

ANALYSING PREVENTIVE DETENTION LAWS AND ARTICLE 21

Written by Yash Vithlani* & Keerthanaa B**

* 4th Year BA LLB(Hons) Student, School of Law, Christ(Deemed to be University)

** 4th Year BA LLB(Hons) Student, School of Law, Christ(Deemed to be University)

ABSTARCT:

Preventive detention, the right of the authorities to hold a person in custody on mere suspicion. The draconian law has been inherited from our colonial masters, though opposed has been in our Constitution for the past seventy years. The paper looks at the shift of the preventive detention laws position from A.K. Gopalan case to the landmark judgement which introduced the concept of 'Golden Triangle', Maneka Gandhi v. Union of India. Though the courts have tried to plunge the loopholes present in Article 22 of the Constitution, the decision of suspicion is subjective. Though the laws which are supportive of preventive detention are in the lines of "Prevention is better than Cure". The courts have in the various judgements such as the case of Francis Coralie Mullin have held that the test of Article 21 has to be passed along with the tests of Article 22.

This paper tries to look into the harmonious construction of Articles 21 and 22 of the Constitution of India. Though a widely debated Article, it is requirement for the welfare of the citizens.

KEYWORDS:

Preventive detention | Maneka Gandhi case | Article 22 | Article 21 | Golden Triangle | Detenu.

INTRODUCTION:

Preventive detention means holding a person in custody in order to ensure that the said person does not cause harm or pose a threat to the society. The detention under Article 22(3) is merely on the basis of suspicion. A democratic country like India, upholding equality, liberty and justice has questioned the presence of Article 22 in the Constitution. Many have debated but the presence of the Article goes back to the colonised era of the country.

India is one of the few countries which has a long history of preventive detention in the world. Preventive detention is a widely debated topic since it has led to human rights violations by the police officers in power¹. It is said to be one of the anarchic and draconic laws adopted from the colonial master, British.

The history of preventive detention laws dates back to the Bengal Regulation Act, 1818 where people could be detained on mere suspicion which was applicable to the three Presidencies, that is, Calcutta, Bombay and Madras during the British era

Later the '*Black law*' commonly called as the Rowlatt Act was introduced in the year 1919 which ensured indefinite detention on mere suspicion without formal trial and judicial review. Though our forefathers fought hard to abolish this Act, it is still present in our country.

Dr. B.R. Ambedkar's role:

The preventive detention clause was introduced in the form of *Article 15A* into our Constitution by the Advocate of liberties, Dr. B.R. Ambedkar in order to amend the fault made in Article 15 (now Article 21). The 'due process' clause couldn't be inserted since its presence will prevent the state from having preventive detention laws. Hence the clause 'procedure established by law' was inserted. It was the intention of the Constituent Assembly that there should be no impediment being created by judiciary for the legislature in enacting social welfare laws. The assembly had taken note of the varying interpretations of the 'due process' clause by the United States Supreme Court., and hence inserted the phrase 'procedure established by law'. Dr Ambedkar, in order to ensure that in matters of preventive detentions, judicial review is not absolutely excluded, inserted *Article 15A* as a safeguard, thereby ensuring

¹ Ahmed Noormohmed Bhatti v. State of Gujarat, A.I.R. 2005 SC 2115.

that at least in matters of preventive detention, through *Article 15A*(now Article 22) the ‘due process’ clause can be inserted in the draft constitution.

It may be noted that the provisions contained in clause (1) and clause (2) are already to be found in the Criminal Procedure Code. Introduction of Article 15A is to put a limitation upon the authority both of Parliament as well as of State Legislature not to abrogate these two provisions, because they were now introduced in the Constitution itself. Any amendment required to these principles required a special and complicated procedure.²

Preventive detention is necessary for the executive to detain a person who tampers either with public order or with the Defence Services of the country and that the exigency of the liberty of the individual should not be placed above the interests of the State. The framers felt that the security of the state was as important as the liberty of the individual. This is the main reason as to why preventive detention was introduced into the Constitution.

The object of the provision:

The main intention of Dr. B.R. Ambedkar behind this provision was to ensure that the State was vested with sufficient power to guard against the evil, which undermines the Constitution and the State and undermine even the individual liberty, which all of us desire.

