Preventive Detention Vis-À-Vis Rule of Law in India- A Critical Study

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Abstract

The principle of the rule of law is increasingly threatened in the war against terrorism. The preventive detention law, enacted in post-independence India, grants the state vast powers to arrest and detain anyone before the commission of a crime. These powers can be exercised by the state against a person who may be a threat to the security or public order of the State. Such laws that emphasize on detaining a suspect restrict the liberty of individuals who may not have even committed a crime. A person detained under the Preventive Detention Law is neither charged nor brought to trial and denied constitutional protection of rights guaranteed under Article 22 of the Constitution of India. The courts are precluded from determining the legality of any such order passed by the government. Further, the presumption of innocence of the accused until proven guilty, which forms a cardinal principle of criminal law, is compromised. Such unbridled powers vested in the State entail grave violations of human rights and fundamental freedom of the detainee and threaten the rule of law. This paper explores the necessity and rationale of preventive detention laws to counter terror and the role of the judiciary in averting the misuse of such laws. It outlines instances where the incumbent governments have sought to use this legislation as a weapon to suppress dissent and crush opposition. The author argues that it is significant to enact strict laws to deal with grave offenses, but necessary safeguards should be incorporated within the realm of legal framework to protect the most fundamental rights of the detenue and prevent their potent abuse by the state.

***Keywords*:** Universal Declaration of Human Rights, Rule of law, Preventive Detention, Natural Justice

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"*One of the challenges of a democratic government is making sure that even in the midst of emergencies and passion, we make sure that the rule of law and the basic precepts of justice and liberty prevail.*"

-Barack Obama

Introduction

The Universal Declaration of Human Rights, which was regarded as a Magna Carta of Human Rights, was brought into operation in the year 1948. It laid down the framework and provided an impetus to the drafting of many other international treaties and regional laws on human rights. Most prominent among them are the "International Covenant on Civil and Political Rights", 1966 (ICCPR) [i]; "International Covenant on Economic, Social, and Cultural Rights", 1966 (ICESCR) [ii]; "Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment", 1984 (CAT) [iii]; and the "Convention against Enforced Disappearance, 2006." [iv] The UDHR enshrines one of the most fundamental human rights, i.e., the right to life, liberty, and security.[v] A significant consequence of right to personal liberty is the protection against arbitrary detention, which has been enshrined under Article 9 of UDHR. The ICCPR safeguards various rights of an individual, i.e., the rights to life, liberty, and security, and guarantees freedom from arbitrary arrest and detention.[vi] It ensures the "right of any arrested or detained individual to petition the court to decide the validity of the detention order and be released if the detention is found illegal."[vii] All these treaties and conventions embody the universal principle of the rule of law and personal liberty for individuals. Most nations have attempted to prioritize human rights and personal liberties through various domestic legislation and regulations.

But these human rights are being abused and curtailed by the State under the garb of countering terrorism. The current legislation existing in India for curbing terrorism is the Unlawful Activities (Prevention) Act, 1967, better known as the UAPA. It was initially enacted as a preventive detention law, but after the repeal of Prevention of Terrorism Act (POTA), it was amended in 2004 and consequently became a preventive detention law as well as an anti-terror law. The legislation has been subject to criticism for being consistently misused by the law enforcement agencies. It has become a tool in the hands of the state to violate rule of law and

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suppress dissent and target student activists and journalists who have chosen to raise their voice against the policies of the government.

One essential premise of the rule of law is that law is sovereign over all authority and does not distinguish between various classes of persons. It seeks to restrain the powers of the government to prevent it from becoming a totalitarian state. While discussing the concept of the rule of law, one cannot overlook A.V. Dicey's narrative on this rule in his book, *"Law and the Constitution"* (1885). He meticulously illustrated the vulnerability of the rule of law to government mandates and commands. He stated, "No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land." [viii]

The law on preventive detention dangerously intimidates the core values incorporated in Dicey's fundamental freedoms. The procedure adopted by the executive in detaining an individual nullifies the principles of natural justice in every aspect. Personal liberty encompasses a variety of rights, as it is subject to the widest possible interpretation. Preventive detention is a serious violation of personal liberty and is incompatible with the rule of law and democratic principles. It can be explained as the incarceration of a citizen who is perceived as a threat to society by the executive, sans determination of the detainee's guilt by the judiciary. [ix] It secures detention of an individual without a formal charge or a trial. The detenue is not produced before the magistrate within 24 hours, as mandated under the Constitution. Additionally, he is denied the right to engage a lawyer to represent him before detaining authorities. Such acts infringe upon various components of the rule of law. One such component is the absence of court jurisdiction in determining the validity of the detention order passed on the basis of the subjective satisfaction of the executive. It results in the denial of the detenue's inherent rights to challenge his detention in a court of law. In a democracy, it is incumbent upon the courts to intervene and ensure stringent compliance with the procedural safeguards assured to the detainee under the Constitution and determine the plausibility of such detention. The other component of rule of law that stands infringed is contravention of the principle of presumption of innocence until proven guilty. The detainee is presumed guilty without any charge or trial. Further, he is stigmatized by society as a criminal and placed in a similar situation as a convicted prisoner.

