

2023

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Recommended Citation

D. Nandana, 'Abuse of Powers under Preventive Detention Law - A Threat to Constitutional Law' (2023) 2 JJLR 13-25.
Available at www.jurynesia.com/vol-2-issue-2/.

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ABUSE OF POWERS UNDER PREVENTIVE DETENTION LAW - A THREAT TO CONSTITUTIONAL LAW

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ABSTRACT

A crucial role for the judiciary must be played in cases of detention. India is a diverse nation home to several distinct faiths, castes, civilizations, dialects, conventions, and customs, among other things. In India, sectarian and caste violence are highly prevalent. Preventive Detention is entirely different from the arrest and detention of ordinary cases. The purpose can be peace, the nation's protection, and public order. But this is power of preventive detention is abused by many officials by jeopardizing the detainee rights, thereby causing despotism to constitutionalism. This research paper aims to recognize the importance of the preventive detention in our nation and highlight the areas in which they operate and where regulatory laws are vital. This paper will also focus on a critical study of how the preventive detention is a threat to constitutional law. The current study seeks to examine the significance of preventive detention and the legal provisions. The current study would be focusing on rights of them and will also be covering the aspects related to the laws that govern it. The researcher will also be enhancing the data about the existing court verdicts and will cover few related cases.

KEYWORDS: Constitution, Preventive detention, rights, significance, authority.

INTRODUCTION

The purpose of preventive detention of an individual without trial is to prevent him from committing specific crimes. Preventive detention is also when instances of police detainment solely based on apprehensions that

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they might commit a crime or negatively affect society, henceforth detaining the individual. The police have the right to detain anyone suspected of committing a crime. State may use this power to accomplish their unlawful ends by abusing it as an unreliable tool they have in their hands. Henceforth, preventive detention is often described as “*Jurisdiction of suspicion*”. The Advisory Boards, who are executive authorities, are delegated to assess the detainees' conduct. In this course, the basic right to personal liberty of the detainees may be at jeopardy due to the authorities' potential for abuse and misuse power of their positions.

Art. 22 of the Constitution of India protects against the abuse of police authority to make arrests and detention. It is within the ambit of the Right to Freedom to prohibit preventative detention. It grants protection to persons who are arrested or detained.

ART. 22 PROTECTION AGAINST ARREST AND DETENTION IN CERTAIN CASES

- Art. 22 clause (1) States that, the person charged shall be informed on what grounds he is arrested (*even if arrested under preventive detention*) and will be represented by a legal representative of his choice.
- Art. 22 clause (2) states that “*Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate*”, which means the individual detained has to be produced before the magistrate within 24 hours. He shall not be detained further unless the magistrate sanction further detention.

- Art. 22 (1) and (2) are not to apply to people arrested under preventive detention laws.
- Art. 22 clause (4) states that “No law providing for preventive detention shall authorize the detention of a person for a longer period than two months unless an Advisory Board constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:”, the individual shall not be detained for more than three months unless the advisory board constitutes.
- Art. 22 clause (5) states that “*When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order*”. The person shall be communicated on what grounds he is detained and afford him the earliest opportunity to make the representation.
- Art. 22 clause (6) is an exception to clause (5), which states that it is outlawed from disclosing the facts that built the grounds for the person's detention, if which revolves or detriment to the integrity of the nation, as considered against the public interest.

IMPORTANCE OF PREVENTION DETENTION

1. Prevention is a necessary evil only to prevent public disorder. While testing the order of preventive detention, it must ensure that the facts brought before it has a direct and inevitable nexus.
 - i. Harm

- ii. Danger
- iii. Alarm
- iv. Feeling of insecurity among the general public or any section thereof at large².

2. Services essential to the community

3. Foreign affairs or security of India

4. The case of *Mariappan v. The District Collector and others*³, the court decided that the objective of detention and the detention laws is to prevent the commission of specific offenses rather than to punish.

ANALYSIS

The preventative detention clause (Art. 22) destroys the aim and significance of the chapter on fundamental rights. Individual liberty is undermined while granting the State arbitrary powers. It supports the allegation that the Indian Constitution focuses more on protecting the rights of the State against the individual than those of the person to protect their rights. Prominently, preventative detention has not been included in the Constitution of any democratic nation in the world as an intrinsic element to the extent as India did.

Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and England (except during war). Since, however, Art. 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal, but it must confine the power of preventive detention within very narrow limits, otherwise, will be taking away the individual right to liberty guaranteed by Art. 21 of the Constitution of India which was won after long, arduous

² *Banka Sneha Sheela v. State of Telangana*, (2021) 9 SCC 415

³ H.C.P.(MD) No.244 of 2014.

and historical struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.

In our country, regulations governing preventative detention are now often abused. These provisions provide tremendous executive power in deciding it detains people. Preventive detention has been egregiously abused, especially in the case of minorities and Dalits, due to a lack of procedural safeguards.

SAFEGUARDS PROVIDED AGAINST THE MISUSE OF PREVENTIVE DETENTION

The law prescribed by the Parliament shall authorize the detention of any person. Only the Parliament can enact laws allowing for preventative detention for defense, foreign policy, and national security concerns. The legislative power over preventative detention is balanced between the Parliament and the state legislatures under the Constitution. To maintain a state's security, critical services, and public order, the Parliament and state legislatures may simultaneously pass laws allowing for preventative detention.

No detenu can be detained for more than three months. It also emphasizes that no person can be detained permanently. Based on the principle of law:

1. Everyone is innocent unless proven guilty.
2. An individual shall not be punished before conviction. The presumption of innocence and the grant of bail being a matter of right. As the principle of bail itself says that Bail is the norm And Jail is exception. If the person is detained under general law he can have right to bail. But if he is detained under Preventive Detention Act there will be no right of bail.

3. Bail applications ought to be disposed of within a period of two weeks except if the provisions mandate otherwise, with the exception being an intervening application. Applications for anticipatory bail are expected to be disposed of within a period of six weeks with the exception of any intervening application.⁴
4. If the bail is rejected, then the detenu shall be released after his completion of 1/3rd of punishment. The poor who cannot afford representation can issue himself by personal bond. It has been held in *T.V. Sravanan v. State*⁵, *A. Shanthi v. Govt. of T.N*⁶, and *Rajesh Gulati v. Govt. of NCT of Delhi*⁷. The detention order under the preventive detention statute is unlawful if no bail application was in process and the detainee was imprisoned in the nexus of a criminal prosecution. These judgements seem to have been made following the Constitution Bench's ruling in *Haradhan Saha v. State of West Bengal*.⁸ It has been observed:

“here the person concerned is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardize the security of the State or public order.”

5. Art. 22(5) states that the person shall be provide the earliest opportunity for making the representation. The representation has to be dealt with expeditiously and independently. In *Ankit Ashok Jalan v. Union of India*⁹, Consequently, if the law is now settled that a

⁴ (2022) 10 SCC 51.

⁵ Appeal (Crl.) 1176 of 2005.

⁶ W.A. No. 2164 of 2021.

⁷ (2002) 7 SCC 129.

⁸ AIR 1975 SC 260.

⁹ (2020) 16 SCC 127.

representation can be made to the specially empowered official who had issued the order of detention in accordance with the power conferred in him and the representation needs to be evaluated independently by such detaining authority. Here in this case, the detaining authority's utter passivity in considering the representation prejudiced the detenu and infringed their constitutional rights. Therefore, the court accept this writ petition and declare that the detenues' continuing detention by the detention orders is unlawful, void, and unconstitutional.

6. The court held in *A.K. Roy v. Union of India*¹⁰, that while denying the right to legal representation is not unconstitutional, the State is not required to uphold that right and is not permitted to present attorneys before advisory boards to present their case unless it also grants the same right to detainees. A breach of Art. 14 would result from failure to do so.
7. Every case of preventive detention must be presented to an advisory board of High Court judges or individuals qualified to serve on the High Court. The advisory board must be consulted within three months of the detention, and any continued detention after that time requires the board's approval.

PREVENTIVE DETENTION: A THREAT TO CONSTITUTIONAL LAW

Preventive detention is not with respect of law and order. It is in the respect of public order. Art. 23(3)(b) is not a fundamental right. It is an exception to Art. 21. Art. 21 which is central to the whole chapter in our fundamental rights. Its use must be confined to specific, limited circumstances and include necessary safeguards to preserve the fundamental rights of detainees if preventive detention is to remain a part

¹⁰ (1982) 1 SCC 27.

of Indian Constitution. Preventive detention law cannot be liberally interpreted it and must always given a strict and a narrow interpretation.

In *Arnab Manoranjan Goswami v. State of Maharashtra*¹¹, has observed the Sec. 482 recognizes the inherent power of the High Court to make such orders as are necessary to give effect to the provisions of CrPC 'or prevent abuse of the process of any court or otherwise to secure the ends of justice'.

