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Preventive Detention Repugnant To Democratic Constitution

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ABSTRACT: Security is considered to be an impotent aspect in the 21st century. It plays a crucial role in not only protecting the citizens of the country but also the various sectors that are functioning in the nation. It helps in safeguarding the rights of people belonging to different vulnerable groups. There have been various acts that have been passed by the Indian Legislature. These acts have played an important role in ensuring security to the nation. Security helps the nation to be free from any kind of threat from external and internal factors. The aim of the Indian Legislature is to make laws that can uphold the fundamental rights of all the citizens residing in the country. In rare situations, the Indian Legislature has implemented laws that have neglected the Fundamental Rights of the citizens. Preventive Detention Act was passed by the Indian Legislature to prevent anti-national elements from carrying out acts that are hostile to Nation's security and defense. It has played an important role in preventing any individual to commit any type of offence that is violative of public morality.

The governance regime in India includes certain specific laws and acts which have been constructed either to keep internal security or have continued since the period of the British rule. In today's world, caste and communal violence have become very common. National security, equality, and human freedom being the central principles in India's constitution, the Constitution of India under Article 21 ensured a life with dignity to every person, which is a fundamental right which is inviolable. The state's approach towards criminals has always been tough in suppressing and disowning the illegal activities in the best interest of the public. Our constitutional framers chose to keep preventive detention as a method of curbing anti-national operations.

Preventive Detention can be understood as imprisonment of a person without trial, an act that is supposedly justified for non-punitive ends and is often described as a preventive measure rather than a punitive one. The essence of the Law on Preventive Detention is entirely different from the arrest and incarceration under regular criminal prison, which is relevant in both a crisis and a calm scenario. In the event of arrest and detention, the arrested person is given various safeguards mentioned under Article 22(1) and (2) of the Constitution, but in compliance with the law of preventive detention under Article 22(3), such protections are not extended to the arrested detention. Clauses (4) to (7) provide for the protections in accordance with preventive detention.

KEYWORDS: preventive, repugnant, democratic, law, detention, constitution, framers, anti-national, criminal

I. INTRODUCTION

Preventive Detention is a term that relates to a situation wherein the individual is arrested or taken into custody legally or illegally. When an individual is arrested for the benefit of society then it is called Preventive Detention.[1]

There are two types of preventive detention: The first type relates to punitive detention which means under which detention is considered to be. a method of punishment. This detainment only happens after there has been a commission of a crime or there has been an attempt committed towards the crime. The other type means that a person is detained in advance to prevent any possibility of the commitment of crime or its engagement. Preventive detention is an action that is taken on an apprehension that the person can commit any wrongful act. Preventive Detention is a term that means administrative detention as the detention is directed by the executive or any decision-making authority. According to Section 151 of the Criminal Procedure Code, preventive detention is an action that can be taken on the grounds of suspicion that certain wrong actions can be committed by a particular person. A police officer is allowed to arrest any individual without the orders of the Magistrate if he gets any information that the individual can commit an offence. Article 22 of the Indian



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Constitution has laid down that a person can be given protection against arrest and detention. Preventive Detention is the act of imprisoning accused persons prior to trial on the presumption that their discharge can be heinous to society as that person can commit crimes. This term means that a person is detained based on mere apprehension in the executive's mind without a trial and convicted by the court. The laws that are regulating the concept of preventive detention are repulsive to the modern democratic constitution. [2,3]These laws have raised certain questions in relation to the protection of the citizens that is mentioned in Article 22 of the Indian Constitution.

The concept of preventive detention is to incarcerate a person on the assumption that their release will eventually lead to the commission of anti societal activities. Unlike the usual legal proceedings where a person is punished for committing a criminal act, the working of this provision is based on taking a preventive measure.

The Supreme Court of India held the same reasoning in a smuggling case by quoting the Bench in the landmark case of Rex v Halliday(1917 UKHL 1). The basis of the particular judgment was stressed on taking a precautionary measure instead of a punitive one.

The state has often contended that these laws have an instrumental purpose of safeguarding the internal security of the state including maintaining public order. Other grounds for detaining an individual without trial may include the preservation of essential supplies and foreign affairs and interests of India. The first clause of Article 22 expresses that a person shall be informed of the grounds on which he has been arrested and he cannot be detained without the disclosure of the same. The right of the accused to be produced before the magistrate is ensured by the second clause of the article.[4,5]

Article 22(3)(b) states that whoever has been arrested under preventive detention laws will be excluded from getting protection under Article 22(1) and 22(2).