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The history of the preventive detention law in India has its origin in the East India Company Act of 1793, enacted by the British. The framers of the Indian Constitution carried forward their legacy and authorized preventive detention under Article 22(3)(b) of the Constitution of India. This provision was deemed to be an exception to the right to life guaranteed under Article 21 of the Constitution and formulated to be applied in rare circumstances. The law on Preventive detention must fall within the purview of Article 21 and the procedural safeguards enunciated under Article 22(4) and Article 22(5) of the Constitution. Deprivation of liberty on the ground of dangerousness is invoked to prevent the commission of a crime before it is committed. A person may be detained even before he has taken any steps in furtherance of the commission of a crime. This results in diluting the principle of presumption of innocence until proven guilty which becomes a myth and the detained individual is believed to be guilty even before trial. The ordinary criminal process is substituted by preventive detention laws on grounds of public safety in such precarious situations. This is likely to result in a waiver of the rule of law, which is indispensable to safeguarding the freedom of individuals. According to the National Crime Records Bureau (NCRB), which started collecting data on preventive detention only since 2017, there are 1.1 lakh people who were detained or placed under preventive detention in 2021 alone. This constitutes a 23.7 per cent increase in comparison to the previous year. As per the NCRB's 2021 data, the government of Tamil Nadu, followed by Telangana and Gujarat, passed the most preventive detention orders.[x]

The question at hand is whether there is a need for a law on preventive detention in addition to the ordinary criminal law of the land. In all the debates on preventive detention, it has been argued by the government of India that the nation faces a recurrent threat to its security from internal and external forces, and ordinary criminal law will not be sufficient in curbing economic crimes, anti-social elements, terror acts, and threats to national security.[xi] Even though there is a lack of empirical evidence to corroborate the premise that social conditions have attained critical gravity to warrant such a law, the need for preventive detention is deemed imperative in the Indian context. [xii] The term national security embodies emotive and political considerations. [xiii] It is apprehended that administrative detention will serve as a canopy to suppress legitimate political defiance. India is a diverse country, and there is a likelihood of separatist tendencies and insurgency disrupting public order in the state. However, the institutions endowed with the power to curb such terrorist acts, including the police,

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prosecution, and judiciary, have failed to protect the human rights of the accused in their endeavor to fight terrorism, which is a matter of concern in a democratic society. As the Supreme Court of India has recognized, "terrorism often thrives where human rights are violated," and "the lack of hope for justice provides breeding grounds for terrorism." [xiv] Therefore, the state must attempt to reconcile the demand of national security and rule of law in the face of unrelenting terrorist threat. If we look at the history of several democratic nations, it can be discerned that the preventive detention policies of these nations commenced with minimal judicial review and greater executive discretion. However, when these nations became familiar to "emergency" like situation, they granted more due process rights and judicial review to detainees despite threat of terrorism not abating. [xv]

Preventive Detention and Terror Laws

The introduction of preventive detention in India can be attributed to the British. They used detention laws to apprehend potential insurgents and keep them in custody with minimal safeguards governing their arrest. After the Constitution came into force, the Preventive Detention Act of 1950 was enacted, which governed the law on preventive detention in India until it was repealed in 1969. The Act authorizes the central government and state governments to detain an individual for up to 12 months without the possibility of release to prevent any act "prejudicial to India's defense or security, India's relations with foreign powers, state security, the maintenance of public order, or the maintenance of essential supplies and services." [xvi] After the repeal of the Preventive Detention Act, 1950, many laws on the subject were enacted, such as the Unlawful Activities Prevention Act of 1967 (UAPA), the "Maintenance of Internal Security Act (MISA), 1971; the National Security Act (NSA), 1980; the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980; the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), 1974; the Terrorist and Disruptive Activities (Prevention) Act (TADA), 1987; and the Prevention of Terrorist Activities Act (POTA), 2002." Some of these laws have been repealed and the existing laws on the subject include the Unlawful Activities Prevention Act of 1967, the National Security Act of 1980, the COFEPOSA Act of 1974, and the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act of 1980. The Unlawful

