

# Preventive Detention and Personal Liberty

Aaqib Mushtaq Bhat, Dr Akhilesh Ranaut

**Abstract:** *India is a country having multi-ethnic, multi-religious and multilingual society. Caste and communal violence is very common in India. Apart from that the circumstances at the time, when our constitution came in force demanded such provisions. This is evident from following statement of Dr. Bhimrao Ambedkar, ... in the present circumstances of the country, it may be necessary for the executive to detain a person who is tempering either with the public order or with the defense services of the country. In such case, I don't think that the exigency of the liberty of an individual shall be above the interests of the state". However, the provisions of the constitution seem to be ambiguous and this ambiguity has been tried to do away with some provisions. These provisions are mentioned in Article 22 (1), 22(5), 22 (6).*

**Keywords:** PR, PB, ART

## 1. Introduction

A deprivation of personal liberty prior to criminal conviction in modern legal systems characteristically occurs as a precautionary measure to ensure that the administration of criminal justice is not frustrated or obstructed by those who may become subject to its processes [1]. A person is arrested on reasonable suspicion that they have committed a criminal offence, and is detained in custody until a trial takes place to pass judgment on their suspected criminal conduct. The principal objective of criminal law is to punish convicted offenders [2]. In all cases, the courts are generally empowered to judicially determine whether a person should be deprived of their liberty in accordance with grounds enumerated in national legislation or international instrument.

In the Draft Constitution of India the Drafting Committee had introduced Article 15 A corresponding to the present Article 22 putting some curbs upon the power of preventive detention which has been introduced in the Legislative Lists like Entry 9 in List I and Entry 3 in List III which are as under:

Entry 9, List I :

"Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention."

Entry 3, List III:

"Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community, persons subjected to such detention".

'Preventive detention' is often called 'administrative detention' for the reason is this detention is ordered by the executive and the power of decision rests solely with the administrative or ministerial authority [3]. Although a remedy *a posteriori* may exist in the courts against the decision, if the courts are responsible only for considering the lawfulness of the decision and its proper enforcement, detention will fall within the concept of preventive detention [4].

The purpose of preventive detention is to safeguard national security or public order. A person is detained, not for punishment for a proven transgression of the criminal law,

but because the individual is considered a potential threat to state security [5].

In some cases the suspicion itself is based on the detainee's past criminal infractions or associations, but in other cases, such suspicion may be purely speculative. Detention occurs without charge or trial. As detention is preventive in that no criminal offence has actually been committed, the detainee is not subjected to a charge, nor afforded the opportunity of trial before a competent court.

## 2. Meaning of Preventive Detention and Personal Liberty

Gross' definition of 'preventive detention' is:

Administrative detention, sometimes known as preventive detention, refers to a situation where a person is held without trial. The central purpose of such confinement is to prevent the detainee from committing offences in the future. Detention is based on the danger to state or public security posed by a particular person against whom the government issues a detention order. In other words, if the detainee were released, he would likely threaten the security of the state and the ordinary course of life. [6]

The International Commission of Jurists' Study on States of Emergency defined 'administrative detention' as:

The deprivation of a person's liberty, whether by order of the Head of State or of any executive authority, civil or military, for the purposes of safeguarding national security or public order, or other similar purposes, without that person being charged or brought to trial. [7]

### 2.1 Indian Constitutional Provision in respect of Preventive Detention and Right of Personal Liberty

In Indian constitution the minimum procedural requirements are given under article 22, including any law enacted by legislature in accordance of which a person is deprived of his personal liberty. Under article 22 (1) and (2) are also rights for an arrested person. No one can be arrested and detained without informed him that why he is being arrested. A person who is arrested cannot be denied to be defended by a legal practitioner of his choice. It means every arrested person have the opportunity of hearing. Arrested person can consult with a legal practitioner and appointed to defend them. Every arrested person would be produced before the

nearest magistrate within 24 hours. The detained person cannot put in to the custody beyond the said period by the authority of magistrate. It is mentioned under article 22(1) and (2) of our constitution. But all these safeguards will not apply for some specific matters under article-22 (3), if the person is at the time being an enemy alien. If the person is arrested under certain law made for the purpose of "Preventive Detention" "The first condition above is justified, because when India is in war, the citizen of the enemy country may be arrested. But the second clause was not easy to justify by the constituent assembly. This is one of the provisions which resulted in stormy and acrimonious discussions. Under preventive detention laws a person can be put in to the jail or custody for two reasons. First one is that he has committed a crime. Another one is that he has the potential to commit a crime in future. The custody arising out of the later is preventive detention and under this laws the person will be deemed likely to commit a crime. Thus preventive detention is done before the crime has been committed. It is very tuff to define preventive detention because the word preventive detention is very confusing. For example; how it can say that a person will do a crime in future? And what are the implications of arresting a person without having committed a crime? The enforcement of Preventive Detention laws in peacetime, isn't it against the safeguards of our own citizens as provided by Article 22?