There have been other theorists who criticize the view of the state because this law is arbitrary and unjust towards citizens. Curtailing a person's freedom and right to life and liberty is violative of Article 14, 19, 21. The laws of preventive detention have no intelligibility and give wide discretion to government officials to arrest whomever they want for an indefinite period.

Various clauses of Article 22 guarantee rights and assurances to the accused.[6,7]

Article 22(4) provides that a person shall be taken in custody for a maximum of 3 months, if discretionary powers of detention are extended, it shall be subject to the approval of the advisory board. (1)

The detainee under article 22(5) has the right to be informed about one's arrest and to get legal representation at the earliest of opportunities.

This was reaffirmed by the judgment Abdul Karim v. State of West Bengal (2) where it was held that these rights were valuable constitutional rights and not a mere formality.

In Hem Lall Bhandari v. the State of Sikkim (3), the Supreme Court, laying out the mandate of police officers under preventive detention laws in strict terms, held that

"It is not permissible, in matters relating to the personal liberty and freedom of a citizen, to take either a liberal or a generous view of the lapses on the part of the officers. In matters where the liberty of the citizens is involved, the officers must act with utmost expedition and in strict compliance with the mandatory provisions of law. Expeditious action is insisted upon as a safeguard against manipulation." [8,9]



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The concept of preventive detention has made its way through a long journey via various acts and rules. The term was first introduced in early Britain during the period of the first and the Second World War through The Defence Act according to which it could detain anybody on the pleasure of the Home Minister. At this time preventive detention laws were not present in any country including the United States. (4)

In pre-independence India, the Emergency Defence Act, 1939 was introduced to remove the deterrent aspects of the society during the period of emergency and World War.

Fast forward to mid 20th century these laws were introduced in India by the preventive detention act of 1950. The enactment of The Preventive Detention Act in 1950 was regarded as an incongruent measure by many considering many leaders of independent India languished in jails on the premise of these provisions.[10,11]

The A.K Gopalan v. State of Madras(5) is a landmark judgment with regards to this statute as this judgment showed how the government would further abuse its power for its political gains and this lead to detaining of many political leaders. The constitutionality of the act was challenged, but the Supreme Court finally held the act as constitutionally valid. The act was abolished in 1971.

Under the prime ministership of Mrs. Indira Gandhi, the Maintenance of Internal Security Act (MISA) was enacted which gave indefinite powers to the central govt. It was argued that this provision was gravely misused by the government during the imposition of emergency in 1975 till 1977.

The repeal of this act was soon followed by the enactment of another. The National Security Act was passed in 1980 by the then-elected PM Indira Gandhi. This act continues to exist till date and numerous instances of misuse have been reported before the judiciary. The NSA act was another controversial act with many loopholes in the statute. Section 13 of the act expressly paved the path for preventive detention for 12 months if a person was a threat to public order and also gave the government to modify the sentence.[12,13]

Additionally, the provisions, such as Section 11(4) in the NSA and Section 8(e) in the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 forbade the detainee from getting the aid of legal assistance and which prevented the detainee from appearing before the advisory board constituted under Article 22 by way of a legal practitioner. (6)

The Terrorist and Disruptive Activities (Prevention) Act, TADA was first introduced in 1985 during the insurgency in Punjab. The act came into force to combat terrorism and to deter anti-social elements that would become a threat to the nation.

Subsequently, the Prevention of Terrorism Act (POTA), 2002 an act similar to TADA was introduced keeping in mind the 9/11 attacks and the parliament attack, in 2001. It attempted to formulate stringent provisions for maintaining the integrity and security of the country.

Unlawful activities prevention act was introduced in 1967 but gained much importance in the 1990s after the Babri Masjid incident and communal riots.

The preventive detention laws are still date being used by the government in power to curb the deterrents of society.[14]

On 26 February 1950, the first Preventive Detention Act was passed by the Indian Legislature to prevent anti-national elements from carrying out acts that are hostile to Nation's security and defense. The act was supposed to end after 2



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years in practice however the time limit of the act was extended and was finally abolished in 1971. The Indian Parliament implemented this act when Indian Constitution came into force. The act focused on the detention of individuals up to one year. This act was passed to supervise the situations of displacement and extreme violence that was faced by the country during the partition. This act expired in 1969 after staying in force for two decades. Under this act, the law gave power to the government to detain individuals for a time period of one year.

In 1971 Maintenance of Internal Security Act (MISA) was instituted to establish internal security in India. This act was introduced after the removal of the Preventive Detention Act in 1969. The act had similar powers as that of the Preventive Detention Act. The act was arbitrarily used by the government against the trade unions, political opponents, civil societies during an emergency. This act was later repealed in 1977 after the fall of Indira Gandhi.