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Activities (Prevention) Act, 1967 authorizes detention of a person for 90 days, which can extend up to 180 days if the Public Prosecutor on the basis of a report satisfies the court that detention is necessary for purposes of investigation.[xvii] Under COFEPOSA Act of 1974, the Central Government or State Government can detain any person to prevent the smuggling of goods or any such act that adversely affects the conservation of foreign exchange.[xviii] Under the National Security Act of 1980, most of the provisions of the Preventive Detention Act of 1950 have been restored. The Central Government or the State Government has been endowed with the authority to detain an individual for a period of up to one year if "satisfied" that detention is necessary to prevent any person from "acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, the security of India, or the maintenance of public order or supplies and services essential to the community". [xix] However, such detention remains in force initially for three months, and thereafter, it is incumbent upon the government to submit to the Advisory Board within three weeks the reasons and grounds for the detention and representation, if any made.[xx] If the Advisory Board believes that there are reasonable grounds to detain, then the government is empowered to confirm the detention for a maximum duration of one year.[xxi] India's third law on preventive detention is the "Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act," 1980, which authorizes detention for a maximum period of six months if sufficient reason exists to prevent any person from engaging in black marketeering. [xxii]

The primary laws that India has framed for curbing terrorism have been subject to criticism and censure for human rights violations under the Indian Constitution and International Human Rights Conventions. There has been a public outcry against these laws, as a result of which each subsequent law has gradually improved upon its immediate predecessor. [xxiii] Unfortunately, cases of violations of individual freedom under these laws have not abated. One such illustration is the excessive power used under TADA not for purposes of punishing actual terrorists but rather as a weapon that sanctioned the pervasive use of preventive detention, including extortion and torture by the police.[xxiv] The anti-terror laws confer abundant powers on the law enforcement agency to circumvent due process guaranteed for protection of a citizen’s right to fair trial. The accused is burdened with proving his innocence, which constitutes a transgression of natural justice. In essence, they function as preventive detention laws that criminalize ideas, beliefs, and intentions of an individual that is unconscionable. In

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Punjab, advocates of various courts assimilated documented evidence detailing the stories of thousands of individuals, predominantly Sikhs, indiscriminately detained under TADA for lengthy periods without getting bail and without being informed of the charges framed against them.[xxv] The existence of TADA provisions armed the police with powers to perpetuate human rights violations against suspected terrorists. [xxvi] The Supreme Court has observed, "Anti-terror laws like POTA grant the prosecution greater latitude in pretrial investigation and detention because POTA offences are more complex than ordinary criminal offences and therefore demand greater time to fully investigate." [xxvii] Such laws are constantly used as a tool to target political speech that is critical of the policies of the government and other acts that are protected under free speech guaranteed under Article 19 of the Constitution.

"In 2002, the government of Tamil Nadu detained several leaders of the Tamil Nationalist Movement (TNM), an officially recognized opposition political party, in connection with their participation at a public meeting near Madurai. As widely reported in the media, several speakers at the meeting, including members of Parliament and senior members of various political parties, including the TNM and the Marumalarchi Dravida Munnetra Kazhagam, expressed support for a cease-fire and proposed peace talks between the government of Sri Lanka and the Liberation Tigers of Tamil Eelam, which is banned in India as a terrorist organization. None of the participants advocated support for terrorism by the LTTE or anyone else, and when the Chief Minister of Tamil Nadu, J. Jayalalithaa, was publicly asked about the meeting soon thereafter, she stated that nothing improper had occurred. Nevertheless, four months after the meeting, the speakers and others were detained under POTA because they had expressed support for the LTTE." [xxviii] Such examples demonstrate apathy on the part of the police and consequent violations of human rights, including violations of procedural rights, corruption, abuse, torture, extortion, and staged encounter killings in the process of applying terror laws.

Judicial Approach

The judgment of the Madras High Court in the case of *Sunitha vs State* [xxix] is a step in the right direction. The court went through official statistics that revealed Tamil Nadu had repeatedly topped the list of States that increasingly used preventive detention law of Tamil Nadu Goondas Act, 1982. It was found that when the detention orders were challenged before the courts, they

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were either set aside or held infructuous. The Court concluded that unless State can establish that ordinary criminal law was inadequate in addressing the issue, preventive detention order would be set aside. The court in two cases applied the standard of determining the legality of preventive detention: In the first case, for example, it was alleged that the accused had abused a public servant. The court opined that one of the prerequisites to invoke preventive detention was undermining public order in a public place and since the incident occurred in a private place, there was no question of invoking such an order. The court concluded that the state had failed to establish that the offence could not be dealt with under ordinary criminal law and therefore, set aside the preventive detention order. It also emphasized monetary compensation to be awarded to the detainee where it is proved that such power has been misused by the State. [xxx]

