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PREVENTIVE DETENTION AND NATIONAL SECURITY OF INDIA

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ABSTRACT:

Preventive detention is a unique concept validated by laws like the National Security Act and a controversial aspect of our Indian constitution. It permits detention without charge or trial in order to remove certain threats to individual liberty and national security. The executive power under these laws and Indian constitution's fundamental rights are inherently conflicted subject matter examined in this article. This article also covered the foundation of preventive detention in constitutional aspects, its evolution in earlier days, procedural protections afforded to detainees, and other landmark judicial interpretations. At last it evaluates the current legal system which balances individual liberty and national security.

KEYWORDS:

Preventive Detention; National Security; Article 22; Personal Liberty; Indian Constitution; Judicial Review.

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INTRODUCTION:

Preventive detention is a unique concept that permits the state to detain an individual without conducting any trial in order to prevent any future activities or threaten public order, morality and national security. Article 22 of our Indian constitution gave authority to detain an individual under preventive detention in order to avoid the future outcomes.

The first and foremost objective of preventive detention is to avoid future harmful activities and not to punish for the past conduct. The concept of punitive detention under criminal law is inherently different from preventive detention. The authority to detain an individual is with the executives, if the action of the person is considered as a threat to individual liberty and national security. Laws such as the National Security Act, 1980 (NSA) gave those powers to the executives. Such laws are intended to protect the integrity and sovereignty of the country.

The Indian constitution has taken many attempts to strike a balance between individual freedom and national security by providing safeguards such as information about grounds of detention, right to be represented and reviewed by an Advisory Board. Even though the protections are there, safeguards are limited, especially when compared to the protections available under Articles 20 and 21. Judiciary's role in preventive detention cases is also restricted, as courts usually do not examine the sufficiency of the grounds but only their legality.

1. BODY OF THE ARTICLE:

2.1 PREVENTIVE DETENTION:

Preventive detention refers to the detention of an individual person without conducting any previous trial, based on the satisfaction of the executive authority that such action is necessary to avoid future acts which may affect the public order and national security. It is not like punitive detention and it is not based on past activities but on anticipated danger.

2.1.1 EVOLUTION LAW RELATED TO PREVENTIVE DETENTION:

India's preventive detention laws were started with colonial-era acts to suppress dissent, and it was continued post-independence with preventive detention act, 1950, extended until 1969,

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followed by the heavily abused MISA (1971) during the Emergency. And eventually it led to the current NSA, 1980, and other specific laws (like UAPA) which balances national security with individual liberty under constitutional provisions (Article 22) and often criticized for misuse.

I. Colonial Roots (Pre-1947)

1. Defence of India act, 1915 and Bengal criminal law amendment act, 1925:

In the beginning, the above 2 acts were enacted and these acts were used to detain revolutionaries without conducting any previous trial.

2. Preventive Detention Act, 1939:

In previous times, the preventive detention act, 1939 was broadly used. And also during the time of the Second World War this act was used to curb political opposition.

II. Post-Independence Era (1950s-1970s)

1. Preventive detention act, 1950:

Post independence the government enacted a detention law as a temporary measure for preventive detention. But it was extended repeatedly until 1969, used to counter internal security threats.

2. Maintenance of internal security act, 1971:

This act replaced the law of preventive detention; infamous for mass detentions during the 1975-77 Emergency, silencing critics.

III. Post-Emergency & Current Laws (1980s-Present)

1. National security act, 1980:

The National Security Act, 1980 was introduced after the repeal of MISA. And it allows the detention for acts "detrimental to the interest of the state," and remains in force till now.

2. Terrorist and disruptive activities prevention act, 1985:

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This act was India's first national anti-terror law (1985-1995) enacted to define terrorism, boosting the powers for police, and creation of special courts. Also it faced some criticism for widespread abuse, torture, and high acquittals, leading to its lapse in 1995, though pending cases continued.

3. ***Unlawful activities prevention act, 1967:***

India's primary anti-terrorism law aimed at preventing individuals and associations from doing an act which threatens the country's security and sovereignty. And this act also provides power to CG and other agencies like the National Investigation Agency (NIA).

2.3 CONSTITUTIONAL FRAMEWORK & SAFEGUARDS:

The Constitution itself provides provision for detention that is art. 22 of the constitution mandates safeguards for the detained persons. Simultaneously, the Constitution incorporates limited safeguards for detenus such as the rights are related to information of grounds of arrest and make representation, and Advisory Board's mandatory review.

The validity of preventive detention in India is expressly recognized under Article 22 (3)– (7) of the Constitution. Under this parliament is empowered an enactment related to preventive detention laws and the procedure for detention.

