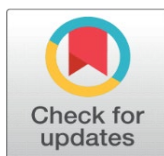


MISUSING PREVENTIVE DETENTION IN SECURITY LEGISLATIONS: A HISTORICAL ANALYSIS FROM THE LENS OF PERSONAL LIBERTY

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ABSTRACT

Preventive Detention is an extraordinary instrument used during times of crisis to prevent the commission of criminogenic behaviour by curtailing individual liberty on the apprehension of a criminal act, in the interests of national security. However, within Indian law, this extraordinary power holds a peculiar position in the sense that it is applicable during peacetime as well, an anomaly from the juristic position that it occupies in other jurisdictions. The historical roots of this power are traceable from the colonial era, wherein it was used as a means to silence dissent against the colonial State, yet, even after independence, it was given constitutional recognition and included and incorporated into the constitutional mechanism within Article 22. This is perhaps attributable to the exceptional circumstances surrounding the birth of this nascent nation, yet, over the past seven decades, it has been used as a means of silencing dissent and curtailing the voices of opposition, primarily due to its loose, imprecise, and vague connotation, as well as the blanket power that has been constitutionally granted on the State to exercise preventive detention. Curiously, although the judiciary has historically been an avowed protector of individual liberty and freedom, petitions challenging the validity of preventive detention legislations have often fallen on deaf ears, with the judiciary repeatedly valuing the principles of national security that these legislations envisage to protect over the individual rights of liberty and freedom. Thus, over the past seven decades, the misuse and abuse of preventive detention have become a dark spot in Indian legislative and judicial history.

Against this backdrop, this paper is interested in examining the historical development and application of preventive detention laws in India, starting from the colonial period and expanding the discussion to the present, to understand the reasoning for its implementation during the British era, its subsequent inclusion within the constitutional framework, its use and misuse over the decades and the judicial opinion towards its imposition, to try and understand the nuances that this extraordinary power has carried in Indian jurisprudence.

Keywords: Preventive Detention, Security legislation, Colonial State, Personal liberty, Constitutional law, Due Process.

1. INTRODUCTION

Criminal law jurisprudence traditionally allows an individual's personal liberty to be curtailed through detention and arrest only when both the requisite elements of crime – *mens rea* and *actus reus* are fulfilled. The institution of preventive detention, which allows an individual to be detained lawfully on the mere apprehension that there is an inclination on the individual's part to commit some antecedent criminal activity is an anomaly to this rule, yet, despite being distinct from the norm, it has been incorporated into the constitutional fold under Article 22. Security legislations, which are laws concerned with extraordinary crimes that are aimed towards damaging the security and harmony of the nation, have become the bedrock of imposing preventing detention on individuals. The attitude of relying upon security legislation for dealing with extraordinary criminal behaviour through preventive detention has been consistent since the

colonial era, wherein the colonial government relied upon the same for curbing voices of dissent even before they were raised. Today, although the sword of colonialism no longer hangs upon India, the governments of independent India have also relied on using preventive detention, generally through security legislation, to limit dissent and free speech. This is intrinsically problematic in a democracy where these rights are enshrined within the constitutional fabric and safeguarded by constitutional guarantees. Regrettably, the judiciary, which is the bastion of rights and individual liberty, has generally exhibited a lethargic attitude in placing liberty on a pedestal above national security.

It is against this backdrop that the present paper shall try to understand the imposition of preventive detention within the aegis of security legislation, by tracing the history of the same from colonial times to the present era. It shall also look at the judicial attitude towards preventive detention through security legislations, and attempt to carve out a path for the future where individual liberty is balanced with national security without sacrificing one for the other.

2. PREVENTIVE DETENTION: A JOURNEY FROM COLONIAL IMPOSITION TO CONSTITUTIONAL RECOGNITION

The history of preventive detention is uncannily British because it is a product of the British legal system. It is inherently distinct from punitive detention since it allows for detaining an individual even before the commission of a crime. Punitive detention is well-defined in legal jurisprudence as a measure taken by the State to curtail the personal liberty of individuals and confine them within a designated region, with the inherent reasoning for effecting such detention differing according to the theory of punishment being adhered to by the State. This, however, begs the question – what exactly is preventive detention? Lord Finaly had discussed the meaning and scope of preventive detention in *Rex v. Haliday*¹ when he elaborated – “the object of preventive detention is not to punish an individual for having committed a crime but rather to intercept him before the commission of the criminal offence.” Lord Macmillan also echoed similar sentiments in *Liversidge v. Anderson*² when he explained that preventive detention is designed to intercept an individual before the actual commission of a crime.

2.1 Preventive Detention in British India: An Overview

In the Indian context, The “Bengal State Prisoners Regulation, 1818” was the first legislative enactment that allowed individuals to be placed under “personal restraints” in the interests of “*public tranquillity and security of the State*”, where judicial proceedings were deemed unaffordable due to lack of sufficient evidence.³ This prompted similar legislations in the other two provinces of Madras and Bombay as well, with the “Madras Regulation XI, 1819”, and “Bombay Regulation XXV, 1827” respectively. A century later, with the outbreak of the First World War, a new security legislation was introduced, which empowered the Governor-General in Council to restrict the movement of any individual to a confined area if such a person was suspected of acting in any manner that was prejudicial to public safety.⁴ This was a derivative of the Defence of the Realm Act, 1914 which was in force in Britain, and both legislations were repealed after the war ended.