Further, in *Mallada K Sri Ram v. State of Telangana* [xxxi] *("Mallada"),* the Apex Court quashed a preventive detention order imposed under Section 3(2) of the Telangana Prevention of Dangerous Activities Act, 1986. It held, "mere apprehension of breach of law and order will not be sufficient to satisfy the requirements of 'maintenance of public order' to warrant invoking preventive detention. The personal liberty of an accused cannot be slaughtered merely on grounds of preventive detention solely because he is implicated in a criminal lawsuit. These powers that can be traced to the colonial era are exceptional as well as drastic. There are sufficient constitutional safeguards inserted under Article 22 of the Constitution to prevent their misuse. This provision was considerably debated and discussed in the Constituent Assembly to prevent the extraordinary powers of preventive detention from degenerating into an autocratic exercise of power by the state authorities."

The Supreme Court has also counseled the state, observing, "Such restrictive powers under preventive detention laws that restrict individual freedoms should be exercised with extra caution and not as a matter of course. They must not be exercised as an alternative to ordinary laws, it warned."[xxxii]

Quite recently, the Guwahati High Court examined preventive detentions in Assam and directed the State to pay 50,000 rupees as compensation to a person because he had been detained by the government for a period more than four-and-a-half month beyond the stipulated time of three months. [xxxiii] The Court further directed the Assam State Legal Services Authority

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to investigate and seek a report of all detenues lodged in various prisons under preventive detention laws to find similar such cases of illegal detention and thereby take "remedial measures" if necessary. [xxxiv] The Court further observed that Article 22 of the Constitution "explicitly stipulates that no law that permits preventive detention shall allow a person to be detained for more than three months unless the Advisory Board believes there is sufficient cause for the same. [xxxv]

The courts are bereft of the power to substitute their own opinion for that of the detaining authority to assess the necessity of detention in a specific instance. It is the sole discretion of detaining authority to determine the necessity of detaining an individual who is detrimental to public order. Such power ought to be used only in the most exceptional circumstances where the threat is proximate, severe, and unavoidable. The detaining authority must apply its mind while exercising discretion. There are many instances where the courts have quashed detention orders because the detaining authority has considered irrelevant factors while passing its decision or failed to consider the circumstances of the detainee.

Constitutional Framework and Preventive Detention

The principle of preventive detention has been permanently incorporated into the Indian legal system. The Parliament has been vested with the power to draft a law under Entry 9 of List I (also known as the "Union List"), on matters relating to defence, security and foreign affairs of India. Similar powers have been endowed on the Parliament and the State Legislature under Entry 3 of List III (also known as the "Concurrent List") to maintain public order in the state and provide supplies or services vital to the community. Pursuant to the enormous powers granted to the Legislature, it is incumbent upon the judiciary to protect the personal liberty of an individual against the arbitrary exercise of power by the executive, which seeks to encroach upon the freedom of an individual under the pretext of providing national security.

Article 22(3) of the Constitution authorizes the preventive detention of an individual. Clauses 1 and 2 of Article 22 of the Constitution guarantee certain procedural safeguards to all persons in custody under Indian law. However, Clauses 3–7 of Article 22 outline the procedural

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safeguards available in cases of preventive detention only. Clause 3 of Article 22 explicitly states that certain safeguards shall not be available to persons detained under preventive detention law, and these include "the right to be represented and assisted by legal counsel; the right to be informed of the grounds of detention; and the right to be produced before the nearest magistrate within 24 hours after arrest." [xxxvi] The intent behind these provisions is to deprive the detainee of having recourse to the courts because it is the executive who is responsible for the maintenance of public order and therefore, it solely exercises the power of detention.[xxxvii] However, certain safeguards have been provided in the Constitution to prevent the reckless use of preventive detention. It is mandated under the law to inform the Advisory Board if a person has been detained for a period longer than three months. [xxxviii] If the Advisory Board opines that sufficient cause exists for detention beyond this period, then preventive custody can be extended. [xxxix] Nevertheless, detention for three months without the right to challenge is unconscionable and unethical. Another safeguard enforced is that the detaining authorities are obligated to inform the grounds of detention "as soon as possible" to the detainee and provide earliest opportunity of making a representation against the order. [xl] The Supreme Court has ruled, "This allows the courts to examine the question of whether the grounds furnished are sufficient to enable the detainee to make a representation." [xli] This point alone is justifiable. The detaining authorities cannot on mere suspicion contend that a detainee has acted in a manner, which may be prejudicial to the interests of the state. The authorities are obligated to adduce sufficient particulars about the previous conduct of the detainee to determine which of his activities are prejudicial to national security or the maintenance of public order. Such detention will always be deemed arbitrary if safeguards for those detained are not complied with.