ARTICLE 22: PROTECTION AGAINST ARREST AND DETENTION IN CERTAIN CASES.

Article 22 of the constitution expressly dealt with the protection against arrest and detention and can be divided into two parts:

A. Safeguards in Ordinary Arrest (Articles 22(1)– (2))

These following provisions apply only to ordinary criminal arrests:

1. Right to be informed about the grounds of arrest.

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2. Right to consult and make defence through legal practitioner.
3. Produce to the magistrate within 24 hours of detention.

The above three safeguards do not apply in case of preventive detention.

B. Preventive Detention Provisions (Articles 22(3)–(7))

1. Article 22(3): Exception Clause

This clause excludes enemy aliens, and persons detained under preventive detention laws from the protections under clauses (1) and (2).

2. Article 22(4): Advisory Board Safeguard

If any person is detained under this clause cannot be detained for more than three months unless an Advisory Board reports sufficient cause for detention. The advisory boards are filled with qualified persons like HC judges.

3. Article 22(5): Right to Communication and Representation

Under clause (5) the grounds of detention must be communicated as soon as possible. The detenu should get an opportunity to make representation (principle of natural justice). This is the important safeguard given under Article 22.

4. Article 22(6): Non-disclosure in Public Interest

Under this clause, the State may withhold the discovery of facts if it is against public interest, often sometimes invoked in national security cases.

5. Article 22(7): Parliamentary Power

This clause gave the power to the parliament to enact national security laws for preventive measures. Parliament can prescribe the time for detention and can modify the requirements of the Advisory Board.

2.4 NATIONAL SECURITY ACT:

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Preventive detention is a precautionary approach and it's not punitive. The main purpose of preventive detention is to prevent future harm to public order and national security, economic stability. But it operates based on the satisfaction of the executive authority, raising serious constitutional concerns. Pursuant to this power, several statutes and acts have been enacted, most notably the NSA, 1980, which authorizes detention for the safeguard of public safety and security.

NSA, 1980 is an Indian preventive detention law, which allows the CG and SG to detain individual persons for actions "prejudicial" to India's defence, security, integrity, sovereignty, foreign relations, or public order and other important things. It authorized those authorities to hold people without formal charges for up to 12 months, requiring review by Advisory Boards (comprising High Court judges) and strict adherence to procedures.

2.5 Comparative study of preventive detention laws:

Laws related to preventive detention in India allow the government to detain a person to prevent threats to national security and public order. Under the Constitution, Article 22 plays a main role. NSA,1980; COFEPOSA, 1974; and many other laws. Before this TADA, MISA acts were used and later it was repealed. This law does not focus on punishments for the act which is done, it focuses on prevention. Many countries use preventive detention in extreme conditions but India is permanently included in the Constitution, this shows how preventive detention is considered as an important tool for national security.[1]

2.6 RELATIONSHIP BETWEEN ARTICLE 22 AND NATIONAL SECURITY LAWS:

The constitutional validity of the National Security Act, 1980 is directly derived from Article 22. Article 22 permits preventive detention in certain cases such as the protection of the security of the nation. Indian judiciary has interpreted that such power must be exercised reasonably and

[1] Md. Imran wahab, understanding the national security act(1980): preventive detention, security, and civil liberties, (dec 25 8.30 am), legal service india, https://www.legalserviceindia.com/Legal-Articles/understanding-indias-national-security-act-nsa-1980-preventive-detention-security-and-civil-liberties/

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should be complied with procedural safeguards. Misuse of provisions in the National Security Act can violate Articles 14 and 21, even though it is formally complied with Article 22.

IMPORTANT PROVISIONS OF THE NATIONAL SECURITY ACT, 1980 RELATING TO ARTICLE 22:

1. **Section 3: Power to Detain**

This section empowers the CG & SG or District Magistrate to order preventive detention.

The grounds for detention include security of the state, maintenance of public order and maintenance of essential supplies and services. [Relation to Article 22(3)]

2. **Section 8: Grounds of Detention**

Under this section detenu must get information about the grounds of detention immediately. It provides an opportunity to the detenu to make a representation against the detention. [Relation to Article 22(5) & 22(6)]

3. **Section 9: Constitution of Advisory Board**

This section provides for the constitution and composition of an Advisory Board consisting of persons who have been judges of the High Court or qualified to be so. [Relation to Article 22(4)(a)]

4. **Section 10: Reference to Advisory Board**

Under this section the government must make a reference or to place detention order and grounds before the Advisory Board within 3 weeks of detention. [Relation to Article 22(4)]