In *Union of India v Paul Nanickan and Anr*, the Supreme Court of India stated: the object of preventive detention is not to punish a man for having done something but to intercept him, before he does it, and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification for such detention is suspicion or reasonable probability and not criminal conviction, which can only be warranted by legal evidence [8].

Following these provisions are given in our constitution under Article 22 (1), 22(5), 22 (6). Article 22(1) says, that No person who is arrested shall be detained in custody without being informed, as soon as may not be, of the grounds for such arrest, nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. Article 22 (5) says 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 are presentation against the order. And article 22 (6) refers that Nothing in Clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the Public Interest to disclose. The constitution 44th amendment act, 1978 has amended article 22 and reduce the maximum period for which a person may be detained without obtaining the advisory board from three to two months.

## 2.2 The Prohibition on Arbitrary Arrest and Detention

Preventive detention is not explicitly prohibited by the ICCPR. Whether preventive detention is a permissible deprivation of liberty depends on whether it falls within the

prohibition on arbitrary arrest and detention under Article 9(1) of the ICCPR.

This Article states:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Consistent with Article 31(1) of the Vienna Convention, this paper will firstly apply a textual analysis to the ordinary meaning of Article 9(1) of the ICCPR as a starting point for interpretation. This Article of the Vienna Convention recommends:

A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

If the drafters had intended a restrictive interpretation of the word 'arbitrary', there would be no point in including both the second and third sentences of the Article.

The prohibition on arbitrary arrest and detention would be entirely superfluous because protection against solely unlawful arrest and detention would be covered by the principle of legality. On a structural analysis, a different meaning must have been intended for the prohibition on arbitrary arrest and detention, distinct from the principle of legality, protecting unlawful arrest and detention.

As drafted, the Covenant is consistent if a distinct meaning is attributable to the prohibition on arbitrary detention (focusing on unlawful arrest and detention), and the principle of legality (concerned with the protection from arbitrary laws in addition to unlawful acts). [9]

## 2.3 Role of Courts in respect of Preventive Detention and personal liberty

The area of preventive detention is very much administrative-ridden. The law of preventive detention has been so designed as to leave very broad discretion with administrative authorities to order preventive detention of a person, and leave only a narrow margin for judicial review. However, the courts have been conscious of the fact that preventive detention affects one of the most cherished rights of a human being, namely, the freedom of his person and have therefore gradually evolved a few principles to control administrative discretion in the area in order to safeguard the individual's freedom from undue exercise of power.

In the case of *A K Gopalan V. State of Madras* [10], petitioner filed a writ of Habeas Corpus against his detention in Madras Jail. It questioned the expression 'Personal Liberty'. The issue was whether Preventive Detention Act 1950 ultra vires Fundamental Rights under Constitution. It was held that the Preventive Detention act was intra vires the Constitution of India with the exception of Section 14 which is illegal and ultravires. It was further held that Article 21 is applicable to preventive detention and Preventive Detention

Act 1950 permits detention beyond a period of three months and excludes the necessity of consulting an advisory board. It is not obligatory on the Parliament to prescribe any maximum period.

In another case **Kharak Singh V. State of UP** [11], the court stated that personal liberty was not only limited to bodily restraint or enforcement. Kharak Singh was charged in dacoity case but was released since there was monitored his movements and activities even at night. The court laid down that an unauthorised intrusion into a person's home and disturbance caused to him thereby violated his right to personal liberty enshrined in Article 21.

In **Maneka Gandhi V. Union of India** the court expressed 'personal liberty' under Article 21 of the widest amplitude. Protection with regard to Article 19 also included unlike in the case of Kharak Singh. The Supreme Court's role of explaining the constitutionality of preventive detention has been enormous and positive. The use of preventive measures from being victimized with unlawful use of preventive detention has been safeguarded massively by Writ Habeas Corpus. Double Jeopardy too stands consistent from Petitioner's defense point.

In **Deepak Baja V. State of Maharashtra**, Article 32 and 226 empowers the Supreme Court and High Court respectively to issue writs. Habeas Corpus which means

"you may have the body" is a writ issued calling upon person by whom another person is detained to bring the Detention before the Court and to let the court know by what authority he has been detained. The writ of Habeas Corpus is a device, requiring examination of the question of illegal detention. The writ has been described as "a great Constitutional privilege of the Citizen" or the first security of civil liberty".