In the Constitutional Assembly Debates on preventive detention [xlii], Shri Mahavir Tyagi (United Provinces, General) said, *"Let us not make provisions which will be applied against us very soon. There might come a time when these very clauses, which we are now considering, will be used freely by a Government against its political opponents. This is a charter of freedom that we are considering. But is this a proper place for providing for the curtailment of that very freedom and liberty? When freedom is being guaranteed, why does the Drafting Committee think it fit to introduce provisions for detaining people and curbing freedom? This is an article*

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which will enable the future Government to detain people and deprive them of their liberty rather than guarantee it."

Ambedkar's speech introducing Draft Article 15-A, which culminated into Article 22 of the Constitution, provides answers. He contended that considering the present situation in the country, the "exigency of liberty of the individual should [not] be placed above the interests of the State." [xliii] He further argued that the proposed clauses controlled use of the preventive detention, by incorporating safeguards such as limitation of three months period in executive detention, vesting a right to know grounds of detention and vesting right to make a representation for securing release. The provision also mandates referrals to Advisory Boards in case of detention beyond this period. [xliv]

Disappointed with certain aspects of this provision, Pandit Thakur Das Bhargava suggested that in the first proviso in the proposed new article 15-A (presently Article 22) as moved by Dr. Ambedkar, the words "and for reasons recorded" should be added. He pleaded with the Committee to consider the full effect of these words because insertion of these words would mean that as soon as a man is produced and papers are presented before the Magistrate, it becomes obligatory for the Magistrate to examine the reasons for detention and the duration of remand and incarceration. Further, the reasons given could be challenged by the accused in a higher court. Once reasons are given, it is assumed that the order passed was justified. [xlv] He further proposed that the barest demands of justice be given to the detainee and they should not be subjected to unnecessary restrictions. [xlvi]

The Constitutional Assembly Debates portray that the members were struck with a moral dilemma. They wanted to preserve individual liberty but they were compelled by circumstances existing at that time in the country to legitimize preventive detention.

Relation Between Preventive Detention and Rule of Law

The rule of law is a significant component of liberty, equality, and due process, which are the hallmarks of a democratic government. The right to freedom resides in every citizen by being a human and it cannot be revoked by arbitrary discretion of the state. Where the legal authority

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to deprive the right is an executive official whose decision is based on subjective satisfaction and not on objective truth, the line between the rule of law and rule by law becomes blurred and obscure. [xlvii] Preventive detention laws were formulated to give unfettered powers to the executive and limit the scope of judicial interference. Consequently, grave abuse of power and violations of individual liberty on the part of the state increased, and the legitimacy of the law was reduced. In most cases, the ruling party uses this law as a weapon to suppress dissent and restrict freedom of speech, thus undermining democratic principles and the ethos of the law. Pertinently, it is the rule of law that prevents democracy from degenerating into an elected dictatorship. In such circumstances, the judiciary must intervene and exercise its powers to uphold the rule of law, thereby deterring the government from misusing its powers. It is imperative that the judiciary, in carrying out its functions, be seen as independent of the government. [xlviii]

The government has often showcased a tendency to promote itself above the rule of law, supposedly for the noble cause of providing public security. Some contemporary theorists like Italian philosopher Giorgio Agamben claim, “In the present age of terror, the law has been suspended and replaced by a juridical void, a black hole from which all pretensions to legality are expelled.” [xlix] Alternatively, a perusal of the work of German political theorist Carl Schmitt (1985) emphasizes “in times of emergency, the sovereign shed any pretense of being constrained by law and instead deploys it against designated enemies.” [l] In such circumstances, rule by law has subjugated the rule of law, and people are given very few rights of redress.[li] A lot depends on whether judges unabashedly exercise their power in the courts to restrain the executive from its attempt to rule by law. Only judicial adherence to the rule of law can protect the citizens against the extremity of the executive's counterterrorism measures. Such measures taken by the state in the name of providing security to the public depart from the rule of law and dilute the safeguards guaranteed to the accused by the Constitution. Due process is slackened and the inviolable rights of citizens are infringed to defend the state against terrorism. However, certain conventions like the ICCPR authorize that states may, in limited situations, temporarily derogate from part of their obligations on human rights guarantees, and one such “public emergency” is the threat of terrorism, which permits such a derogation. [lii]