5. **Section 11: Advisory Board Procedure**

The followings are the procedure of the Advisory Board:

Step 1: Reviews detention

Step 2: Hears the detenu (no lawyer as a matter of right)

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Step 3: Submits report within 7 weeks of detention

[Relation to Article 22(3)(b)]

6. **Section 12: Action on Advisory Board Report**

If the Board finds no sufficient cause, then the detention must be revoked by the board itself. If sufficient cause exists, the board may allow the detention to be continued. [Relation to Article 22(4)]

7. **Section 13: Maximum Period of Detention**

This sec fixes the max detention period. Under the National Security Act, the maximum detention period is 12 months. It may be subject to confirmation and review by the parliament. [Relation to Article 22(7)(a)]

8. **Section 14: Revocation or Modification**

Under this section the government has a power to revise or make changes about the detention at any time and fresh detention can be ordered based on the possible on new facts. [Relation to Article 22 (Safeguard principle)]

2.7 Preventive Detention and International Human Rights Law:

International human rights conventions and declarations like UDHR and ICCPR improve protection against arbitrary detention. Article 9 of the ICCPR gives the right to liberty and fair trial. Preventive detention laws are frequently criticized internationally because of detention without trial. International law permits limited restrictions. India as a signatory to ICCPR, must carefully watch that laws comply with human rights standards. The main challenge is balancing national security needs with international obligations.

2.8 Misuse and Abuse of Preventive Detention Laws:

Even though preventive detention is a law which is used to protect national security, there are allegations which are misusing the law. There are criticisms which say authorities use this law

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for political and many other improper reasons to detain an individual without any sufficient evidence. While the person who is detained doesn't know all the grounds for detention and there are no trial procedures, this makes an increase in possibility for misuse. The court often states that preventive detention should be used with caution and only in genuine conditions. Because of misuse it may lead to damage to public trust. So, there should be strict safeguards and judicial review to prevent abuse.

2.9 Statistical and Empirical Analysis of Preventive Detention:

A source of data says that there is frequent use of preventive detention recently. There are a large number of preventive detentions under the NSA and state preventive detention laws are reported. But many detentions are later quashed by the high court due to procedural errors and lack of justifications. This denotes that if a law is used widely, it is used carefully. Many studies also indicate that preventive detention is sometimes applied in cases that could have been handled under regular laws. These findings question the necessity of use preventive detention for national security purpose

2.10 Habeas Corpus and Constitutional Remedies:

Habeas corpus is a constitutional remedy under Article 32 and 226 of the Constitution. This gives immunity to detained people to challenge unlawful detention before the SC and HC. In preventive detention habeas corpus plays an important role in protecting the detained people under article 21. Courts analysis that proper procedure and grounds for detention are communicated are done. And checks whether constitutional safeguards under Article 22 were properly validated. Courts do not question subjective satisfaction of detaining authority, they only ensure that procedures are properly followed.

2.11 Recent Judicial Trends in Preventive Detention:

Nowadays, Indian courts have a thought of a rights oriented approach in preventive detention cases. SC and HC have quashed many detention orders which are delayed in passing or execution, where procedural safeguards are violated. Courts stated that preventive detention is an exceptional measure and must be strictly interpreted. Matters which directly affect national

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security, courts have shown deference to executive authorities. This shows an attempt to maintain a balance between protecting individual liberty and national security.

2.12 Preventive Detention and Federalism:

Preventive detentions are operating in both central and state levels. The constitution stated preventive detention in the concurrent list of schedule 7 which allows both central and state legislatures to enact laws. The CG enforces laws like NSA, while the state makes their own preventive detention laws for maintaining public order. This federal level structure gives flexibility in solving regional security challenges. However differences in implementing those laws lead to inconsistency and misuse. There should be an effective coordination among central and state authorities which is necessary to ensure preventive detention serves National security with constitutional validity.

2.13 JUDICIAL INTERPRETATION:

The interpretation by the judiciary regarding Article 22 reflects the great and gradual shift from [2]supremacy of executive to constitutional accountability. The courts examined the necessity laws related to preventive detention which safeguards national security. Art 22, as interpreted by the judiciary, stands as a reminder that even national security laws must bow to the Constitution.

Interpretation of judiciary in preventive detention has an important role in improving preventive detention jurisprudence in India. Indian courts have continuously held that preventive detention is a necessary one, but it must be strictly compiled.