In 1974 Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) was passed by the Indian Legislature which provided for preventive detention to maintain and improve foreign exchange and to deter illegal trade. This act came into existence after the repayment of the MISA. Under this act the detention period for the smugglers was one year however on 13 July 1984 the time period was increased to two years.

The Terrorist and Disruptive Activities Act(TADA), 1987 was implemented during the Separatist movement in the nation that was seen especially in Punjab. The government saw that the new offences were created by the terrorist affected areas, provided powers to the profile and reduced the protection that was given to the defendants. The act provided a definition of the term terrorist act and disruptive activities. It gave powers to detain the suspects, attach their property and levied certain restrictions on bail. Under this, the confession that was made to the police officer was considered admissible in fact of evidence that facilitated torture and custodial abuse. As there was a lot of misuse and drawbacks the act was later repealed in 1995. The act has focused on the definition like Disruptive activities, by act or by speech or through any other media. The TADA courts have been established to prosecute those individuals who have been accused of the terrorist activities that have happened in the areas that are designated by the government as terrorist affected areas. From the time period of 1985 to 1996 over 76,000 people have been arrested under this act.[15] The Prevention of Terrorist Activities Act (POTA) was implemented in 2002 after the hijacking of IC-814 plane in 1999 that had to fly from Kathmandu to New Delhi, the Terrorist Act in World Trade Centre on 11 September 2001 and the Parliament Attack on 13 December 2001. The act focused on the concept of defense limits, police powers, setting up of courts and admissibility of a confession. The law focused on the detention of the suspect up to 180 days by a special court, the inclusion of a separate chapter with names of a terrorist organization. There were a number of parties missed this act for their political The question of the constitutional validity of the act was later discussed in the case of the People's Union for Civil Liberties vs Union of India. This act was later repealed in 2004 as there was a lot of misuse by the parties.

The Unlawful Activities & Prevention Act (UAPA) was implemented by the Indian Legislature in 1967. The Indian government combined the powers of the Preventive Detention Act with UAPA to declare the organizations unlawful. This term has been used vaguely from the very beginning. Under this act, bail is difficult to obtain. The act has allowed the accused to be kept in custody for six months without the filing of the charge sheet. Under this, any person who has been accused of the crime of murder can get bail within the time period of three months of arrest if the case is not provided to him. The UAPA has been misused many times and has led to the human rights violation. The UAPA has discarded the review clause and therefore has been repealed in Parliament. The act dealt with the offences that have been related to unlawful activities under which the government was empowered to declare some activities and some associations as unlawful as they were a threat to the sovereignty of the people. The act was amended many times in 2004, 2008, 2012 and later in 2019. In the latest amendment of 2019, it was provided that under Schedule IV, the government will have the power to declare any individual as a terrorist. It was also given that under Section 25 the DG of the NIA will be having the power to seize property. The words like terrorist organization and terrorist act were removed from the Prevention Of Terrorist Activities Act and later on added in this act.[16]

II. DISCUSSION

The preventive detention laws in the present day scenario are used as a trump card for the executives to detain any person whom they may consider as a threat to the security of the nation. The grant of such explicit powers to the parliament and the state legislature has put immense pressure on the interpreters of the constitution. As discussed before, the constitution does provide some protection against the arbitrary exercise of preventive detention laws.



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However, there are clauses in the same article which can also deny the same right to an accused detained under this law. For example, article 22(6) denies the individual the right to disclosure his grounds of detention. This proviso stands in dissonance with clause (5) of Article 22.

The government is further empowered in cases where it can further extend the detention period of three months without the opinion of the advisory board under Article 22(7). Considering the petitions of habeas corpus challenging NSA, between 2018 and 2020, 73.5 percent of them were found as incorrect decisions, and detainees were held on wrongful grounds as held by the court. Therefore, there have been various instances of wrongful detention which are found to be arbitrary and unjust. [12,13]

The court had, in the case of Maneka Gandhi v Union of India (7), widened the scope of the expression 'personal liberty' by noting that article 21 did not exclude article 19 from its purview. It further asserted that any statute which tends to deprive the personal liberty of a citizen will be left at the mercy of Article 21 and Article 19.

The case of A.K. Roy v. Union of India (8), laid down the principle that in cases where the government may use a legal practitioner, the detainee shall not be denied the use of legal aid as it would be violative of parity and article 14 of the Indian constitution.

The Court in the case of Nand Lal Bajaj v State of Punjab and Anr(9) firmly held that the fundamental scheme of parliamentary arrangement conflicted with the preventive detention laws. It inferred its reasoning on the basis that this is the responsibility of the statesman. This particular case law declared that frequent judicial intervention in such cases could be considered as encroachment into the space of legislature and executive.