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Therefore, any executive order detaining an individual must be scrutinized to make certain that it does not infringe upon human rights solely on the grounds of protecting national security. Preventive detention of terror suspects for an indefinite period solely on suspicion of illegal activities amounts to a contravention of the rule of law as well as international humanitarian laws. India, though a signatory to the ICCPR, has not ratified the Optional Protocol to the ICCPR. Therefore, aggrieved individuals are forbidden from bringing complaints of human rights violations before the Human Rights Committee.[liii] Nevertheless, India signed the U.N. Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) in 1997, though it has failed to accord ratification to the CAT. It has lacked alacrity in taking any measures towards amending its domestic laws to bring them into conformity with CAT's requirements. [liv] However, the ICCPR explicitly contains provisions prohibiting torture and cruel, inhuman, or degrading treatment, which form a significant component of the customary international law norm, or *jus cogens*, from which no derogation is permissible.

Further, the principle of presumption of innocence, which is a fundamental principle of criminal law, has a significant bearing on preventive detention. There should be curbs and controls on its usage including periodic review, compliance with due process, compensation in case of illegal detention, and likelihood of harm if not detained.

The increasing primacy given to crime and terror control implies that governments are more inclined towards infringing upon the inalienable rights of suspects in pursuit of the greater good of public security. It is common knowledge that national security laws and preventive detention laws are potent tools in the hands of the state to target and persecute political opponents, protestors and rebels, trade union leaders, workers, students, and human rights activist. [lv] The presumption of innocence of the accused, which is a cardinal principle of the right to a fair trial and a significant guarantee for protecting the human rights of the accused, is susceptible to breach in matters of preventive detention.

In most countries, preventive detention has been institutionalized as part of the ordinary law of the land. The executive authority is not answerable to the courts for justifying the basis on which the detention order was passed. The proceedings before the Review Boards are held behind closed doors, with no access to the detainee's legal counsel. The detainees are deprived of basic, fundamental rights, which include the right to confidential communication with their

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legal counsel and the right to meet family members in prison. The incarceration of the detainee continues unabated for an indeterminate period without any respite from the court. Although in some countries there is a limit on the period of detention, the same can be evaded by issuing a new detention order even before the detainee is released from custody. Even the grounds of arrest communicated to the detainee are very vague and, most of the time, not given at all. All such instances demonstrate a lack of respect for human rights and the erosion of the rule of law.

Cognizant of such loopholes and the large-scale deprivation of individual liberty, the Human Rights Council of the United Nations passed resolution 20/16, which was adopted on July 6, 2012. Pursuant to such a resolution, the Working Group of the Council prepared a report (A/HRC/27/47) that comprised draft guidelines on the subject of challenging the legality of detention orders before a judicial body.[lvi] It recommended that States implement the right to personal liberty that is sacrosanct under customary international law, make certain that safeguards are extended to all forms of denial of rights and liberty, and ensure that no person is detained before trial commences for periods beyond what is stated under the law. Furthermore, it suggested that States should take steps to ensure that such persons are expeditiously brought before a judge. [lvii]

Conclusion and Recommendation

Levy of a considerable term of imprisonment devoid of trial under executive discretion is not in congruence with the principle of rule of law. Therefore, any law authorizing preventive detention can be fair and reasonable only if it strikes "a balance between individual liberty on one hand and prerequisites of an orderly society on the other." [lviii] Administering the power of preventive detention violates the right to personal liberty, which is one of the most cherished rights of a citizen. Therefore, the said power must be exercised cautiously, failing which the right to liberty would be rendered futile and nugatory. The larger concern for the public good resulting from anti-social activities cannot be a sufficient ground for infringing on the personal freedom of a citizen, disregarding the procedure established by law, particularly when ordinary criminal law is available to be invoked in such circumstances. Our Constitution has enshrined

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various philosophies, and the most quintessential one is "living with dignity," and the same should not be censured in the name of precautionary incarceration.