2.13.1 NARROW INTERPRETATION:

A.K. GOPALAN V. STATE OF MADRAS (1950)[3]

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[2] Md. Imran wahab, understanding the national security act(1980): preventive detention, security, and civil liberties, (dec 25 8.30 am), legal service india, https://www.legalserviceindia.com/Legal-Articles/understanding-indias-national-security-act-nsa-1980-preventive-detention-security-and-civil-liberties/

[3] A.K. Gopalan v The State Of Madras, A.I.R.1950 S.C.27

The SC held the constitutionality of laws related to preventive detention by adopting a narrow interpretation about national security and individual liberty.

However, this approach was substantially revised in Menaka Gandhi case,

2.13.2 LIBERAL INTERPRETATION:

MENAKA GANDHI V. UNION OF INDIA (1978)[4]

The court interpreted Article 21 broadly in this case. Where the Court held that any law depriving personal liberty must be true, fair and reasonable, thereby expanding the scope of right to life and liberty. And also it was held that the procedure under these laws must comply with just and reasonable manners.

Preventive detention laws must comply with, right to equality (art. 14), right to freedom (art. 19) and Article 21 (due process). This case revolutionized the interpretation of Article 22 by subjecting national security laws to substantive judicial review.

2.13.3 RIGHT TO REPRESENTATION:

ICCHU DEVI CHORARIA V. UNION OF INDIA (1980)[5]

In this case the Supreme Court held that the unreasonable delay in supplying ground or reason for detention and providing documents to a person was in violation of their fundamental right to make an effective representation under Article 22(5) of the Constitution. It renders that detention illegal and requiring immediate release.

The Court held that the detenu must receive materials promptly to meaningfully exercise the rights given to them to challenge the detention and also to make representations.

2.13.4 ADVISORY BOARD AND PROCEDURAL SAFEGUARDS:

A.K. ROY V. UNION OF INDIA (1982)[6]

[4] Maneka Gandhi v Union Of India, A.I.R.1978 S.C.597
[5] Ichhu Devi Choraria v Union Of India & Ors, A.I.R.1980 S.C.1983
[6] A.K.Roy v Union Of India And Anr, A.I.R.1982 S.C.710

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The supreme court held that the National Security Act (NSA) that such laws are constitutional if they have safeguards. The constitutionality of the act upheld in this case. It can be challenged if they violate fundamental rights mentioned in part III of the constitution.

However, Court emphasized:

1. Review by the Advisory Board is mandatory.
2. Detention period 3 months requires approval from the Board.
3. Procedural safeguards must be strictly followed.

2.13.5 DELAY AND LAPSE IN DETENTION ORDERS:

REKHA V. STATE OF TAMIL NADU (2011)[7]

In this case the court held that procedural safeguards (rules for fair process) in preventive detention cases must be strictly followed, which means the authorities can't ignore small errors or delays; even minor delays in these cases can invalidate the detention order, detention is exception to right to liberty and liberty is a fundamental right, requires strict compliance to legal procedures.

2.13.6 Functioning and Accountability of Advisory Boards:

If the detentions are more than 3 months, it needs review by an advisory board consisting of qualified judges or persons eligible to be judged. The advisory board analyzes whether there is sufficient cause of detention. The opinion of the board is bound to the government. The main purpose of the board is to prevent arbitrary detention and to provide an independent review mechanism. Even though there are concerns raised related to transparency, as proceedings are not public and detainees have limited opportunity to present their case. Fairness and accountability should be ensured in advisory board proceedings are important to Equalize national security and individual rights.[8]

[7] Rekha v State of Tamil Nadu, (2011) 5 S.C.C. 244
[8] Md. Imran wahab, understanding the national security act(1980): preventive detention, security, and civil liberties, (dec 25 8.30 am), legal service india, https://www.legalserviceindia.com/Legal-Articles/understanding-indias-national-security-act-nsa-1980-preventive-detention-security-and-civil-liberties/

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3.CONCLUSION:

In India, preventive detention plays an important role in constitutional aspects and also in protection of national security. The evolution of preventive detention shows a cycle of enacting strong detention laws, facing many criticisms for abuse, repealing them, and then introducing new, often similar, legislation, which reflects an ongoing dispute between national security and individual freedom.

Despite this progressive interpretation, the courts are continuing to exercise a very limited jurisdiction on cases like preventive detention. They are focusing only on procedural compliance rather than the adequacy of grounds. This restrictive approach often creates room for executive arbitrariness, and raises misuse of power under national security laws.

The most controversial topic of our Indian constitution is preventive detention. The existence of preventive detention has reasons such as national security and public order. Under Article 22, the protections are minimal and it requires strict enforcement mechanisms. There must be a strict balance maintained between individual freedom and national security. This balance can be achieved only through rigorous judicial interpretations, transparency in executive action, and review of preventive detention laws from time to time.

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