an interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation."[5]

[3] Pushpa Devei M. Jatia vs. M.L. Wadhawan, (1987) 3 SCC 367
[4] Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608
[5] Sunil Fulchand Shah v Union of India (2000) 3 SCC 409

Thus, as one can see, preventive detention is vastly different from punitive detention and it is a necessary evil for the security of the State. Punitive detention is where the accused is convicted and is serving his punishment. Preventive detention basically allows the State to detain an accused or a suspect so as to prevent him from doing something that he might have done and which may have caused a reasonable threat or harm to the public order or security of the State.

CHAPTER 2: HISTORY OF PREVENTIVE DETENTION LAWS IN INDIA

How did preventive detention laws emerge and come into existence in India?

Preventive detention laws in India date back to when India was a British colony and India was ruled by the British. Laws authorising preventive detention thus existed since 1818. The powers conferred to the executive to arrest a person merely on the basis of suspicion can be seen in laws like the Bengal Regulation III of 1818 (the Bengal State Prisoners Regulation) and other similar laws which existed in the Madras and Bombay Presidencies. "At the outbreak of the Second World War, the British Parliament enacted the Emergency Powers (Defence) Act, 1939 which authorised making regulations providing for preventive detention. Regulation 18B made under section 2(2) of the said Act stated: -

"If the Secretary of State has reasonable cause to believe any person to have been or to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in preparation or instigation of such acts and that by reason thereof, it is necessary to exercise control over him, he may make an order directing that he be detained."

Rule 26 of the Rules framed under the Defence of India Act, 1939 authorised the Government to detain a person whenever it was "satisfied with respect to that particular person that such detention was necessary to prevent him from acting in any manner prejudicial to the defence and safety of the country."

These were war time measures made during the World War II. But even after the war was over, preventive detention continued in India as an instrument to suppress apprehended breach of public order, public safety, and the like by the Provincial Maintenance of Public Order Acts."[6]

[6] Block 4: Preventive Detention Laws available at http://egyankosh.ac.in/bitstream/123456789/39085/1/Unit-1.pdf (visited on 15 March, 2019)

As the Indian Constitution borrows heavily from the British laws that were in place, the makers of the Constitution realised that the abnormal circumstances which gave rise to such abnormal legislation in the past had not and would not disappear after India's Independence.

India went through a series of Acts which allowed for preventive detention. This began with the Preventive Detention Act, 1950 which constituted the laws for preventive detention in India. This was to be a temporary Act meant to be only for a year but it was extended multiple times. It finally expired in the year 1969. This Act was meant for and directed at persons, in the words of Sardar Vallabhai Patel, whose avowed object was to create disruption, dislocation, and tamper with communications, to stubborn loyalty and make it impossible for normal government based on law to function. Shortly after the expiry of this Act, in the year 1971 the Maintenance of Internal Security Act came into place and had similar provisions to that of the Preventive Detention Act. The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 was also brought into place and was considered to be the economic adjunct of the Maintenance of Internal Security Act. The MISA was repealed by the parliament in the year 1978. The National Security Act, 1980, and the Prevention of Black marketing and Maintenance of Supplies of Essential Commodities Act, 1980 conferred the Central and State Governments with the power of preventive detention to safeguard defence and security of the country and to maintain public order and essential supplies and services. The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 also provides powers of preventive detention.

As one can see, preventive detention laws have a long drawn out legislative history in India. Preventive detention which in most cases is used only during times of war, in most democracies, came to be a law which was used also in times of peace in India due to its historical usage in India as well as its legislative history.

CHAPTER 3: JUDICIAL OPINION OF PREVENTIVE DETENTION LAWS IN INDIA

How does the judiciary view preventive detention laws through various judicial pronouncements?

Our makers of the Constitution did not hesitate to give Constitutional sanctity to Preventive Detention Laws. The constitutional assembly debates show clearly that the need for preventive detention laws was generally accepted though with reluctance. A distinguished jurist, Mr. Alladi Krishnaswasmy Ayyar describes preventive detention as a necessary evil because, according to him, there were people determined to undermine the sanctity of the Constitution, the security of the State and even individual liberty. India is one of the few countries in the world whose Constitution allows for preventive detention during peacetime without safeguards that are considered basic requirements for protecting fundamental human rights. Article 22 of the Indian Constitution, preventive detention may be implemented in peacetime, non-emergency situations or otherwise. The Constitution expressly allows for an individual to be detained without charge or trial for up to three months. The Article further denies detainees the right to legal representation, cross-examination, timely or periodic review, access to the courts or compensation for unlawful arrest or detention. These provisions made under Article 22 of the Constitution in Part III which expressly deals with fundamental rights are ironically a devastating blow to other fundamental rights which relate to personal liberties. These provisions are also in direct violation of International Conventions or treaties that India is a signatory to like the International Covenant on Civil and Political Rights.