Nevertheless, the SC in Rekha v State of TN (10) asserted that this provision was repugnant to the ideas of rule of law and the democratic ethics on which the foundation of the Indian constitution is set on.[13,14]

The case of Shri Pawan Kharetrilal Arora v. Shri Ramrao Wagh &others(11) highlighted the gross infringement of fundamental rights provided to a citizen. It was held by the Bombay high court that the detaining authority had committed a serious mistake by wrongfully confining the individual for 9 months based on 24 bogus cases. However, the judges of the high court in the same judgment took into account the apology issued by the authority and held that even though the grounds of confinement depended on gross nature of mistakes and the detaining authority committed a serious mistake which stuns judicial conscience, it acknowledged the apology by the authority and held that the authority acted under some basic honesty and was allowed protection under this section 16.

The apex court was of the opinion that these laws were not entirely unlawful and inconsistent, yet the intensity with which they are applied must be restrained within very narrow limits.

Certain recommendations were made by United Nations Human Rights Council with regards to the preventive detention laws in India. -(12)

- The inhuman treatment and torture given to prisoners must be stopped.
- The detainee must be given a right to be represented by a legal counsel.
- The detainee must be immediately informed about his arrest under Article 9(2) of the International Covenant on Civil and Political Rights. It provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him".
- Further in cases of wrongful detention, compensation shall be provided following Article 9(5) of the ICCPR which provides this as a right to all individuals.



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- The executive-controlled advisory body may produce impartial decisions subjected to bias which would violate the ICCPR (Article 14)(1) and the Universal Declaration of Human Rights (Article 10) i.e. independent and impartial tribunal.
- The system of periodic reviews by the advisory board needs to be introduced.

The Indian legal system is filled with loopholes and the preventive detention laws take benefit of these fallacies. Certain amendments in these laws are deemed necessary to get corrective justice and to uphold a person's basic freedom and liberty. These laws if not exercised with proper care will become a dagger murdering the notion of justice. The laws of preventive detention have no intelligibility and give wide discretion to government officials to arrest whomever they want for an indefinite period of time. The executive's arbitrary exercise of power to suppress those who raise their voices against tyranny is completely against the notion of democracy.[16]

Preventive Detention Act, 1950 has reinforced human detention in various situations where the state conditions were involved like national defence, international affairs, preservation for peace and public order. The validity of the Preventive Detention Act was first time challenged under the case of AK Gopalan vs The State of Madras where it was apparent that the freedom of an individual isn't qualified as per Article 21. The Supreme Court analyzed the view of Article 21 and Article 22 and refused to entertain any inadequacies in the procedure that was given by the law. It was laid down that both these articles were autonomous of each other. Under this case when the petitioner argued the validity of detention on those grounds violated Article 19 and Article 21 of the Indian Constitution the Supreme Court rejected all the arguments and said that the detention could be justified if they have been conducted in accordance with the legally established procedure.

Under the case of Maneka Gandhi vs Union of India [1], the court expanded the definition of personal liberty. The court held that Article 19 is not included under Article 21 and that any statute which deprives a citizen of his personal liberty will be under the scrutiny of Article 21 and Article 19.

Article 22 of the Indian Constitution provides certain rights in case of preventive detention: Clause 2 of the Article 22 of Indian Constitution states that every individual who is arrested and detained should be produced before the nearest judge within the 24-hour time period. No individual should be kept in the custody for more than

Clause 4 of Article 22 of the Indian Constitution states no law for preventive detention authorizes any individual to be detained for more than three months unless there is a reasonable justification by the advisory panel for his detainment. The report has to be provided before the expiration of three months.

Clause 5 of Article 22 of the Indian Constitution provides that the reason for the detention of an individual should be given to that individual as earliest as possible by official means. The correspondence should include all the ground related and factual information. A person who is detained can be kept in custody if there are reasonable and satisfactory reasons for his detainment. This clause also ensures that the detainee is allowed to contact any lawyer after the grounds for his detainment has been communicated to him.[13]

Object Of The Preventive Detention

The object of preventive detention is that the detainee is prevented to commit any act that is prejudicial to the state. There are certain grounds on which a person can be detained like:

- Services essential to the community
- Security of the State
- Foreign Services or foreign services
- Public Order



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A person can be detained without a trial according to the above grounds. A detainee who is covered under preventive detention doesn't have any right of personal liberty that is guaranteed under Article 19 or Article 21.

Under the case of Mariappan vs The District Collector And others [2], the court held that the object of detention is not to punish but to prevent an individual from committing any offence that is against the State.