In **Sunil Batra V Delhi Administration** a post card written by the Detenu from jail was converted into a writ petition for Habeas Corpus. The writ would lie if the power of detention has been exercised mala fide or for collateral or ulterior purpose – as it was laid down in **Gopalan V. State of Madras**. Similarly if the detention is justified under the law, the writ would be refused.

In **Secretary to Government & others V. Nabila & others**, High Court quashed the order of detention mainly on the ground that the detention was in remand in connection with the solitary ground case when there was no material before the detaining authority to show that either the Detain himself or his relatives are taking steps to file application for bail in solitary ground case. Held the impugned order of the High Court quashing the order of detention on solitary ground case is erroneous and liable to be set aside. The Detenu was taken into custody in Sept 2012 and the order of detention was passed in Dec 2012. The same was quashed by High Court on April 2013. After a long time already expired and period of detention expired in April 2014 even if the impugned order passed by the High Court is set aside, the Detenu cannot and shall not be taken into custody for serving the remaining period of detention. Unless there still exist materials to the satisfaction of the detaining authority.

## 2.4 Safeguards Applicable to those in Preventive Detention

Each of the safeguards that apply to a person deprived of personal liberty under Article 9 of the ICCPR are intended to avoid unlawful or arbitrary conduct from the moment of the deprivation of freedom. This section of the paper addresses the issue of the safeguards under Article 9 of the ICCPR apply to a person in preventive detention.

*Article 9(2) – Right to be Informed of the Reasons for the Detention*

Article 9(2) of the ICCPR provides:

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

Two rights exist:

(i) Anyone who is arrested has the right to be informed at the time of arrest of the reasons for his arrest; and (ii) A person charged with an offence has the right to be promptly notified of a charge or charges against him and enable the detainee to discern the substance of the complaint against him. [12] In *Drescher Caldas v Uruguay*, the Human Rights Committee held in relation to the

ICCPR:

The Committee is of the opinion that Article 9(2) of the Covenant requires that anyone who is arrested shall be informed sufficiently of the reasons for his arrest to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded [13] under the prompt security measures without any indication of the substance of the complaint against him was a breach of Article 9(2) of the ICCPR. [14] According to the Human Rights Committee in **Campbell v Jamaica**: One of the most important reasons for the requirement of 'prompt' information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority. [14]

That the right to be informed of the reasons for detention at the time of arrest applies to cases of preventive detention has been confirmed by General Comment 8 on Article 9 by the Human Rights Committee. The right serves the purpose of placing the detained person in a position to make use of their right to review the lawfulness of detention pursuant to Article 9(4).

It is, however, the prohibition on arbitrary arrest and detention discussed above, that protects a person in preventive detention from indefinite detention. Where a person in preventive detention is detained without criminal charge, detention will be 'arbitrary' if it extends beyond a reasonable length of time.

Article 9(4) ICCPR provides:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The principle of judicial control over detention stems from, and is analogous to, the English remedy of *habeas corpus*, enabling a person arrested or detained to challenge the validity of his detention before court, and obtain release if detention is unlawful. The right of judicial control ensures persons who are arrested and detained are given the right to judicial review of the lawfulness of the measure to which they are subjected.

The *travaux préparatoires* of the ICCPR show that the initial draft of Article 9(4) read:

Everyone who is deprived of his liberty by arrest or detention shall have an effective remedy in the nature of 'habeas corpus' by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

### 2.5 Procedural Safeguards under Indian Constitution:

The Indian Constitution establishes a convoluted regime of procedural rights in preventive detention cases. Article 21 provides that no person may be deprived of their personal liberty except according to a "procedure established by law." Article 22 provides that all persons arrested or detained must be

- 1) Immediately informed of the grounds for their arrest;
- 2) Allowed to consult and be defended by a lawyer; and
- 3) Produced before a magistrate within twenty-four hours.

This progressive procedural rights regime, however, is not applicable in preventive detention cases. Indeed, the Constitution makes clear that the rights identified in Articles 21 and 22 (1)-(2) do not constrain the Parliament's power to fashion preventive detention laws. Such laws must, nevertheless, incorporate certain minimal procedural safeguards.

The Supreme Court has also reasoned that the rights enumerated in Article 22 (5) imply certain other procedural protections. For example, in **Wasi Uddin Ahmed v. District Magistrate, Aligarh** [15] the Court ruled that the provision of Article 22 requiring the government to "afford" the detainee the opportunity to make a representation implies the right of the detainee to be informed of his or her rights under this article. The Court has refused, however, to recognize the right to counsel in preventive detention cases. In the landmark judgment of **A. K. Roy v. Union of India**, the Supreme Court was asked to determine the constitutionality of the NSA. [16] The NSA was challenged on numerous grounds. Among these was the charge that the NSA unconstitutionally denied detainees their fundamental right to representation by legal counsel in hearings before the Advisory Board. Despite recognizing that consideration by the Advisory Board of the matters and material used against the detenu is the only opportunity available to him for a fair and objective appraisal of his case, the Court held that detainees do not have the right to representation in these hearings.

