

CRITICAL APPRAISAL OF PREVENTIVE DETENTION PROVISIONS UNDER THE NATIONAL SECURITY ACT, 1980

Written by *Prof. Avinash Krishna Goswami**, *Prof. Dr. Ritu Gautam*** & *Vaibhav Kumar****

**Assistant Professor, Sharda School of Law, Sharda University, Noida, India*

***Assistant Professor, Sharda School of Law, Sharda University, Noida, India*

**** BALLB Student, Sharda School of Law Sharda University, Noida, India*

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ABSTRACT

The primary focus of this paper is on the shortcomings of the existing preventive detention legislation, especially the National Security Act, 1980. India had various laws on preventive detention prior to the existing National Security Act, 1980 but they were gradually repealed, and then the current Act was brought, it was initially enacted as an Ordinance by the President in 1980 but now it has become a prominent law on preventive detention. Preventive detention violates the very basic fundamental right of an individual which is the right to personal liberty enshrined under Article 21 of the Constitution and the mandate provided under Article 22 related to the rights of an arrested person is also violated in the case of preventive detention. India is among the few nations where preventive detention law is constitutional whereas in countries like USA and England no such law exists(exception during wartime).

Alarming rise in the number of preventive detentions due to the ease provided under the preventive detention laws, there is a need in the Indian legal system to make the authorities accountable for arbitrary detentions and to establish safeguards to ensure fair procedure before restricting people's freedom.

Keywords: *preventive detention, fundamental right, liberty, arbitrary.*

INTRODUCTION

Preventive detention means putting a person in jail to stop him from committing any potential crimes. In other words, preventative detention is a measure implemented by the administration when there is a reasonable suspicion that the individual in question may commit some crimes that would be harmful to the state. An 'arrest' is made when a person is accused of a crime when a person is detained in a preventive detention case then they are simply prohibited from acting in a way that could harm the law-and-order situation. Article 22 of the Indian Constitution provides protection against arrest and detention in certain cases. While the goal of a punitive detention is to punish someone for what they have already done, the goal of a preventive detention is to catch someone before they do something and stop them from doing it. No crime has been established, and no charge has been made. The only basis for such detention—rather than a criminal conviction—is suspicion or a reasonable probability that the person being held would engage in behaviour that could harm the society or jeopardise national security. Here a person is made to suffer before they have even committed the crime therefore preventive detention goes against the fundamental concept of criminal law that a person is innocent until proven guilty.

The Supreme Court ruled in the case of **Union of India v. Paul Nanickan and Anr**¹ that the goal of preventative detention is to obstruct someone before they do something and discourage them from doing it rather than to punish them for doing it. Instead of a criminal conviction, which can only be supported by reliable evidence, such detention is justified on the basis of suspicion or a plausible theory.

The Madras High Court ruled in the case of **Mariappan v. The District Collector and others (2014)** that the purpose of preventative detention is not to punish the detainee but rather to stop them from doing something that would be harmful to the State. In this approach, the concerned authority's satisfaction may only be described as subjective. Any of the predetermined requirements, including:

1. State security,
2. Public order,

¹AIR 2003 SC 4622

3. Foreign Affairs, and
4. Community services, apply to it.

The Supreme Court stated that public order is defined as injury, danger, alarm, or a sense of unease among the general public or any segment threat or a grave widespread danger to life or public health in **Madhu Limaye and Anr vs. Ved Murti &Ors.**²

INTERNATIONAL PERSPECTIVE ON PREVENTIVE DETENTION LAWS

According to Lord Finley in the case of **R. v. Halliday**, the word "preventive" is distinct from the word "punitive," and this remedy is not punitive but rather preventive.³

The US passed a law authorizing preventive detention in 1984. This enables law enforcement to hold suspects of crimes in custody without charging them or holding a trial until they can provide evidence to support their release.

In the case of **United States v. Salerno**⁴, the act was contested in front of the US Supreme Court in 1987. The Fifth and Eighth Amendments due process requirements were not violated by the measure, the court ruled in 1987. Several American states passed detention statutes in the wake of the Salerno case. The idea of preventive detention was recognized for the first time in the Salerno ruling on a theoretical level.

Preventive detention laws have been authorized by the **Australian** government. Anyone in **Canada** who has been labeled a dangerous offender by the court is subject to indefinite detention. Serious offenders in **Germany** may be detained as part of the criminal justice process. It keeps them from committing serious crimes. In **Japan**, pre-trial custody may be extended for an additional 23 days without being charged. The prosecutors have discretion in this matter. The Internal Security Act of 1960 in **Malaysia** was passed to enable law enforcement to hold suspects for preventive measures. Statute in **New Zealand** permits the

² 1971 AIR 2608

³[1889] 61 LT 701

⁴481 U.S. 739 (1987)

preventive detention of adults over 18 who have been found guilty of serious crimes or sexual offences.