The public interest in ensuring the due investigation of crime is protected by ensuring that the inherent power of the High Court is exercised with caution. That is one—and a significant—end of the spectrum. The other end of the spectrum is equally important: the recognition by Section 482 of the power inhering in the High Court to prevent the abuse of process or to secure the ends of justice is a valuable safeguard for protecting liberty.¹²

As a matter of fact, even when a preventative detention order is based on subjective judgement, it violates Art. 14, 19, 21, and 22 of the Constitution, since it impairs the life and freedom of a citizen. The preventive detention law is statutory in nature. The exercise of that power must be within that statute's limitation. The emphasis must be exercised for the purpose it is conferred. If the power is misused or abused for collateral purposes or is outside the ground vested in the statute, or it considers things that are extraneous or irrelevant. Then, the exercise of power is vitiated as it could be a colorable exercise of power, i.e. the power is not vested for that power.

In the case of *V. Shantha v. State of Telangana*¹³, The rhetorical incantation of the word's "goonda" or "*prejudicial to maintenance of public*

¹¹ (2020) 9 SCC 1.

¹² *Arnab Manoranjan Goswami v. State of Maharashtra*, (2020) 9 SCC 1.

¹³ (2017) 14 SCC 577.

order” cannot justify invoking the Draconian powers of preventive detention. To classify the detenu as a “*goonda*” affecting public order because of inadequate yield from the chilli seed sold by him and prevent him from moving for bail even is a gross abuse of the statutory power of preventive detention. The grounds of detention are ex-facie extraneous to the Act¹⁴.

The most significant of the fundamental rights protected by the Indian Constitution is Art. 21. One that represents a critical that our ancestors achieved after long, painful battles is the liberty of a citizen. Therefore, Art. 22 must be interpreted in light of Art. 21 rather than being read in isolation; otherwise, will become nugatory.

Judicial dispensation rests on the certainty and uniformity of its decisions. It is forbidden for a court to treat individuals accused of the same offense differently, regardless of whether the same or different courts are handling the case. This course of action, even if judicially decided, violates both Art.s 14 and 15 of the Indian Constitution.

In *State of Maharashtra v. Bhaurao Punjabrao Gawande*¹⁵, this Court observed:

Personal liberty is a precious right. So did the Founding Fathers believe because, while their first object was to give the people a Constitution whereby a Government was established, their second, equally important, was to protect the people against the Government. That is why, while conferring extensive powers on the Government like the power to declare an emergency, the power to suspend the enforcement of fundamental rights or the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights which they regarded as

¹⁴ *Id.*

¹⁵ AIR 2008 SC 2931.

'*fundamental*'. The imperative necessity to protect those rights is a lesson taught by all history and all human experience. Our Constitution-makers had lived through bitter years and seen an alien Government trample upon human rights which the country had fought hard to preserve. They believed like Jefferson that 'an elective despotism was not the Government we fought for' and therefore, while arming the Government with large powers to prevent anarchy from within and conquest from without, they took care to ensure that those powers were not abused to mutilate the liberties of the people.

In *Ahmed Noormohmad Bhatti v. State of Gujarat*¹⁶, while upholding the validity of the Criminal Procedure Code of 1973's Section 151, which gives the police the authority to detain and arrest someone without a warrant to stop the commission of a Cognizable Offense, held that a provision could not be declared to be unconstitutional because the police officer might abuse his position.

CONCLUSION

In the case of *United States v. Salerno*¹⁷, the Supreme Court established a few safeguards to prevent the abuse of preventive detention powers. These safeguards included the right to counsel as a crucial component of proceedings, strict adherence to the requirements for speedy trials, hearings within a reasonable amount of time after capture, etc. Similarly, in India, protections are in place, yet justice is delayed or denied when these safeguards are involved.

Preventive detention law cannot be liberally interpreted. If the ordinary law of land can deal with situation recourse to preventive detention law will be illegal.¹⁸ Preventive detention is frequently referred as "*Jurisdiction*

¹⁶ (2005) 3 GLR 2604.

¹⁷ 481 U.S. 739 (1987).

¹⁸ *Rekha v. State of T.N.*, (2011) 5 SCC 244.

of suspicion". So, the detention orders are only issued after the detaining authority is subjectively satisfied. Therefore, meticulous compliance with procedural safeguards is mandatory¹⁹. The procedural safeguards differ in the rule of law and rule of whim or capricious. When the procedure once complied, it shall administer equal justice.

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