The letter of the law, with its broad terminology and broad powers granted to police and local governments under preventive detention laws, makes it a weapon in the hand of the state for violating the rights of its citizens. It is inevitable that the preventive detention laws, in alliance with Article 22 of the Constitution, give immense power to the government, thus making it susceptible to abuse. The interests in defence of which the government may issue detention orders are extraordinarily vague. The use of terms like "the security of the state," "maintenance of public order," or "relations of India with foreign powers" could be interpreted very widely by the authorities to include every kind of public act. Furthermore, the decision of the executive authority is not subject to scrutiny by the judiciary, and only the Advisory Boards, which are more or less controlled by the Executive. Pertinently, only the Executive, devoid of the attribute of independence that is vested in the judicial tribunals, can review the decision. This results in the denial of basic rights guaranteed to the accused, which is left at the mercy of the executive authority without having recourse to the courts. States have expanded the ambit of detention laws to include ordinary crimes, thus increasing the number of persons arrested under these laws. The present-day governments justify national security laws and preventive detention laws that were formulated to provide for detention without charge or trial on the pretext of internal disturbance and national security. But in reality, the government uses these laws when the stability of the government is imperiled or vulnerable. The State's responsibility to maintain public order is not an absolute duty and it must be exercised with minimum violation of individual liberty. The Central and State government, predominantly enact the detention laws by way of an ordinance rather than the ordinary legislative process, justifying their action as immediately necessary in the prevailing scenario. Such legislation leaves no room for discussion or debate in Parliament on behalf of elected representatives of the people, thereby hampering the democratic process. Indian society is pluralist in nature, comprising different ethnic, religious, and linguistic groups. In such circumstances, it is imperative that the government frames policies encompassing members of these groups and delegate authority to them to avert any feeling of alienation. The delegation would reduce social tension that contributes to violence and militarization in society. Furthermore, concerns relating to national security should not eclipse the basic liberties granted to the people under the Constitution.

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Procedural safeguards for persons detained or facing prosecution under national security and related laws must be made available. They should be held in amiable and better conditions so that they can be distinguished from convicted criminals. The detained individuals should be kept bereft of the harm and stigma that is associated with convicted prisoners. Additionally, there should be a provision for compensation for all persons detained or prosecuted under orders that were passed mala fide or in excess of authority, and the concerned authority should be held liable. This would deter authorities from curtailing the liberty of individuals without sufficient justification. Further, preventive detention should be invoked by the State as a last resort when no other alternative is available to prevent potential harm to public order. Independence of the judiciary ought to be maintained to give impetus to the rule of law, which presupposes that the government refrains from arbitrary actions and complies with domestic and international human rights standards. Preventive detention laws should not displace the rule of law, even in threatening or non-threatening times. And most importantly, there needs to be a shift in mindsets and an acceptance of the primacy of individual liberty.

Endnotes

[i] The International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly resolution 2200A (XXI) on 16 December 1966 and entered into force on 23 March 1976.
[ii] The International Covenant on Economic, Social, and Cultural Rights (ICESCR) was adopted by the United Nations General Assembly (Resolution 2200 A (XXI)) on 16 December 1966.
[iii] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") was adopted by the General Assembly of the United Nations on 10 December 1984 (resolution 39/46).
[iv] International Convention for the Protection of All Persons from Enforced Disappearance (adopted December 20, 2006, not yet in force) UN Doc A/RES/61/177.
[v] Article 3 UDHR
[vi] ICCPR Supra Note 2 Article 6, 9
[vii] *Ibid* Article 9
[viii] I. Mahomed, *"Preventive Detention and the Rule of Law*", 106 S. AFRICAN L.J. 546 (1989).

[ix] *Ibid*
[x] Gursimran Kaur Bakshi, *'Preventive detention no longer viewed as an exceptional measure",* Nov. 24, 2022 available at: https://theleaflet.in/preventive-detention-no-longer-viewed-as-an-exceptional-measure/ (last visited on 15.01.2024)
[xi] David H. Bayley, "*The Indian Experience with Preventive Detention",* Pacific Affairs, Summer, 1962, Vol. 35, No. 2 (Summer, 1962), pg 112
[xii] *Ibid*
[xiii] Rinat Kitai-Sangero, *"The Limits of Preventive Detention",* 40 McGeorge Law Review (2016)
[xiv] *People's Union for Civil Liberties* v. *Union of India*, A.I.R. 2004 S.C. 456, 467