NATURE OF PREVENTIVE DETENTION:

The nature of preventive detention has been explained by the Supreme Court in the case of *Khudiram Das v. The State of West Bengal and Ors*³. as :

- *The power of detention is clearly a preventive measure. It does not partake in any manner of the nature of punishment. It is taken by way of precaution to prevent mischief to the community.*
- *Since every preventive measure is based on the principle that a person should be prevented from doing something which, if left free and unfettered, it is reasonably*

² <http://cadindia.clpr.org.in/article/AVIhAOmAAO9qwJQrY0WL?p=229> (last accessed on 5th Dec.2017)

³ *Khudiram Das v. The State of West Bengal and Ors*, A.I.R. 1975 SC 550.

probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof...

- *The matters which have to be considered by the detaining authority are whether the person concerned, having regard to his past conduct judged in the light of the surrounding circumstances and other relevant material, would be likely to act in a prejudicial manner and if so, whether it is necessary to detain him with a view to preventing him from so acting.*
- *These are not matters susceptible of objective determination and they could not be intended to be judged by objective standards.*
- *They are essentially matters which have to be administratively determined for the purpose of taking administrative action. Their determination is, therefore, deliberately and advisedly left by the legislature to the subjective satisfaction of the detaining authority which by reason of its special position, experience and expertise would be best fitted to decide them...The Court cannot, on a review of the grounds, substitute its own opinion for that of the authority..*

IS THE STATE-ACTION JUSTIFIED?

Article 22 (3) of the Constitution of India provides that, if a person is arrested or detained under a law providing for preventive detention, then the protection against arrest and detention under Article 22 (1) and 22 (2) shall not be available.

But this power given to the state isn't absolute. It has been hedged in by limitations:

- (a) An Advisory Board should, within a period of three months be satisfied that there is reasonable cause for detention.
- (b) Detention may be extended beyond three months if Parliament makes a general law laying down in what class of cases the detention may exceed three months and state the period of such detention.
- (c) The detaining authorities must give the detainee earliest opportunities for making representation against the detention.

These limitations ensure that there is reasonable protection to the detainee so that the state doesn't over step its power. Though the human right activists may contend that alienation of

Clauses 1 and 2 of Article 22 will violate fundamental rights but the detainee is given the right to know if it doesn't harm the public interest and the detention is carried out keeping in mind the welfare of the citizens.

(i) A.K Gopalan v. State of Madras⁴

The validity of the various provisions of the Preventive Detention Act, 1950, in the light of the Constitution of India was examined by the Supreme Court for the first time in the well-known case, A. K. Gopalan v. the State of Madras, which was also the first case in which the Supreme Court was called upon to interpret the Constitution under which it had been established.

The majority of the Court held that the substantive freedom from imprisonment was guaranteed in Article 21 which said that "no person shall be deprived of his life or personal liberty except in accordance with procedure established by law."

The expression "*personal liberty*," it was held, meant freedom from any kind of physical coercion, including arrest and detention. In holding that Article 21 guaranteed freedom from imprisonment, the majority rejected the suggestion on behalf of the petitioner that in matters of preventive detention Article 19 (I) (d), which guaranteed freedom "*movement throughout the territory of India*" subject to the power the State to impose "*reasonable restrictions*" in the interests of the "general public and the Scheduled Tribes" was applicable⁵. Thus failed the attempt to have the Court determine whether preventive detention generally, and the various provisions of the Preventive Detention Act, 1950, could be regarded as "reasonable restrictions" on liberty.

The Court held that Article 21 did not leave it for the Courts to determine whether the procedure laid down by the legislature was proper and just; it guaranteed only that whatever procedure was laid down by the law must be properly observed.

⁴ A.K Gopalan v. State of Madras, A.I.R. 1950 SC 27.

⁵ Pradyumna K. Tripathi, Preventive Detention: The Indian Experience, The American Journal of Comparative Law at 230.