This, however, paved the way for the infamous “Rowlatt Act”, which was a special law for allowing the detention of individuals merely based on suspicion.⁵ Judicial review of such was barred completely,⁶ and the legislation also had a retrospective effect, allowing the detention of the individuals detained under the Defence of India to be legally extended without judicial intervention.⁷ Although the “Rowlatt Act” was subsequently repealed following the recommendations of the “Repressive Laws Committee of the British Government”, which was formed in the aftermath of the heinous Jallianwala Bagh Massacre, a decade later, the “Emergency Powers Ordinance, 1932” was passed by relying on the aforementioned “Bengal Regulation of 1818.” This was primarily used to crack down on nationalist uprisings, and preventive detention was imposed on more than 3,500 individuals during the 1930s.⁸

¹ 1917 A.C 260.

² (1942) A.C 206.

³ Bengal State Prisoners Regulation, 1818, Preamble.

⁴ Defence of India (Criminal Amendment) Act, 1915, s. 2(1)(f).

⁵ Anarchical and Revolutionary Crimes Act, 1919, s.34.

⁶ *Ibid*, s.17.

⁷ Binda Preeti Sahni, “Effects of Emergency Law in India 1915-1935” 3 *Studies in Asia, Illinois State University* 150 (2013).

⁸ A.W Brian Simpson, “Rounding Up the Usual Suspects: The Legacy of British Colonialism and European Convention on Human Rights” 41 *Loyola Law Review* 640 (1996).

The outbreak of the Second World War led to the enactment of the “Defence of India Act, of 1939”, which was again a derivative of its British counterpart the “Emergency Powers (Defence) Act, 1939.” Section 2(2)(x) of this legislation empowered “*the detention of any person who was reasonably suspected of harboring hostile intentions, or having acting in a manner prejudicial to the interests and safety of British India.*”⁹ Interestingly, Rule 26 of the Rules enacted for giving effect to this legislation envisaged “*special tribunals*” to adjudicate the violations enforceable under this legislation, however, that was deemed *ultra vires* by the Federal Court of India.¹⁰ The government unsuccessfully attempted to depose this judicial decree vide “*Ordinance (No. XIX, 1943)*”, however, that was struck down as well in “*Emperor v. Shibnath Banerjee*” by the Federal Court by holding that a law which allowed for detention according to “*government satisfaction*” was not good law at all.¹¹ This position was again reiterated in “*Emperor v. Keshav Gokhale*”¹² when it held that the application of mind by the detaining authority was a prerequisite to any form of detention, and detention without any evidentiary value that necessitates such detention will be null and void. Although the legislation itself was repealed after the war, merely a few years later, the impending chaos of India’s independence and the partition it brought along led to the enactment of various Provincial Maintenance of Public Order Acts that also granted preventive detention powers. Therefore, the institution of preventive detention through special legislation was carried over on the eve of India’s independence as well, giving a glimpse of how it will be treated in the decades to come.

2.2 Preventive Detention and Constitutional Inclusion – An Overview

Preventive detention was envisaged as an extraordinary measure that was mandated by extraordinary circumstances, and even within the British legal system, it was treated as an *emergency mechanism* that could be applied during “wartime” and not during normal “peacetime”.¹³ The scenario in American legal is also similar since the Internal Security Act, 1950 which allows for *emergency detention* of individuals can only be implemented during emergencies brought forth due to war, invasion, or domestic insurrection.¹⁴ Interestingly though, in India, preventive detention has been included within the constitutional framework unlike either the British or the American legal systems, making it a constitutional power bestowed upon the State.

Article 22 of the Constitution, under clauses 3-7, allows preventive detention. It has been postulated that this article (Article 15A during the Constituent Assembly Debates) was included as an added safeguard to Article 21 (Article 15 during the Constituent Assembly Debates) since the phrase “*procedure established by law*” which was incorporated in place of “*due process of law*” after B.N Rau’s discussion with Justice Frankfurter¹⁵ by taking inspiration from the Japanese Constitution¹⁶ was considered to provide comparatively less protection to individual liberty than necessary when weighed against *due process*. Dr. Ambedkar, in this regard, had famously expressed his dissatisfaction by claiming that the provisions of the erstwhile Article 15 only provided *carte blanche* to the State to arrest an individual through legislation since the only requisite limitation on the State for curtailing individual liberty was that the procedure had to be “*established by law*”. The added protection envisaged by the framers of the Constitution is reflected in the first two clauses of the present Article 22 which grants an individual the right to be informed about the grounds of arrest and the right to seek recourse from a legal counsel of choice;¹⁷ and also mandates that every person who has been detained or arrested must be presented before a magistrate within twenty-four hours of arrest, and also states that detention beyond twenty-four hours without magisterial authority is not allowed legally.¹⁸ These are also corresponding provisions within the criminal procedure code that echo these protections.¹⁹

⁹Defence of India Act, 1939, s 2(2)(x).

¹⁰Keshav Talpade v. Emperor, AIR 1943, F.C 1

¹¹AIR 1943 F.C 75.

¹²AIR 1945 BOM 212.

¹³Cornelius P Cotter, “Emergency Detention in Wartime: The British Experience” 6 *Stanford Law Review* 242 (1954).