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[xv] Blum, Stephanie Cooper, "*Preventive detention in the war on terror: A comparison of how the United States, Britain, and Israel detain and incapacitate terrorist suspects.*" Homeland Security Affairs 4.3 (2008).
[xvi] Section 3(1)(a) Preventive Detention Act, 1950
[xvii] Section 43D(2)(b) Unlawful Activities Prevention Act, 1967
[xviii] Section 3 Conservation of Foreign Exchange and Prevention of Smuggling Activities Act
[xix] Section 3 National Security Act 1980 as amended by Act Nos. 24 of 1984 and 60 of 1984
[xx] Section 3(3) National Security Act 1980
[xxi] Section 13 National Security Act 1980
[xxii] Section 3 Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act 1980
[xxiii] Kalhan, A., Conroy, G. P., Kaushal, M., & Miller, S.S. "*Colonial continuities: Human rights, terrorism, and security laws in India",* Colum. J. Asian L., 20, 93. (2006)
[xxiv] See Ravi Nair, Confronting the Violence Committed By Armed Opposition Groups, 1 YALE HUM. RTS. & DEV. L.J. 1 (1998); HUMAN RIGHTS WATCH, PUNJAB IN CRISIS: HUMAN RIGHTS IN INDIA 170-204 (1991) [hereinafter HRW, PUNJAB IN CRISIS] (discussing human rights and humanitarian law violations by militants in Punjab).
[xxv] *Ibid*
[xxvi] *Ibid*
[xxvii] *People's Union for Civil Liberties v. Union of India* A.I.R. 2004 SC at 479
[xxviii] The Terror of POTA and other Security Legislation: A Report on the People's Tribunal on the Prevention of Terrorism Act and other Security Legislation at 41-45 (Preeti Verma ed., 2004)
[xxix] HCP (MD) No. 1710 of 2022]
[xxx] Gautam Bhatia, *"Preventive Detention cannot be normalized*", THE INDIAN EXPRESS (Dec. 13, 2022, New Delhi) 12.
[xxxi] Criminal Appeal No 561 of 2022 (Arising out of SLP (Crl) No 1788 of 2022)
[xxxii] *Subhash Popatlal Dave v. Union of India,* (2014) 1 SCC 280
[xxxiii] Sukrita Baruah, *"HC asks Assam govt to compensate man detained beyond stipulated time"*, THE INDIAN EXPRESS (May 17, 2023, New Delhi) 7.
[xxxiv] *Ibid*
[xxxv] *Ibid*
[xxxvi] Article 22(3) of Indian Constitution
[xxxvii] David H. Bayley, *"The Indian Experience with Preventive Detention",* Pacific Affairs, Summer, 1962, Vol. 35, No. 2 (Summer, 1962), pp. 99-115
[xxxviii] Article 22(4) Indian Constitution
[xxxix] Article 22(4) (a) Indian Constitution
[xl] Article 22 (5) of Indian Constitution
[xli] *State of Bombay v. A. R. S. Vaidya* (1950), S. C. J., 208
[xlii] VOLUME IX Friday, the 16th September 1949 The Constituent Assembly of India met in the Constitution Hall, New Delhi, at Nine of the Clock, Mr. President (The Honourable Dr. Rajendra Prasad) in the Chair.
[xliii] Speech of Dr. B.R. Ambedkar, Constituent Assembly Debates, Vol. IX, 1500 (15/09/1949).

[xliv] Speech of Dr. B.R. Ambedkar, Constituent Assembly Debates, Vol. IX, 1500 (15/09/1949).

[xlv] *Ibid*
[xlvi] *Ibid*
[xlvii] *Supra at 8*
[xlviii] Lord Woolf, '*The Rule of Law and A Change in the Constitution'* Cambridge Law Journal 317,321((2004) 63
[xlix] *Ibid*
[l] *Ibid*
[li] Barry Vaughan & Shane Kilcommins, TERRORISM RIGHTS AND THE RULE OF LAW, Routledge (2013)
[lii] ICCPR *supra* note 2 article 4 (permitting derogation from some provisions, including articles 9 and 10, in the event of "public emergency which threatens the life of the nation and the existence of which is officially proclaimed")
[liii] Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 (entered into force March 23, 1976).
[liv] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, U.N. Doc. A/RES/39/708, 1465 U.N.T.S. 85; see Asia-Pacific Human Rights Network, India:

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Human Rights Challenges for the New Government, HUMAN RIGHTS FEATURES, HRF/99/04 (May 30, 2004), http://www.hrdc.net/sahrdc/hrfeatures/HRF99. htm. For many years, India also has refused to permit the U.N. Special Rapporteur on Torture or other representatives appointed under U.N. special mechanisms to visit India to investigate allegations of torture or other human rights violations. Id.; *see also*, A.G. Noorani, India, Torture, and the UN, ECON. &POL. WKLY., June 7, 1986, at 989.

[lv] Erosion of the Rule of Law in Asia: Report of the Seminar Held in Bangkok, 18th-22nd December 1987 (1987).

[lvi] Human Rights Council, REPORT OF WORKING GROUP ON ARBITRARY DETENTION (June 2014) *available at*: https://www.right-docs.org/doc/a-hrc-27-48/ (last visited on 23.03.2023)

[lvii] *Ibid*

[lviii] *Shahid Muneeb Mir* v. *State of J&K and others* HCP No.224/2018 Pg 3

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