Thus in this case, the Supreme Court closed the doors on the introduction of procedural safeguards by judicial implication in the case of preventive or punitive detention. Procedure in matters of detention was to be subject only to such conditions as were expressly provided by the Constitution, for instance, in Article 22. The Court interpreted that Fundamental Rights are independent of each other and that Article 19 did not apply where Article 21 applied. Article 19 applied to a free man and not to a person in preventive detention. Thus the procedure could not be challenged even if it were not reasonable or not consistent with natural justice.

(ii) In the case of *RC Cooper v Union of India*⁶ the court established a link between Article 19(1)(f) and Article 31(2) to provide some protection to private property.

When Article 19(1)(f) and Article 31(2) can be linked then why can't Article 19 be linked with Articles 21 and 22?

The Supreme Court recognised the logic in the case of *Sambhu Nath Sarkar v. State of West Bengal*⁷ that the majority in *RC Cooper case* held the majority in *Gopalan case* to be incorrect.

At last the Court linked Articles 19, 21 and 22 in *West Bengal v Ashok Dey*⁸. This case held preventive detention valid because in the disturbed state of law and order prevailing in the state, the law enacted was in the interest of the general public.

(iii) *Maneka Gandhi v. Union of India*⁹:

This case completely overrides the *Gopalan case*. The term 'personal liberty' was given the widest possible interpretation. By majority it was held that the Article 21 does not exclude Article 19 and that even if there is a law depriving a person of his liberty, it must stand the test of not only Article 21 but also other provisions of Part III of the Constitution.

"Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are

⁶ RC Cooper v Union of India, A.I.R. 1970 SC 564.

⁷ Sambhu Nath Sarkar v. State of West Bengal, A.I.R. 1973 SC 1425.

⁸ West Bengal v Ashok Dey, A.I.R. 1972 SC 1660.

⁹ Maneka Gandhi v. Union of India, A.I.R. 1978 SC 587.

all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial justice... Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial.”

The Court in this case introduced the Golden Triangle, which clearly depicts the fact that Part III of the Constitution has to be read together and each Article isn't an isolated island. No law of the legislature should infringe any right specified under Part III of the Constitution of India.

The most striking aspect of the Supreme Court's introduction of substantive due process was that it empowered courts to expand the limited phraseology of the right to life under the Constitution, to include a wide range of unenumerated rights. Derived from Article 21, these rights cover areas such as the rights of prisoners, protection of women and children, and environmental rights.

(iv) Post Maneka Gandhi case:

In *Inderjit Barua v. Assam*¹⁰, the validity of Assam Disturbed Areas Act, 1955 and the Armed Forces Special Powers Act, 1985 was challenged. The Court observed that what is just, fair and reasonable procedure established by reasonable law as opposed to arbitrary or discriminatory is a question to be answered by the facts of each case.

If to save hundreds of lives, one life is put in peril or if a law ensures and protects the greater social interest, then such law will be regarded as a beneficial law. It is the duty of the state to ensure maximum happiness to the maximum number as laid down by Bentham.

It is the State's duty to protect the rights of its citizens but at the same time has the duty to ensure that its citizens right aren't infringed by few who want to disrupt the peace and harmony of the society.

The case of *Maneka Gandhi v. Union of India*¹¹ brought about a barrage of change in regard to criminal jurisprudence in India. The effect it had enabled the court to insert a number of rights in regard to the prisoners in lieu of the rights that they deserve.

¹⁰ *Inderjit Barua v. Assam*, A.I.R. 1983 Del 513.

¹¹ *id.* at 10

It is true that these rights are guaranteed to each person who is accused of criminal misconduct, yet there lies a fundamental difference between a regular under trial and a person detained under a preventive detention law, primarily due to the fact that there are no criminal proceedings which have to be initiated under the preventive detention laws and moreover there need not be a commission of an offence under preventive detention. A mere apprehension of a threat of commission of an offence is suffice for the person to be detained under the law.

It is argued though that the preventive detention laws in essence ensure that the right to life and personal liberty of the citizens is not deprived. What constitutes just, fair and reasonable would depend upon the facts of the cause of action.

If in the opinion of the state there lies a threat to the public, it is well within its constitutional mandate to take appropriate action in this regard. This is due to the fact that the matter is one of state policy.