¹⁴M.P Jain, “Judicial Creativity and Preventive Detention in India” 2(2) *Journal of Malaysian and Comparative Law* 263 (1975).

¹⁵Manoj Mate. “The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases” 28 *Berkeley Journal of International Law* 221 (2010).

¹⁶Constitution of Japan, 1947, Art. 31.

¹⁷Constitution of India, 1950, Art. 22(1).

¹⁸*Ibid*, Art. 22(2).

¹⁹ Code of Criminal Procedure, 1973, s.303; see also s.41D; see also s.167.

The protections envisaged by the framers of the Constitution by including Article 21 and the first two clauses of Article 22 highlight their willingness to protect individual liberty. However, the provisions of clauses 3-7 which allow preventive detention, and overrule all the safeguards envisaged within these aforementioned provisions present a curious dichotomy in the attitudes of the framers of the Constitution. Debates on the extent and scope of these provisions seldom took place, unlike the aforementioned protectionary provisions of Articles 21 and 22, which saw vociferous debates, and very few members were against the inclusion of preventive detention into the constitutional fold. It has been opined that the political scenario of the period necessitated such extraordinary laws for dealing with the extraordinary circumstances of India's independence and partition, which also saw the imposition of preventive detention through the Maintenance of Public Order Acts in almost all the provinces during the three years that it took for the Constituent Assembly to draft the Constitution,²⁰ inculcating within their learned minds that such a provision was indeed important. Alladi Krishnaswamy considered bestowing a constitutional recognition on preventive detention as an exception to the protection envisaged under Articles 21 and 22 as a "*necessary evil*" for protecting the security and sanctity of the State as well as the Constitution from the people "*who were determined to undermine it.*"²¹ Dr. Ambedkar also opined that given the circumstances prevalent in the country, it may be a necessity to detain a person tampering with the public order and defense of the country before it can be done, and stated "*I don't think the exigency of the liberty of an individual shall be above the interests of the State.*"²² This presents an interesting scenario since a vast number of the people tasked with framing the Constitution had been victims of preventive detention norms during the struggle for independence, nevertheless, their willingness to incorporate the same within the Constitution hints at the absolute necessity of such a provision in the socio-political environment of that time.

Article 22(3) states that the safeguards enumerated under clause 1&2 of the article do not apply when detained under preventive detention,²³ Furthermore, although the detenu must be informed about the grounds of arrest and given permission to legal representation of choice,²⁴ the State need not disclose facts surrounding the detention if the State feels that such facts are against public order. This created a paradoxical position since the material facts could be withheld from the detenu causing distress in his defence. The judiciary has, however, clarified in "*Hansmukh v. State of Gujarat*" that if the furnished facts are vague and inadequate for making a formal legal representation, then the detenu must be released.²⁵ A detenu's representation must be considered without undue delay due to a constitutional obligation imposed under Article 22, and in cases where there has been a delay, the Court shall be empowered to consider the veracity of the delay and ascertain whether the same was unreasonable or unavoidable.²⁶ It has also been held that an order of preventive detention will be deemed to be irrelevant if it lacks the necessary probative force or is extraneous to the scope or purpose envisaged under the preventive detention law.²⁷ Finally, considering the ambit of preventive detention itself, it has been held that the most crucial issue in considering the validity of detention is whether the activities of the detenu are prejudicial to public order rather than mere law & order since the former is narrower than the latter, and only if the answer is affirmative can an order of detention be upheld.²⁸

Finally, a discussion on the constitutional provisions must discuss Article 22 (7) which negates the protections afforded by the preceding clauses of the article. This authorizes the Parliament to detain individuals beyond three months under a law of preventive detention without referring to the advisory board under clause (4) and also delineate the maximum permissible duration of detention for a detenu along with the procedure to be followed during such detention. Interestingly, this was the result of an amendment moved less than two weeks before the completion of the Constitution by T. Krishnamachari in November 1949. However, the framers committed two grave mistakes in clause (7) – firstly, it enabled the Parliament to determine the maximum duration of detention because of which different security legislations

²⁰ Abhinav Sekhri, "Article 22 – Calling Time on Preventive Detention" 9 *Indian Journal of Constitutional Law* 177 (2020).

²¹ IX Constituent Assembly Debates, 1541-1532

²² *Ibid*, at 1500.

²³ *Supra* Note 17, Art. 22(3).

²⁴ *Ibid*, Art. 22(5)

²⁵ AIR 1981 SC 28.

²⁶ *Rajammal v. UOI*, AIR 1999 SC 684.

²⁷ *Puran Lal v. UOI*, AIR 1958 SC 162.

²⁸ *Commissioner of Police v. C. Anita*, AIR 2004 SC 4423.

have different maximum durations of permissible detention, sometimes lasting over a year; and secondly, by diluting the other safeguards provided in this Article itself, the entire responsibility for safeguarding individual liberty of people was placed on the judiciary. These shortcomings in the foresight of the constitutional forefathers have ultimately killed off the final vestiges of *due process vis-à-vis* preventive detention.

