



PREVENTIVE DETENTION IN INDIA: AN INTRUSIVE STRIDE FOR HUMAN RIGHTS

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Abstract: There are a few countries accompanied with India that have laws pertaining to Preventive Detention. The same has been in existence since ancient times wherein some of those are putting preposterous constraint on Fundamental Rights. One of the most stringent and draconian as per its provisions is Unlawful activities prevention Amendment Act, UAPA 2019. Its section 43D and IV Schedule are specifically arbitrary in nature to that extent, where an individual loses his scope of life. The writ like Habeas Corpus is just a compensation on part of detenu as the detention period can be extended even after completion of 180 days, as per the existing provisions. Considering the humanitarian grounds, these laws are sheerly lacking in providing justice to the detenu. The author has tried to present same in terms of Indian context which has been discussed and analysed thoroughly in this paper. It contains in depth analysis of laws that were in effect before and after Independence. Special emphasis to current laws regarding Preventive Detention have been given and how it curtails Fundamental Rights has been substantiated through case laws and arguments.

Keywords: Detention, UAPA, Fundamental Right, laws, Amendment

Introduction

It would be quite safe to say that preventive detention is unwanted and perilous hurdle in one's fundamental right to life and liberty and that which leads to absolute resistance in strides where the collective growth and one's protection to fundamental right is supremely valued. Preventive detention refers to an act wherein it is believed by the authorities that an individual is threat to law and order, regardless of the fact that he has not committed any crime yet and thus being kept into custody in order to prevent any mishappening. The law has been made for the security purpose, does it really seem correct on part of the one who is being detained? Humanity perishes, every time a person's self-interest is being degraded on the grounds of preventive detention.

Detention is of two types, one is preventive which is to prevent any crime from happening and the other is punitive which is to punish for the act. It originated During World war I and II the time England introduced Realm Act and Emergency powers (defence) Act that gave innumerable powers to the government. After World war I, laws that allow for preventive detention during peacetime, such as the Rowlatt Act of 1919 and the Bengal Criminal Law Amendment Ordinance, superseded the Defence Act.¹

Constitution itself provides sheer power to make laws in respect of national security and interest. India is among a few countries that has laws pertaining to punitive and preventive detention. First law governing preventive detention was entrenched after Independence on February 26, 1950, with the intention of preventing anti-national elements from committing activities detrimental to the security and defence of the country. India, being a land of heterogeneous society where on an interval of a day or two, differences related to Castes and communities are being seen. Several such reminiscent violence palpably witnessed by whole India during partition and before that too.

Keeping those excruciating incidents and atrocities in mind, Constitutional framers have entrenched the law of preventive detention to protect the National security and interest of India, but somehow it violates the Article 21 of the Indian Constitution that ensures and protects each person's life and personal freedom. Moreover, several instances of disobedience to comply with the guidelines established under Article 22(5) have been observed, that is indication of concern here on ground level.

Historical provisions pertaining to growth of detention in colonial India

Preventive detention in India is prevalent since colonial times. The seeds of detention started growing when the East India Company granted sheer powers in hand of Governor general that to detain anyone if found stepping against the interests and growth of British settlement in India.

Similar to this, the East India Company harshly implemented the Bengal State Prisoners Regulation, III of 1818 in the Bengal presidency and afterwards in Bombay and Madras, wherein authority was imperatively empowered to detain anyone on the mere suspicion of criminal intent without any rigorous trial as such.

Correspondingly, the Defence of India Act, passed by the then Governor General of India in 1915 during the First World War, gave executives the authority to restrict speech and movement, intern people without charge or trial, and detain them without cause, if they were found to be engaged in nationalist or revolutionary activities.

During the Second World War, a similar law called the Defence of India Act of 1939 was passed with the objective of punishing anyone who disobeyed and found defending any State that was at war.

¹Ipleaders, available at: <https://blog.ipleaders.in/preventive-detention-laws-india/> (last visited on Oct 26, 2022).