HISTORY OF DETENTION LAWS IN INDIA

British colonial rule in India served as the model for the country's preventive detention laws. The first such rule was Bengal Regulation III from 1818, which gave the government the authority to detain anyone without providing them with legal recourse in the name of self-defense or maintaining the peace. After that, in 1919, the Rowlatt Acts were passed, which garnered strong criticism from the political activists of the day. To stop anti-national elements from committing activities harmful to the nation's security and defence, the first Preventive Detention Act was passed on February 26, 1950 by the Nehru Government after the independence. After the remaining two years of operation, the aforementioned statute was due to expire. However, the act's time frame was periodically extended, and in 1971, it was eventually repealed. The Maintenance of Internal Security Act, or MISA, was passed in 1971 by Indira Gandhi and granted the executive branch and law enforcement agencies sweeping new authority. In 1977, this was abolished. Then President adopted the National Security Ordinance in 1980, which allowed for the preventive imprisonment of those responsible for riots fueled by caste and racial tensions as well as other actions endangering national security. It is presently governed by law. It allows for detention for a maximum of 12 months, however it does not prevent the detainee from challenging their custody. It was improved in 1984 to increase its utility. The amendment significantly reduces the scope of judicial review of legislation governing preventive detention.

The Supreme Court maintained the constitutional legality of the NSA and the Ordinance that came before the Act with a 4:1 majority in **A.K. Roy v. Union of India**.⁵

The various preventive detention laws enacted by the Parliament are:

- Preventive Detention Act (PDA), 1950 expired in 1969.
- Maintenance of Internal Security Act (MISA), 1971 repealed in 1978.

⁵(1982) 2 SCR 272

- Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), 1974.
- The National Security Act (NSA), 1980.
- The Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act (PBMSECA), 1980.
- Terrorist and Disruptive Activities (Prevention) Act (TADA), 1985 repealed in 1995.
- Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act (PITNDPSA), 1988.
- Prevention of Terrorism Act (POTA), 2002 repealed in 2004.
- Unlawful Activities (Prevention) Act (UAPA), 1967 amended in 2004, 2008, 2012, and 2019.

TEST LAID DOWN BY THE SUPREME COURT TO DETERMINE LEGALITY OF PREVENTIVE DETENTION

According to the Supreme Court's decision in **Banka Sneha Sheela vs. State of Telangana & Ors**⁶, Preventive detention is a necessary evil only to prevent public disorder. The State shouldn't arbitrarily use "preventive detention" to address various "law and order" issues when the regular laws of the nation may be used instead. When a preventative detention order is contested, one of the issues the court must address in determining its legitimacy is whether the case could have been handled by the country's general laws. The detention order will be invalid if the answer is yes.

ISSUES AND CHALLENGES OF NATIONAL SECURITY ACT, 1980

- 1) Section 13 of the Act provides unlimited discretion to the Appropriate Authority to revoke or modify the period of detention granted under section 12 without being guided by any principles therefore the Authority can grant any sentence as per their whims and they also have immunity against any suit or legal proceeding so they can abuse the law without any accountability.

⁶ LL 2021 SC 336

- 2) There's no right to get the bail but as per Section 15 the Appropriate authority have the power to release the detenu with or without conditions as per their discretion.
- 3) Grounds of arrest are not disclosed immediately after detention. They can be disclosed any time within 5 days or in some cases within 15 days but authority is not bound to disclose **any fact** which it considers to be against public interest
- 4) Detenu has to be presented within 3 weeks before the Advisory Board which is comparatively too long a time period when compared with time period provided under Article 22(3) for an arrested person to be presented before Magistrate is 24 hours.
- 5) No right to be defended by legal practitioner of choice.
- 6) This Act could be used as tool for suppression particularly against minorities and Dalits in the absence of proper safeguards.
- 7) This Act does not offer any procedural safeguards, such as those that would reduce detainees' susceptibility to torture and unfair treatment or stop officials from abusing preventative custody for nefarious purposes.
- 8) Police assessments of a person's threat level aren't put to the test in court by the prosecution or scrutinised by experts in the legal system.

Preventive Detentions (Crime Head-wise) - 2021

SL	Crime Head	Number of GD Entries made	Persons Detained	Persons Released by Board				Persons in Custody or in Detention at the end of the year
				in 1 Month	in 1 to 3 Months	in 3 to 6 Months	Total	
[1]	[2]	[3]	[4]	[5]	[6]	[7]	[8]	[9]
1	National Security Act	480	483	62	132	48	242	241
2	COFEPOSA	1	1	0	0	0	0	1
3	ESMA	7	10	10	0	0	10	0
4	Prevention of Black Marketing	27	38	9	5	18	32	6
5	FEMA	0	0	0	0	0	0	0
6	Goonda Act (State & Central)	28922	29306	11992	1936	2312	16240	13066
7	Other Detention Acts	21316	79514	67598	938	508	69044	10470
8	PIT NDPS Act	1193	1331	343	19	228	590	741
	Total	51946	110683	80014	3030	3114	86158	24525

• As per data provided by States/UTs

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