3. PREVENTIVE DETENTION THROUGH SECURITY LEGISLATIONS IN POST-COLONIAL INDIA: A CRITIQUE

The first security legislation of independent India was enacted within a month of India's independence as the "Preventive Detention Act, 1950" (hereinafter PDA, 1950) which enabled the Union Parliament to give effect to the powers bestowed upon it by Article 22(3)-(7). Although initially envisaged only as a temporary measure for twelve months, for dealing with the exigencies of partition, the legislation continued for two decades until its repeal in 1969,²⁹ with its temporal scope extended for three years from 1954 onwards through amendment. This legislation is significant for bringing forth the first case on personal liberty and the scope of Article 21 in addressing unfounded limitations on the same in the form of "*A.K. Gopalan v. State of Madras*"³⁰ when the petitioner, A.K. Gopalan, was subjected to preventive detention on the ground that it was necessary to prevent him from acting in a manner which was prejudicial to the State. The petitioner contested the detention by claiming the protection of Articles 21 and 19, however, the Court proclaimed that the detention was valid and demarcated that each provision of the fundamental rights represented a code within themselves and could not be applied when detention was done according to Article 22. Interestingly, it was recognized by the Court that non-communication of the grounds of arrest, which was allowed within the PDA, 1950 was a violation of Article 14, and therefore, by relying upon the *doctrine of severability*, the impugned provision of the legislation was deemed unconstitutional while the other portions continued to remain operational.

The only saving grace of this judgment can be construed to be J. Fazl Ali's dissenting opinion wherein he opined that every fundamental right was complementary to each other and unwarranted violation of the posits of Articles 21 and 19 amounted to illegal detention. This judgment would, interestingly, go on to be reflective of the general opinion and position that the Courts have taken in adjudicating on security legislations and their legality as far as allowing preventing detention is concerned, since more often than not, the judiciary has allowed the "*subjective satisfaction*" of the State in detaining individuals for the larger interest of the State to prevail before individual and personal liberty of the people. Furthermore, the acquiescence given to the State's "*subjective satisfaction*" in detaining an individual was a position opposed to the jurisprudence developed in the landmark *Liversidge case* on the validity of preventive detention orders.³¹ The decade after independence also witnessed the creation of the "Armed Forces Special Powers Act, 1958" (hereinafter APSFA, 1958), a derivative of the "Armed Forces Special Powers Ordinance, 1942", which was implemented during the "Quit India Movement" to suppress the nationalist struggle. Although not a security legislation that specifically deals with preventive detention, it is nonetheless a draconian legislation that allows the State to designate any region as a "*disturbed area*"³² and once such a declaration has been made, it allows the armed forces to use lethal force. It also allows the armed forces to detain on the mere suspicion that the individual will commit a cognizable offense in the future,³³ without an explicit maximum duration for which such detention is permitted. The armed forces operating in "*disturbed areas*" are also immune from any prosecution without authorization of the Union Government.³⁴ Collectively, these provisions grant impunity to the perpetrators of State-sponsored violations, without tenable repercussions, and are *aprima facie* violation of the personal liberty guaranteed by the Constitution. Incontrovertibly, the legislation has no place in a democratic society, and in line with this thought, it's the Justice Jeevan Reddy Commission also advised that the legislation should be repealed. Furthermore, its constitutional validity was also challenged in "*Naga People's Movement of Human Rights v.*

²⁹ Anil Kalhan et.al., "Colonial Continuities: Human rights, Terrorism and Security Laws in India" 20(1) *Columbia Journal of Asian Law* 135 (2006).

³⁰ AIR 1950 SC 27.

³¹ Charles Henry, "Alexandrowicz, Personal liberty and Preventive Detention" 3(4) *Journal of the Indian Law Institute* 451 (1964).

³² Armed Forces Special Powers Act, 1958, s.4(a).

³³ *Ibid*, s. 4(c).

³⁴ *Ibid*, s.6.

*Union of India*³⁵, however, the legislation was deemed constitutionally valid, despite the excesses that it has been privy to over the decades.

The PDA, 1950 was finally repealed at the end of 1969, however, merely two years later, the “Maintenance of Internal Security Act, 1971” (hereinafter MISA, 1971) was passed. The operational period of this legislation coincided with the imposition of Emergency (1975-77) and the already formidable legislation was further bolstered by amendments introduced during the emergency when it empowered both the Union Government as well as the state governments to detain an individual for twenty-four months.³⁶ The suspension of all fundamental rights during the emergency, a stand accepted by the judiciary,³⁷ further empowered the State to mercilessly curtail individual liberty, with the number of victims of this authoritarian law being as high as 1,00,000 during the two years when the Emergency was in operation.³⁸ The culmination of the National Emergency in 1977 also inadvertently led to the repeal of MISA, 1971. However, it also led to another significant development in the politico-legal history of independent India – the landmark “*Maneka Gandhi v. UOI case*.”³⁹ It had two important outcomes that ultimately opened the floodgates of “*personal liberty*” and “*constitutional morality*” for the decades to come. First, the phrase “*procedure established by law*” under Article 21 was deemed to implicitly refer to the “*due process clause*” represented by the 5th and 14th Amendments of the American Constitution, thereby exponentially increasing the scope of Article 21, with *due process* itself being echoed, in no uncertain terms, as part of the constitutional structure.⁴⁰ Secondly, Articles 14, 19, and 21 were held to be part and parcel of the same scheme (the constitutional golden triangle), and any violation of Article 21 would also have to satisfy the tests presented by Articles 14 and 19. These developments also marked a shift in the meaning of “*law*” under Article 21, from the narrower “*lex*” which merely implied “*state-made law*” to the larger “*jus*” which is a representation of the larger concept of “*natural justice*”.⁴¹