This is because that though the Constitution through the adoption of Article 22, recognized preventive detention laws, it left the enactment of the laws to the appropriate legislature. The collective will of the people, through the legislature have time and again decided that the preventive detention laws are a necessity. It is not just, fair or reasonable on part of the state to remain silent when there exists an apprehension on its part that there may lie a threat a certain section of the public or the public at large from one individual.

A value judgment has to be made in this regard, where on one end of the scale, the lives and personal liberty of large sections of the society has to be valued and on the other end the life and personal liberty of the person detained has to be valued.

A prudent and reasonable man would be of the opinion that it would be just and fair to contain the threat than to endanger the masses.

The government may also detain a person if in its opinion there is a chance the person may indulge in any practice may hinder the supply the sale or access of an essential commodity. The government in this regard has enacted the Prevention of Black-marketing and maintenance of Supplies of Essential Commodities Act, 1980.

Under this Act, the person being detained has to be informed of his rights and the procedure under Article 22 have to be conformed to without which the detention order has to be adhered

to without which the detention order would not be valid and the court would be able to strike it down¹²

In regard to the argument raised against preventive detention that there lies no objective standard which has to be adhered to, it is contended that the matter has to be left to the subjective satisfaction of the executive. This primarily due to the fact that the detention is not punitive but in reality it is preventive in nature. It is resorted to with a view to prevent a person from committing activities regarded as prejudicial to certain objects which the law of preventive detention seeks to prescribe.¹³ The dividing line between subjective satisfaction and objective determination becomes rather blurred.¹⁴

PRESENT SCENARIO:

The Constitution of India empowers the legislature to pass preventive detention laws such as the § 8 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA), §4 (c) of the Armed Forces (Special Powers) Act, 1958 (AFSPA) , §3 of the Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act, 1985 and others in order to ensure that certain offences are prevented even before they are committed¹⁵.

The basic motto behind such preventive detention laws is “*Prevention is better than cure*”. It is sometimes effective for the state to prevent a crime rather than facing the damages caused. We can apply the economic principle of cost – benefit analysis, wherein it is better for the state to prevent one person from committing a crime rather than spending on the damages caused due to the crime.

¹² Om Prakash Agarwal v. State of UP, A.I.R. 1985 All 172.

¹³ Raj kumar Singh v. State of Bihar, A.I.R. 1986 SC 1334.

¹⁴ Khudiram v. State of West Bengal, A.I.R. 1975 SC 550.

¹⁵ Derek P. Jinks, THE ANATOMY OF AN INSTITUTIONALIZED EMERGENCY: PREVENTIVE DETENTION AND PERSONAL LIBERTY IN INDIA, Hein Online
Citation: 22 Mich. J. Int'l L. 311 2000-2001

SPECIFIC PREVENTIVE DETENTION LAWS

It is perhaps true that the power of preventive detention deviates from traditional safeguards which have been placed on the administration of executive power but there lies a difference between the areas which are being dealt with in regular criminal action of the state and the areas which the preventive detention laws seek to address.

If one were to examine the Preventive Detention Act, 1950, it primarily dealt with the areas which deal with the relationship of the country with other friendly countries and the national security of the country.

It empowers the central government and the state government to detain a person if the person is acting in a matter which is prejudicial to the defense of India, the relations of India with foreign powers, maintenance of public order and the supply of essential materials.

The district magistrate may make an order in this regard. There are also though safeguards which have been put into place. The magistrate has to inform the state government of such an order and the state government has to ensure that the due procedure laid down by the statute and the Article 22 have been adhered to. The state government also further has to ensure that there have to ensure that the central government is informed of the decision within seven days of the preventive detention being made.

The Supreme Court has also while deciding the constitutional validity of the preventive detention Act. 1950 held that the preventive detention as per the decision of the government is constitutional and a law in furtherance of this is one which is within the bounds of the Constitution.¹⁶

On the other hand, if the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 is examined, one would come to the conclusion that the preventive detention can be made by the state only if the government feels that the person is detrimental to the economic security of the country. The Supreme Court has held the “*security of the state*”

¹⁶ AK Roy v. Union of India, A.I.R. 1982 SC 710.

in broad terms and hence has held that a weak and vulnerable economy would be detrimental to the security of the country.¹⁷

PREVENTIVE DETENTION LAWS NOT VIOLATIVE OF ARTICLE 21:

The Court has laid down guidelines through cases to ensure the State doesn't infringe the rights and liberties of the citizens. The judiciary knowing the volatile nature of the State to overstep its powers has ensured to keep a vigilant on the preventive detention laws¹⁸.