Under the case of Prem Narayan v. Union of India [3], the Allahabad High Court held that preventive detention is a violation of personal freedom of an individual and cannot be infringed in any way however in most cases the courts have condoned the violation of liberty.

Under the case of Khudiram v. State of West Bengal [4], the detainment was made under the Maintenance of Internal Security Act, 1971 (MISA), the Supreme Court held that the court is not having powers to monitor the ampleness or the respectability of the grounds. The court is also not allowed to interfere in the decision that is made by the detaining authority.[14]

III. RESULTS

- The Ministry of Home Affairs (MHA) has constituted an advisory board to review the cases registered under the National Security Act (NSA)
 - The act allows the detention of a person up to a year without any charge.
 - The advisory board is comprising of 3 judges of the Delhi High Court
- Such an advisory board is constituted under Section 9 of the 1980 Act.
- As per official notification

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- Justice Yogesh Khanna will be the chairman of the advisory board
- Justices Chandra Dhari Singh and Rajnish Bhatnagar will be other members of this high-powered body.
- The NSA empowers the Government to detain a person if it considers the individual.
 - A threat to national security or
 - To prevent him or her from disrupting public order.
- Under the NSA, a person can be detained for up to 12 months without a charge.
 - The detained person can be held for 10 days without being told the charges against him or her. [12]

Provision of appeal and allotment of lawyer?

- The detainee can appeal only before the advisory board for relief but will not be allowed a lawyer during the trial.
- 3 WEEKS In the case of every NSA detainee, the Government concerned shall, within three weeks from the date of detention, place before the advisory board the grounds on which the order has been made and the representation, if any, made by the detainee.

Procedure of working of advisory body

- The advisory board will consider the materials placed before it.
- After hearing the detainee it will submit its report to the government within seven weeks from the date of detention of the person concerned.
 - The report of the board shall specify as to whether or not there is sufficient cause for the detention.
 - In case there is sufficient cause for the detention of the person concerned, the government will confirm the detention order and continue the detention for such a period as it thinks fit.[10]
- o In cases where the board has reported that there is no sufficient cause for the detention, the Government will revoke the detention order to release the detainee

Special Case

• In case where a person has been detained with a view to prevent him/ her from acting in any manner prejudicial to the defence of India.



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- S/he can continue to be in jail without obtaining the opinion of the advisory board for a period longer than 3 months, but not exceeding 6 months
- This also applies if the person is detained to prevent from interfering with the Government's efforts in coping with the terrorist, the security of India or the maintenance of public order or the maintenance of supplies.

Background

- NSA 1980 was enacted when the Indira Gandhi Government was in power.
- As per the Government, nearly 1,200 people across the country were detained under the NSA in 2017 and 2018.
- Madhya Pradesh detained the highest number of people under the NSA among all the States followed by Uttar Pradesh.
 - In Madhya Pradesh, 795 people were detained under the NSA in 2017 and 2018
- 466 were released by review boards and 329 were under custody.
- o In Uttar Pradesh, of the 338 people detained under the NSA in 2017 and 2018,
 - 150 were released by review boards and 188 were under detention.
- No official data is available about NSA detainees since 2019, which is a matter of concern regarding our standings on human rights parameters.[16]

IV. CONCLUSIONS

India is one of the developing nations in the world. In today's world peace and security are considered to be the most important elements for the smooth functioning of the nation. India has witnessed a number of agitations on grounds of gender, class, religion race etc however still it has been preserving its independence, dignity and its autonomy through the national security legislation and preventive detention methods. The preventive detention laws are not totally fair and require certain changes to fit well within the scope of the Right to life and Right to liberty. The responsibility of preserving the independence of India is based upon the security-related rules, actions and provisions.

Justice Katju in 2011 said: "Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of the law." Hence the law ought to be strictly construed and should be made meticulously compliant with the procedural safeguards in order to balance the nation's security and individual rights.

Peace and security play a crucial role in today's world. The paper firstly provides an introduction to security. Secondly, the paper deals with the concept of preventive detention. Preventive Detention is a situation under which an individual is detained by an authority in order to prevent him from committing certain offences. Thirdly, the paper emphasis on different types of acts like the Preventive Detention Act, Maintenance of internal security act, Terrorist and Disruptive Activities Act(TADA), Prevention of Terrorist Activities Act (POTA), Unlawful Activities & Prevention Act (UAPA) and Foreign Exchange and Prevention of Smuggling Activities Act. Fourthly the paper focuses on the constitutional validity of preventive detention. It also focuses on the objects and grounds of preventive detention. The paper also emphasizes on Article 22 specifically. The last section of the paper provides a conclusion to the same.[17]

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