In this backdrop, the next chapter of preventive detention through security legislation was written in the form of the “National Security Act, 1980” (hereinafter NSA, 1980). The NSA, 1980 took inspiration on the substantial and procedural provisions of the erstwhile PDA, 1950, and the MISA, 1971. It allowed detention for a maximum of twelve months⁴² (later increased to twenty-four months by amendment)⁴³ and also prohibited judicial proceedings against any person who acted in “*good faith*” according to the provisions of the Act.⁴⁴ Two ordinances further bolstered this legislation. The first allowed the detaining authority to make a representation before an *Advisory Board* between three to six months, which meant that the individual could be detained for six months at least based on “*executive whim*” since this was the “*procedure established by law*” in the present context.⁴⁵ The second stated that when an individual was detained on more than one ground, the detention could not be invalidated on account of some of the grounds being vague, non-existent, or unconnected with the case.⁴⁶

These excesses as well as the judicial developments in the post-emergency period were perhaps the reason why the NSA, 1980 was the first security legislation whose constitutionality was challenged. This happened in *A.K Roy v. UOI*⁴⁷ and the challenge was made on two grounds – firstly, the vagueness of the provisions allowing for preventive detention; and secondly, the prohibition of seeking refuge from a legal counsel during the period of detention. Both these grounds are *prima facie* violations of natural justice principles, as well as an infringement of the rights under Part III of the Indian Constitution. Nonetheless, surprisingly, the judiciary deemed the legislation as well as the provisions allowing for

³⁵(1998) 2 SCC 109.

³⁶ Maintenance of Internal Security Act, 1971, s.16(A).

³⁷ ADM Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.

³⁸ Pannalal Dhar, *Preventive Detention under the Indian Constitution* 144 (Deep & Deep Publications, 1986).

³⁹ (1978) 1 SCC 248.

⁴⁰ Mohd. Arif v. Registrar, SCI, (2014) 9 SCC 737.

⁴¹ Ram Chandra v. State of Bihar, AIR 1961 SC 1269.

⁴² National Security Act, 1980, s.13

⁴³ *Ibid*, s.14A.

⁴⁴ *Ibid*, s.16.

⁴⁵ *Ibid*, s.14A.

⁴⁶ *Ibid*, s.5A.

⁴⁷ (1982) 1 SCC 271.

preventive detention to be reasonable and valid and upheld the NSA,1980 as constitutional. The Court traced its arguments from Article 22(3) and said that the protections afforded to normal detainees were not given to those detained under preventive detention. Ironically, the justification for these egregious ordinances was justified in the Parliament as legislation needed to deal with the “*anti-national, extremist and terrorist elements...in the larger interests of India*”⁴⁸ a virtual reverberation of the justification cited by the Parliament for legitimizing the PDA,1950 more than three decades back.

The “Terrorist and Disruptive Activities Act, 1985” (hereinafter TADA,1985) represented the next security legislation and its scope was even more appalling than the NSA,1980. Although the maximum duration of preventive detention was reduced to six months,⁴⁹ it allowed for in-camera trials in specially designated Courts⁵⁰ and allowed multiple deviations from the normal norms of criminal procedure enshrined in the CrPC,1973.⁵¹ The TADA,1985 also shifted the burden of proof on the defense instead of the prosecution in areas that were designated “*terrorist areas*”⁵² thereby negating the principle of “*innocent until proven guilty*,” one of the foundational principles of criminal law jurisprudence as well as a sacrosanct part of international human rights.⁵³ Finally, the phrases “*terrorist activity*” and “*disruptive activity*” which were the *sine qua non* of the legislation and the gravitational center around which the entire legislation was drafted, did not have any concrete definition, thereby allowing the executive to rely upon its discretion for ascertaining the ambit of these terms. A challenge against the constitutional validity of TADA,1985 in “*Kartar Singh v. State of Punjab*” also culminated in the legislation being deemed constitutionally valid, with only certain procedural changes made to its ambit for violating the tenets of a fair and just trial.⁵⁴ When the law finally saw its end in 1995 after mass public outcry against its imposition, supplemented by a letter from the Chairperson of the National Human Rights Commission, highlighting its misuse and abuse, the damage had already been done. Data from government records indicated that more than 76,000 people had been subjected to preventive detention under this legislation, however, a mere 1% of the detainees were actually convicted of criminal activity,⁵⁵ painting an extremely dismal picture of how vague terminologies and executive discretion had been used to curtail the constitutionally guaranteed personal liberty without justifiable reason, with the judiciary also acting like a mute spectator.