If we are talking about preventive detention laws in India, we cannot get away without mentioning the infamous case of ADM Jabalpur v Shivkant Shukla[7], it was held by the court that preventive detention done under the Act was valid and any claim to writ of habeas corpus is barred by the presidential order. In this case, the court managed to maul the liberties provided for under Article 21. Later, as the Judiciary realised its mistake, it started giving liberal interpretations to Article 21 and this trend began with the case of Maneka Gandhi v Union of India. In the case of State of Punjab v. Sukhpal Singh (1990) 1 SCC 35, the

[7] ADM Jabalpur v Shivkant Shukla (1976) 2 SCC 521

observed what the object of preventive detention is by stating, "Preventive detention is devised to afford protection to the society. The object is not to punish a man for having done something but to intercept before he does it and to prevent him from doing so."[8] In the case of Kubic Darusz vs. Union of India (1990) 1 SCC 568, the court observed, "A preventive detention 'is not punitive but precautionary measure'. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge is formulated; and the justification of such detention is suspicion or reasonable probability and there is no criminal conviction which can only be warranted by legal evidence. In this sense it is an anticipatory action. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. In case of punitive detention to person concerned is detained by way of punishment after being found guilty of wrongdoing where he has the fullest opportunity to defend himself, while preventive detention is not by way of punishment at all, but is intended to prevent a person from indulging in any conduct injurious to the society."[9] The approach our judiciary has taken to preventive detention laws, the laws which deprive personal liberty of the person without trial, is somewhere between the pragmatic or practical view and the idealistic or doctrinaire view. The judiciary has tried time and again to strike a balance. In the case of Vijay Narain Singh v State of Bihar (1984) 3 SCC 14, Venkataramiah, J. observed, "The law of preventive detention is a hard law and therefore it should be strictly construed. Care should be taken that the liberty of a person is not jeopardized unless his case falls squarely within the four corners of the relevant law."[10]

In the case of Raj Kumar Singh v. State of Bihar, (1986) 4 SCC 407 it was observed, "Prevention detention for the social protection of the community is a hard law but, it is a necessary evil in the modern society and must be pragmatically construed, so that it words, does not endanger social defence or the defence of the community and at the same time does not infringe the liberties of the citizens. A balance should always be struck."[11]

Thus, as one can see, the judiciary views preventive detention as a necessary evil in our democratic society and it believes that there should be a balance that needs to be maintained while dealing with personal liberties and the security of the State.

[8] State of Punjab v. Sukhpal Singh (1990) 1 SCC 35
[9] Kubic Darusz vs. Union of India (1990) 1 SCC 568
[10] Vijay Narain Singh v State of Bihar (1984) 3 SCC 14
[11] Raj Kumar Singh v. State of Bihar, (1986) 4 SCC 407

CONCLUSION

The history of Preventive Detention Laws has been a long drawn out one. Despite of being used against the freedom fighters or activists in the British Raj, the same people saw the need for such laws to exist in India. The makers of our Constitution, generally agreed as to the need for such laws, though reluctantly. This makes India one of the few countries in the world to have preventive detention laws even during times of peace and harmony. These laws are seen as a necessary evil to protect the security of State. These laws also get their sanction and find their place quite ironically in Article 22 under Chapter III of the Indian Constitution which deals with fundamental rights of the citizens of India where personal liberties are secured. Preventive detention laws that exist in India also to some extent go against the principles of international conventions it is a signatory to such as the International Covenant on Civil and Political Rights. Preventive detention is basically where a person is detained so as to refrain him from committing an act which would possibly cause harm to the security of the State or to the community. In the view of our judiciary, these laws are a necessary evil. It is also of the opinion that preventive detention is completely different from punitive detention. Our judiciary also strongly believes that there needs to be a balance that needs to be struck between the powers granted to the state to detain somebody and the personal liberties of the person.

To conclude, some scholars believe that preventive detention laws go against the personal liberties of a person and are thus not good laws, while some believe that they are a necessary evil. In my opinion, these laws can be considered necessary evils, but certain safeguards should be made so as to not give arbitrary power to the State and so that the personal liberties of people are not infringed.

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