Provisions in India post-Independence

Soon after Independence, lengthy debate ensued in constituent assembly. Despite many being the afflicted victim of preventive detention, it was found obligatory for them to have laws pertaining to preventive detention for the security and integrity of India. Article 22(1) and 22(2) palpably contains provision related to interest of the arrested. Whereas in Article 22(3) there is specifically mentioned that nothing in clause (1) and (2) shall apply to any person who is detained under preventive detention. Furthermore, the word “may be” mentioned in clause (5) depicts the non-obligation on authority to protect interest of detenu that is, ‘reasons why the order was imposed should be communicated to that person.’

- Preventive Detention Act, 1950
- Unlawful activities prevention Act, 1967
- Maintenance of internal security Act, 1971
- Conservation of foreign exchange and prevention of smuggling activities Act, 1974
- Terrorist and Disruptive activities (prevention) Act, 1985
- Protection of terrorist activities Act, 2002
- Unlawful activities prevention (Amendment) Act, 2004
- Unlawful activities prevention (Amendment) Act, 2019

In 1950, first Preventive Detention Act was passed in India which was amended 7 times just to extend its validity for next 3 years and so was done before getting expired until 1969.

The notable incident of preventive detention is of A.K Gopalan, a communist leader who was held under aforementioned act. He was put in custody from 1947 to 1950 in Madras without being tried. He challenged his detention under Article 32 of Indian constitution through writ of Habeas Corpus. He was of view that his fundamental right under article 14, 19 and 21 of Indian Constitution is violated. This act's validity was being challenged in the case but later on Supreme Court held the act valid.

During India-China war in 1962, The then Chief Minister of Madras and also founder of Dravida Munnetra Kazhagam, C.N Annadurai proposed for a separate Tamil country. It was found very preposterous, if considered the situation that India was dealing with. So, in order to deal with foreign aggression it was found necessary to have such law that could suppress internal issues. So, in accordance with it Unlawful Activities Prevention Act, 1971 was passed. And with help of 16th Amendment, restriction was imposed on three Fundamental Right of speech and expression, Right to assemble, Right to form associations and unions.

The Maintenance of Internal Security Act was approved by the parliament in 1971, which was the subject of numerous disputes and gave authorities the right to seize suspects' private property and detain them without a warrant. The law was put into effect keeping in mind these worries in order to combat terrorism, deception, sabotage, and other threats to national security. Throughout the Emergency, the act which was used to jail, torture, and in some cases forcibly sterilise people was changed numerous times to serve the political demands of the governing system.

More than 40,000 persons were unjustly arrested under this regulation during the 1975 National emergency. Prominent names detained under this law during the emergency were Lal Krishna Advani, Atal Bihari Vajpayee and others.² The 44th Amendment Act of 1978, passed by the Janta Party-led government, annulled the Act.

Conservation of foreign exchange and prevention of smuggling activities Act, 1974 (cofeposa) came into effect for preventive detention in matters related to prevention of smuggling activities and conservation of foreign exchange. Regular such wretched activities made concerned authority feel necessary to have such laws in respective domain.

Terrorist and Disruptive activities (prevention) act, widely known as TADA was in force between 1985-1995. It was first act enacted by Indian parliament to counter rising terrorist activities. This act was purposely entrenched to restrict Khalistani movement, an armed Sikh separatist movement.

TADA was repealed and POTA act, 2002 came into effect, the reason for its entrenchment was terrorist attack in the Parliament and Kandahar Hijack. The terrorists breached the security precociously and somehow were able to enter the Parliament premises, they belonged to Lashkar-e-taiba and Jaish-e-Mohammed, and were being controlled from Pakistan. That led tensions and standoff between both the countries. So, to counter these terror activities from happening, Protection of terrorist activities act was passed in 2002 and repealed in 2004.