The repeal of the TADA,1985 led to the Prevention of Terrorism Act, 2002 (hereinafter POTA,2002). The dark memories of the TADA,1985 had operated as a reminder of the scope for misuse that security legislation allowing preventive detention has, however, with the 2001 9/11 attacks, the perception against the often-imperceptible threat of terrorism changed, and an ordinance was passed, which transformed into a legislation following the 2001 Parliament attack. It shared its similarities with its predecessor, the TADA,1985, and also with the American Patriot Act, 2001.⁵⁶ Vague terminologies, such as the amorphous meaning of “*terrorist act*” which was any action committed to “*threaten the integrity, security or sovereignty of India or to strike terror in the people or any section of the people*,”⁵⁷ It allowed for detention up to three months on the mere suspicion of being a terrorist,⁵⁸ which could be extended by another three months on the prosecution’s report that more time was necessary for the State to conclude investigations,⁵⁹ thereby allowing the detention of a person for six months simply based on suspicion. Bail could be denied for up to a year,⁶⁰ trial

⁴⁸ Granville Austin, *Working of a Democratic Constitution: The Indian Experience* 511 (Oxford University Press, 1999).

⁴⁹ Terrorist and Disruptive Activities Act, 1985, s.28.

⁵⁰ *Ibid*, s.16.

⁵¹ *Ibid*, s.14 provided that the maximum sentence for summary trials would be 2 years whereas the CrPc allows only three months; s.15 considered confessions made before police officials as admissible; s.19 allowed appeals only to the Supreme Court after the designated Court had passed its decree.

⁵² *Ibid*, s.21.

⁵³ Universal Declaration of Human Rights, 1948, Art.11.

⁵⁴ (1994) 2 S.C.R. 375.

⁵⁵ “TADA: Hard Law for Soft State” 13 *Economic and Political Weekly* 1070 (2000).

⁵⁶ Jayanth K. Krishnan, “India’s “Patriot Act”: POTA and the Impact on Civil Liberties in the World’s Largest Democracy, 22 *Law and Equality* 277 (2004).

⁵⁷ *Prevention of Terrorism Act, 2002*, s.03.

⁵⁸ *Ibid*, s.49(2).

⁵⁹ *Ibid*, s.49(7).

⁶⁰ *Ibid*, s.23.

in specially designated Courts, and impunity for government officials acting in “good faith” under this legislation⁶¹ were some other provisions common to such security legislation. Another significant characteristic that the TADA, 1985 and the POTA, 2002 shared was the concept of “retrospective relief”.⁶² This meant that individuals detained under these could not get relief merely because the legislation itself was repealed, and had to wait for judicial intervention since mere cessation of the legislative operations would not renounce them of their past obligations under these legislations.

The judiciary, unsurprisingly by this point, when it had a chance to review its constitutional validity, held it to be valid, in “PUCL v. UOI”, and opined that the State should not be precluded from utilizing and using all the resources available at its disposal for combating terrorism, and a statute enacted in this regard cannot be deemed unconstitutional merely on the ground that there remained some scope for its abuse.⁶³ The judiciary failed to realize that the legislation merely represented a new iteration of the old legislative provisions found in the TADA, 1985 and the NSA, 1980, which had been statistically proven to be abusive for those detained. It also exhibited a myopic perception of the extent to which the constitutionally guaranteed personal liberties of individuals could be and already has been by similar enactments, curtailed, with little scope for relief. Therefore, it would not be wrong to surmise that individual liberty and freedom were again sacrificed at the altar of social security and national interest.

Finally, the scope and ambit of the “Unlawful Activities Prevention Act, 1967” (hereinafter UAPA, 1967) must be discussed. Although a six-decade-old legislation, it was rejuvenated by two amendments in 2004 and 2008, which bolstered its capabilities and turned it into a potent enactment. It suffered from the same criticisms that the earlier legislations were guilty of, and the same vague jargon of *necessity arising out of India’s needs to fight and combat terrorism*⁶⁴ was used to justify its existence. Although it isn’t legislation enacted to give effect to preventive detention, it is nonetheless significant for the present discussion because it allows an individual presumed to commit an act that threatens the integrity, security, or unity of the nation as a terrorist, allowing for preliminary detention of 180 days.⁶⁵ Bail is prohibited for people who are detained under this legislation, and when read with the National Investigation Agency Act, 2008, special Courts for dealing with offenders detained under the UAPA, 1967 are envisaged.⁶⁶

4. JUDICIAL INERTIA: A CRITICAL ANALYSIS

The Indian judiciary has been a bastion of individual rights, and especially since the latter part of the 1970s onwards, it has exemplarily been a beacon of judicial activism across the globe, regularly evolving new mechanisms for protecting and safeguarding the rights of people. This is evident in the evolution of multiple nuanced procedural mechanisms such as PIL, epistolary jurisdiction, compensatory jurisprudence etc. Nonetheless, curiously, when questions have been raised at its altar against security legislations that have time and again abused individual liberty, it has chosen to remain a mute spectator.

The vagueness of the norms allowing preventive detention is undoubtedly the greatest shortcoming of all the legislations discussed above, and the judiciary failed to consider the excesses being committed against individual liberty by these amorphous provisions. It has regularly deferred to the executive the “subjective satisfaction” in wielding the power of preventive detention vis-à-vis security legislation. The executive’s satisfaction was always deemed reasonable, and there was abject failure on the judiciary’s part in attempting to lift the veil of satisfaction to ascertain whether it was indeed objectively satisfactory. While discussing the MISA, 1971, the Court had opined in “*Magan Cope v. West Bengal*”⁶⁷ that there was the legislation gave a “very wide ambit of discretionary powers to the State, allowing the scope for its abuse, and therefore, the letter of the law needed to be meticulously complied with.” However, instead of giving relief to future detainees by placing meaningful restrictions on discretionary satisfaction, it instead chose to place its faith in the executive’s reasonable judgment. A similar opinion was also taken by the Guwahati High Court, when, while discussing the probable excesses under the AFSPA, 1958 in detaining individuals, it placed faith in the executive’s objective morality

⁶¹*Ibid*, s.57.