It has been held by the Court that the basis of detention cannot be challenged but have a right to look into the matter under the Article 32 and Article 226. The Courts are more circumspect in observing them while exercising their said extraordinary equitable and discretionary power in these cases.¹⁹

The Court has spelt various judgements challenging the subjective satisfaction of the executive body. The Court in the case of *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors*²⁰ while dealing with the detention law, held that the law of preventive detention has to pass the test not only of Article 22 but also of Article 21. Having regard to the distinctive character of preventive detention as apart from punitive detention, the restrictions placed on a person preventively detained must, consistently with the effectiveness of detention, be minimal.

So also every act which offends against or impairs human dignity would constitute deprivation pro-tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.

It is to prevent the possible abuse of this draconian measure that the legislature has taken care to provide certain salutary safeguards such as:

¹⁷ Attorney General of India vs. Amrutlal Prajivandas, A.I.R. 1994 SC 2179.

¹⁸ Joginder Kumar v. State of Uttar Pradesh (2008) 17 SCC 133.

¹⁹ 1991(93)BomLR34

²⁰ Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors, (1981) SCC 608.

- (i) the obligation to furnish to the detenu the grounds of detention ordinarily within five days and in exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of detention,
- (ii) the right to make representation against the order of detention,
- (iii) the Constitution of Advisory Board consisting of persons who are or have been qualified to be appointed as judges of the High Court,
- (iv) the reference of the case of the detenu to the Advisory Board within 5 weeks of the date of detention,
- (v) the hearing of the detenu by the Advisory Board in person and the submission by the board of its report to the Government within 11 weeks from the date of detention,
- (vi) the obligation of the Government to revoke the detention order if the advisory board reports that there is in its opinion no sufficient cause for the detention of the person concerned,
- (vii) the provision of the maximum period for which a person can be detained and
- (viii) revocation of the detention order by the Government on the representation of the detenu independently of the recommendation of the advisory board, etc.²¹

CONCLUSION:

However, repugnant the notion of preventive detention may be to the champions of individual liberty, it has also to be remembered that the power to make such a law even during peace time has been incorporated in the Constitution by the framers of the Constitution many of whom had tasted the bitter fruits of such detention law during the struggle for freedom. Whatever may, therefore, be one's own notions about the dimensions of individual liberty, one must accept the provisions of the Constitution as enacted by the mature vision and seasoned experience of the Constitution makers. We must also not lose sight of the fact that over the years, by and large, the judiciary has interpreted the Act and the orders made thereunder strictly so as to have to the detenu the benefit of every unexplained error of

²¹ Additional Secretary to the Government of India and Ors. v. Smt. Alka Subhash Gadia and Anr., 1991(93)BomLR34.

omission and commission and has either struck down the order itself or has held its further operation illegal.

Preventive detention is a detestable evil, the very negation of liberty and self-government. But, democracy needs protection at both ends. It needs to be protected against uncontrolled and excessive authority in the hands of the State. Equally, does it need protection against internal forces seeking to subvert the democratic constitution while sheltering their sinister organization and illegal activities under the very Constitution?

The possibility of such exploitation of the provisions of the Constitution against itself engenders the inescapable necessity of lodging in Parliament and in the state legislatures adequate power to deal with subversion well in advance; it makes the power of preventive detention a necessity. The state in pursuance of its sovereign power and its executive functions are in essence ensuring that the life and personal liberty of the people are not put in jeopardy, the constitution has ensured that the preventive detention laws are just, fair and reasonable. The value of numerically superior persons comes before that of one person who is also the reason for the cause of action to come into the picture in the first place. The preventive detention laws being just fair and reasonable, and for the protection of the right to life and personal liberty of a large number of persons, is well within the scope of the Right to life and personal liberty as per the Indian Constitution.

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