Preventive detention law does, therefore, guarantee a limited regime of procedural rights. These guarantees, however,

arguably fall well short of established international human rights standards.<sup>16</sup> Given this brief outline of preventive detention legislation, it is easy to understand why critics of these laws suggest that they constitute an institutionalized derogation regime.<sup>57</sup> Governments employing this practice do not, however, share the unstated assumption of these critiques that preventive detention violates established international human rights law. In the next section, I survey the justificatory practices of the Indian government with a view towards understanding the practice of preventive detention in its best light.

### 3. Conclusion and Suggestions

Man was born free and was left free by the Creator in this world. Therefore, right to personal liberty is the birthright of a man and this right should be free from any sort of restraint and coercion. However, this does not mean that a person can go to any extent affecting the rights of others. Thus, he is free to the extent the rights of others are not infringed. Preventive detention in general, and the Indian case in particular, reveals a fundamental weakness in international human rights law. Human rights regimes have not as yet articulated principles that can accommodate the structural tension between the ideal of an international legal order and the demands of effective domestic governance. This deficiency often means that evaluation of controversial practices devolves into either bare assertions of sovereignty by states or crude assertions of the primacy of international law by international institutions and lawyers. Finding a "third way" will require fine-grained comparative legal work that takes seriously both the proffered rationales for state practices and the deficiencies of international standards. Therefore, to protect the rights of others from being violated, the State can play its part and can make laws for preventively detaining a person before he can indulge in such activities that are prejudicial to the maintenance of public law and order or to the security of State. The preventive detention law should be more humane and must respect the human rights. Human rights are guaranteed by the Part III of the Constitution of India. Thus, the preventive detention law must stand the test of Part III of the Constitution. Hence, the detaining authority cannot act arbitrarily while exercising the power under the preventive detention law and such detention should be made in consonance with the principle of Rule of Law. On the basis of above study, I would like to propose the following suggestions:

- 1) The Government should take an initiative to hold awareness programmes through various means of communication like print and electronic media, public meetings and other suitable means, to make people informed about the detention law and the repercussions thereof, so that the people cannot indulge in such activities which may lead them in trouble.
- 2) The Public Safety Act, 1978 should be amended to accommodate provisions imposing severe punishments on the detaining authority who failed to uphold the safeguards laid down in Art.22(5) of the Constitution of India.
- 3) Further, it is suggested that the time for the Advisory Board to submit its report to the Government should be

reduced from eight weeks to three weeks so that the cases of detainees would be considered at the earliest and this will prevent the authority from detaining unlawfully persons against whom the Advisory Board finds "no sufficient cause for detention". This will help in the quick disposal of cases, so the ends of justice will be achieved.

- 4) The maximum period for which a person may be detained should be reduced from twelve months to six months from the date of detention in case of persons acting in any manner prejudicial to the maintenance of public order and from two years to one year in case of person whose activities may be regarded as a threat to the security of State.

## References

- [1] United Nations Department of Economic and Social Affairs, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* (United Nations, 1964), 62–3.
- [2] John Hatchard, *Individual Freedoms & State Security in the African Context: The Case of Zimbabwe* (1993), 46.
- [3] United Nations Economic and Social Council, Commission on Human Rights, Sub- Commission on Prevention of Discrimination and Protection of Minorities, 'Report on the Practice of Administrative Detention, submitted by Mr Louis Joinet', E/CN.4/Sub.2/1989/27 (6 July 1989), 7.
- [4] Ibid .
- [5] *R v Halliday* (1917) AC 216
- [6] 2001 18(3) *Arizona Journal of International and Comparative Law* 721, 752.
- [7] International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (1983), 394.
- [8] *Union of India v Paul Nanickan and Anr*, Appeal (Crl) 21 of 2002, (13 October 2003).
- [9] Laurent Jr Marcoux, 'Protection from Arbitrary Arrest and Detention Under International Law' (1982) 5(2) *Boston College International and Comparative Law Review* 345, 359.
- [10] AIR 1950 SC 27
- [11] AIR 1963, SC 1295.
- [12] Scott N Carlson and Gregory Gisvold, *Practical Guide to the International Covenant on Civil and Political Rights* (2003), 84.
- [13] *Adolfo Drescher Caldas v Uruguay*, Communication No.43/1979 (11 January 1979), UN Doc.Supp. No 40 (A/38/40), 192 (1983), [13.2].
- [14] Ibid.
- [15] AIR 1981, SC 2166
- [16] *A.K. Roy v. Union of India*, A.I.R. 1982 S.C. 710.