⁶²*Supra Note 29*, at 105.

⁶³ 9 SCC 540.

⁶⁴Sudha Setty, “What’s in a Name? How Nations Define Terrorism Ten Years After 9/11” 33 *University of Pennsylvania Journal of International Law* 54 (2011).

⁶⁵Unlawful Activities Prevention Act, 1967, s.43D.

⁶⁶National Investigation Agency Act, 2008, s.13.

⁶⁷AIR 1975 SC 953.

and reasonableness instead of placing shackles on the State's arbitrariness, by observing that the armed forces must take action in cooperation with the local administration.⁶⁸ Yet, the executive is often complicit in the excesses being committed, and sometimes, the excesses flow from the executive and administration itself. In *"Horendt Gogoi v. UOI"*, it directed that detenus under the AFSPA, 1958 must be handed over to the local police with *"least possible delay"*,⁶⁹ however, it failed to concretize what would amount to an unreasonable delay, contributing to the already uncertain safeguards without giving any concrete results.

Perhaps the constitutional recognition afforded to preventive detention has made it a constitutionally accepted power to be wielded by the State. Since the Constitution did not provide any extraordinary circumstances in which the same could be exercised, in a manner akin to the jurisprudence of the British and American systems, the judiciary's hands were proverbially tied as far as limiting the State's implementation of preventive detention through various mechanisms are concerned. Sir Ivor Jennings had famously declared *"All Constitutions are reflections of the past and testators of the future."*⁷⁰ The Constitution of India has also been shaped by the various developments in colonial India. Courting arrest was a symbol of dissent during the colonial period, and fostering nationalist strategy. The arbitrary use of preventive detention, primarily for silencing the leaders of the movement, signalled the fascist nature of the colonial government. However, at some level, it would also undeniably foment within the fathers of independent India a respect for personal liberty, which is reflected within the constitutional framework. Yet, the inclusion of preventive detention within the Constitution by its framers, and also the power bestowed upon the State to enact security legislations was indeed based on the pious intentions of the fathers of our Constitution. This makes this hallowed ground, which maybe the judiciary is reluctant to tread.

Nevertheless, the Indian judiciary has time and again highlighted its nature as an institution that gives paramount importance to the rights conferred on individuals by the Constitution, especially Part III, and therefore, it is a confusing paradox that it would yield to the constitutional mechanism and allow the State to curb individual liberty with impunity. It has famously proclaimed, in *"E.M. Royappa v. State of Tamil Nadu"* that arbitrariness is antithetical to the rule of law, and equated it to the *"embodiment of the whims and caprices of an absolute monarch"*⁷¹ yet, it has repeatedly failed to strike down the arbitrariness being exercised by the State in curbing individual liberty through preventive detention. The PDA, 1950 was responsible for detaining *A.K. Gopalan*, and that should have been a sign of the misuse that similar legislations would undergo in the future, nonetheless, despite seven decades of utilization, the judiciary did not take any firm stand against any legislation. This hints at a rare instance of judicial inaction and inertia when the Indian judiciary, as activist as it is, chose to maintain the *status quo* and place its faith in the State.

5. CONCLUSION

Preventive detention is not a foreign concept, rather, it has existed for centuries in British jurisprudence, and naturally, on account of the influence that British law has played on Indian jurisprudence, has also been made a part of Indian law through both constitutional incorporation and legislative action through security laws. However, it has more often than not been misused and abused, and individual liberty has been sacrificed mercilessly at the altar of national security and public interest. The judiciary too has remained a spectator instead of being a fountain from which individual rights could flow when curtailed. Finally, the rule of law has also been victimized due to the prevalent arbitrariness of the State. In this vein, the following suggestions can be given to improve the circumstances surrounding *security legislation and preventive detention*, and provide a balanced scale where national security, safety & public order stand on equal footing with individual liberty and freedom, without one being abandoned in the other's interest –

- Linguistic and semantic vagueness should be addressed, and clear norms must be demarcated within the security legislations that allow preventive detention. This will limit the ambit of the law and prevent misuse.
- Extraordinary procedural laxities such as in-camera trials and refusal of bail need to be limited to extraordinary circumstances, and a separate class for those suspected of undertaking the commission of the most heinous offenses

⁶⁸Luithukia Vs Rishang Keishing, (1988) 2 Gau. LR 159.

⁶⁹(1991) Gau CR 3801.

⁷⁰Sir Ivor Jennings, *Some Characteristics of the Indian Constitution* 56 (Oxford University Press, 1953).

⁷¹(1974) 4 SCC 3.

may be formulated within the legislation where these procedural norms apply. In general, even if preventive detention is imposed on someone, it should follow the procedural norms given under general criminal law.