In 2004, Unlawful Activities Prevention (Amendment) Act, UAPA came into effect, wherein legislature of India introduced specific chapters to punish terrorist activities as it was considered inevitable to substantiate these laws with increasing plethora of terrorist activities and their advancement into the domain.

The most controversial and debatable one which is existing law on preventive detention in India is, Unlawful activities prevention (Amendment) Act, 2019. This act has been subject to various debates and imputation.

Unlawful Activities Prevention (Amendment) Act, 2019

It is considered to be a most draconian law in the history of India. Before this act was getting passed, it was wilfully raised by the opposition that there is high chance of this act getting misused. As it sheerly allows the government to dissent, monitor and curb any act. Furthermore, to designate any individual as a terrorist or organization as a terrorist organization if participate, prepares, promotes, or get involved in terrorism. The most heart-wrenching thing in this act is duration of detention. This act allows government to detain anyone for period of 180 days without any chargesheet filed. Till 180 days there is no provision of right to bail for detenu. Section 167 of CrPC contains provision of detention for maximum period of 90 days and it is requisite to grant right to bail after that. Whereas, Section 43 D of UAPA, 2019 states that any individual can be detained for the period of 180 days which is extendable if investigation is in process and till that, right to bail can't be granted.

² INDIA.COM, available at: <https://www.india.com/education/emergency-in-india-during-1975-atrocities-and-acts-during-emergency-1581724/> (last visited on Oct 29, 2022).

The next thing is, it allows government to designate any individual as a terrorist and to add his name into IV Schedule of UAPA, 2019, and for same, there is no due process available. If that particular individual wants to appeal for the remedy, he would have to wait for 45 days to get his name de-notified, but he would have to ask for same authority by which he has been designated. It completely crumples scope of an individual socially which put misery restrain on each and every opportunity of its fate.

Role of Judiciary in matters of preventive detention

Judiciary is the sole protector of Fundamental Rights and Constitution.

In the case of *Umar Khalid v. State of National Capital Territory of Delhi*, the petitioner was held in connection with the Delhi riot case from February 2020 during CAA and NRC protest. That resulted in horrific atrocities, for which he was accused of being the mastermind of a pre-planned conspiracy and a key participant in a Whatsapp group of Muslim JNU students, both of which the court later found to be prima facie true. As a result, the court denied him bail for a period of two years.. And was booked under Terrorist act, section 43D of Unlawful activities prevention Act, UAPA 2019. Along with, provisions of Indian Penal Code. It was observed by the court that the act done by him was not normal in nature, rather it was destructive and perilous that led to grave consequences, thereby reportedly 700 got injured and 53 deaths occurred.³

In case of *Deppak Bajaj v. State of Maharashtra*, petitioner Deppak Bajaj was detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 thereby he filed a writ petition under Article 32 to challenge the detention order passed against him. Supreme court decided that, if detention order has been passed against a person, thereby comes during pre-execution stage and proves the detention order passed against him as illegal. Then there is no point in proceeding with the matter and compelling the petitioner to get behind the bars. Emphasis to supremacy and infringement of Fundamental rights were laid on. Furthermore, relevant documents were missing and thus not placed before the detaining authority. Resulting, it vitiated the detention order and thus it was found illegal and was contemptively quashed.⁴

In case of *Ahmed Noormohmed Bhatti vs State Of Gujarat*. Under article 226 and section 482 of CrPC, petitioner filed a writ petition before the high court of Gujarat in which he prayed to declare section 151 of CrPC as unconstitutional which gives power to police authority to detain anyone for the duration of 24 hours. The respective court ruled that, if it is found that the person is required to be detained for the period exceeding 24 hours, he may not be released and may be detained under any other provision of entrenched law rather than section 151 of CrPC. Also, Neither the provision by any means can be said to be arbitrary or unreasonable nor it can be said to be violative of Fundamental Rights defined under Article 21 and 22 of the Indian Constitution.⁵