- If there is *prima facie* evidence that security legislations were abused and preventive detention was imposed on individuals for curbing political dissent or silencing those critical of the regime, then the detainees must be given compensation. The judiciary has already delineated that compensation may be provided in circumstances wherein article 21 has been unfairly violated⁷² and the arbitrary imposition of preventive detention is undoubtedly an instance of the violation of the same.
- Provisions that violate the tenets of natural justice, such as refusing information about the grounds of detention or provisions for preventing the detenu from seeking help from a counsel of his choice, or placing the burden of proof on the defendant for proving his innocence should be immediately struck down by the judiciary for being a violation of the larger principles of human rights.

Finally, to conclude, to surmise that the paper is against preventive detention as a legal instrument would be a wrong takeaway. The significance of the law is recognised undoubtedly, yet, there has been an attempt to highlight the shortcomings in its implementation, its misuse as a weapon for silencing political critics, and a usurpation of democratic values. This is the central thematic norm of this paper. A future where a concrete and clear set of provisions govern such an extraordinary power, with a focus on preventing its abuse, would be a welcome development.

CONFLICT OF INTERESTS

None

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None

REFERENCES

- "TADA: Hard Law for Soft State" 13 *Economic and Political Weekly* 1070 (2000).
- A.K. Gopalan v. State of Madras, AIR 1950 SC 27.
- A.K. Roy, (1982) 1 SCC 271.
- A.W Brian Simpson, "Rounding Up the Usual Suspects: The Legacy of British Colonialism and European Convention on Human Rights" 41 *Loyola Law Review* (1996).
- Abhinav Sekhri, "Article 22 – Calling Time on Preventive Detention" 9 *Indian Journal of Constitutional Law* (2020).
- ADM Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.
- Anarchical and Revolutionary Crimes Act, 1919.
- Anil Kalhan et.al., "Colonial Continuities: Human rights, Terrorism and Security Laws in India" 20(1) *Columbia Journal of Asian Law* (2006).
- Armed Forces Special Powers Act, 1958.
- Bengal State Prisoners Regulation, 1818, Preamble.
- Binda Preeti Sahni, "Effects of Emergency Law in India 1915-1935" 3 *Studies in Asia, Illinois State University* (2013).
- Charles Henry, "Alexandrowicz, Personal liberty and Preventive Detention" 3(4) *Journal of the Indian Law Institute* (1964).
- Code of Criminal Procedure, 1973.
- Commissioner of Police v. C. Anita, AIR 2004 SC 4423.
- Constitution of India, 1950.
- Constitution of Japan, 1947.
- Cornelius P Cotter, "Emergency Detention in Wartime: The British Experience" 6 *Stanford Law Review* (1954).
- Defence of India (Criminal Amendment) Act, 1915.
- Defence of India Act, 1939.
- E.M Royappa v. State of Tamil Nadu, (1974) 4 SCC 3.
- Emperor v. Keshav Gokhale, AIR 1945 BOM 212.
- Emperor v. Shibnath Banerjee, AIR 1943 F.C 75.

⁷²MC Mehta v. State of Bihar, (1987) 4 SCC 141.

- Granville Austin, *Working of a Democratic Constitution: The Indian Experience* (Oxford University Press, 1999).
- Hansmukh v. State of Gujarat, AIR 1981 SC 28.
- Horendt Gogoi v. UOI, (1991) Gau CR 3801.
- IX Constituent Assembly Debates.
- Jayanth K. Krishnan, "India's "Patriot Act": POTA and the Impact on Civil Liberties in the World's Largest Democracy, 22 *Law and Equality* (2004).
- Kartar Singh v. State of Punjab, (1994) 2 S.C.R. 375.
- Keshav Talpade v. Emperor, AIR 1943, F.C 1
- Liversidge v. Anderson, (1942) A.C 206.
- Luithukia Vs Rishang Keishing, (1988) 2 Gau. LR 159.
- M.P Jain, "Judicial Creativity and Preventive Detention in India" 2(2) *Journal of Malaysian and Comparative Law* (1975).
- Maintenance of Internal Security Act, 1971.
- Maneka Gandhi v. UOI, (1978) 1 SCC 248.
- Manoj Mate. "The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases" 28 *Berkeley Journal of International Law* (2010).
- MC Mehta v. State of Bihar, (1987) 4 SCC 141.
- Megan Cope v. State of West Bengal, AIR 1975 SC 953.
- Mohd. Arif v. Registrar, SCI, (2014) 9 SCC 737.
- Naga People's Movement of Human Rights v. UOI, (1998) 2 SCC 109.
- National Investigation Agency Act, 2008.
- National Security Act, 1980.
- Pannalal Dhar, *Preventive Detention under the Indian Constitution* (Deep & Deep Publications, 1986).
- Prevention of Terrorism Act*, 2002.
- PUCL v. UOI, 9 SCC 540.
- Puran Lal v. UOI, AIR 1958 SC 162.
- Rajammal v. UOI, AIR 1999 SC 684.
- Ram Chandra v. State of Bihar, AIR 1961 SC 1269.
- Rex v. Haliday, 1917 A.C 260.
- Sir Ivor Jennings, *Some Characteristics of the Indian Constitution* (Oxford University Press, 1953).
- Sudha Setty, "What's in a Name? How Nations Define Terrorism Ten Years After 9/11" 33 *University of Pennsylvania Journal of International Law* (2011).
- Terrorist and Disruptive Activities Act, 1985.
- Universal Declaration of Human Rights, 1948.
- Unlawful Activities Prevention Act, 1967.