³ AIR 2022 DHC 004325

⁴ AIR 2009 SC 628

⁵ AIR 2005 3 SCC 647

In case of *Chaju Ram vs State of Jammu and Kashmir*, petitioner was detained by District magistrate under Jammu & Kashmir Preventive Detention Act, 1964 on the grounds that he along with some leaders of Democratic Conference has conspired and incited landless people residing in RS pura Tehsil to illegally occupy land in Nandpur Mechanised Farm.⁶ Resulting, some parts of respective area were illegally occupied. Petitioner filed a writ petition under Article 32 for his release under Habeas Corpus which later on he withdrew it. He filed second petition in which he stated that being an illiterate person he couldn't understand the language and he was deprived of his right as grounds on which he has been detained were not explained to him.

The respective court ruled that since the petitioner is illiterate it is necessary to make him understand as early as possible the language in which he understands so that he can avail himself the right of making representation. Furthermore, the grounds on which he has been detained are lacking in time, place, date and details of leaders and to whom he along with other leaders has incited to do so. The final judgment was such that since the petitioner was deprived of his right to make representation and the grounds of detention were sheerly vague and non complied with Jammu & Kashmir Preventive Detention Act, 1964. Resulting, his detention was declared unlawful and declared to be entitled to his liberty.

Suggestions

It is very appreciable to have laws pertaining to security and integrity of India but considering the stringent Sections and Clauses of Unlawful Activities Prevention (Amendment) Act, 2019 that contains sheer provision by which anyone can be designated as a terrorist is detrimental and against the humanitarian grounds. Detention can never be of utmost surety it is just an apprehension that any individual is threat to law and order and it is not in compliance with the propensity of Constitution. An individual can lose his scope of life socially just by the level of excruciating trauma he goes through while in detention period, as the provisions of it allows detaining authority to keep any individual in detention period as required. There is need to minimise the rigidity of it. India is known for its democracy that glistens all over the world and laws like UAPA, 2019 put misery stain on it, as it puts extravagant restraint on speech and expression which is purgatory for the growth and development of harmonious society.

Conclusion

It is crucial to have regulations for maintaining law and order throughout the country. But the law shouldn't in any way contribute to racial tension and social unrest. It appears that we have least valued the interest of individuals. As aforementioned cases corroborates that the authority doesn't get punished by their wrongful act due to non-existence of such provisions except disciplinary actions. Who is there to compensate for if the detention is found illegal? And what if the detenu is the only bread earner of his family?

In the case of *Rekha v. State of Tamil Nadu*, the defendant was accused of selling medications that had passed their expiration date by altering the original stickers that stated their expiration date. The hon'ble Supreme Court ruled that the relevant provisions of the Drugs and Cosmetics Act 1940 were competent to

⁶ AIR 1970 1 SCC 536

deal with the matter. Furthermore, detention was considered arbitrary and unnecessary. As a result, the detention order was deemed unlawful.⁷

In the matter of *Joginder Kumar v. State of Uttar Pradesh*, the Hon'ble Supreme Court rendered a decision that 'Because it is legal for the police officer to do so, no arrests can be made'. Being able to arrest someone is one thing. The basis for using it is very different. The police officer must be able to defend the arrest outside the scope of his authority. The reputation and self-esteem of a person might be irreparably damaged by being arrested and held in a police cell. A regular arrest cannot be initiated based solely on the accusation that someone committed an offence.⁸

It seems very preposterous to evade natural justice over someone, if detained illegally. Laws in effect before UAPA, 2019 were largely in compliance with principles of constitution in addition to security and integrity of India. Existing laws are being used as a medium to suppress entity.

India was colony of British, despite being the outsiders, they didn't proposed such intense provisions. No laws in USA or England is in existence except for the situation of war. The reference made is not to corroborate to not have such laws rather it is being done so to signify that in order to maintain law and order there is no need to have such stringent law wherein there is palpable abuse of one's respect and dignity.

⁷ AIR 2011 4 SCC 260

⁸ AIR 1994 4 SCC 260