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PREVENTIVE DETENTION LAWS IN INDIA AND U. K. : A CRITICAL ANALYSIS

RAJIV KUMAR
Research Scholar,
Sardar Patel University,
Anand, **(GJ) INDIA**

ABSTRACT

Parliament of India and parliament of U.K. have enacted plenty of statutes and rules to counter the terrorism and safeguarding the societal interest. Through this article, the author is making a comparison of major legislations regarding preventive detention laws made in UK and India. While writing the present article the author explores the vast and exceptional measures which has now become normalised in the two large legal systems of the world. Author attempts to examine the ways in which these detention laws take a leap from the general constitutional and criminal law standards and contend that the usual constitutional limits on the governments have failed to bridle the executive's power and actions.

INTRODUCTION

The Preventive Detention law has a chequered history. The Preventive Detention means for preventing to the crime again and again. Basically to protect the society from the wrong doers. It is very important to detain some persons who is committing the crime again and again. Basically preventive detention law are meant for precautionary measure and the purpose is not of punitive in nature. "Preventive Detention law was passed in 1950 for the first time. According to this law if any individual would be danger for the society at large that individual will be detained in the Preventive Detention Laws.

So far as India is concerned the Preventive Detention Laws find place in the Part-III of the Indian Constitution. In order to understand why a provision permitting detention without trial i.e. Preventive Detention finds a place in Part III of the Constitution dealing with fundamental rights, we need only to see the backdrop around the time our Constitution was framed by the

Constituent Assembly. That at the time of partition India was facing a separate movement wherein Pakistan at the time of partition claiming over Kashmir Region and a separate Razakar Movement was going on in Hyderabad and these internal issues were heavily being faced by the country and the member of Constitution Assembly were concerned about the same. Constituent Assembly thereafter failed that after independence the Govt. of India will need the power of Preventive Detention while looking at the prevailing circumstances. Looking into the prevailing circumstances the framers of the Constitution amended the existing law relating to Preventive Detention and provided constitutional safeguard in case of violation of individual rights wherein an individual can approach the Supreme Court under Article 32 and High Court under Article 226 of the Constitution of India. Supreme Court and High Court have dealt with plenty of cases wherein they have set aside detention orders in Writ of habeas corpus.

Hon'ble Mr. Justice Patanjali Sastri in the very first case of Preventive Detention In A.K. Gopalan v. State of Madras[1], provided broad explanation regarding the necessity of preventive detention and observed:

> *"This sinister-looking feature, so strangely out of place in a democratic Constitution, which invests personal liberty with the sacrosanctity of a fundamental right, and so incompatible with the promises of its Preamble, is doubtless designed to prevent the abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant republic."*

In UK detention laws has been developed through years wherein from magna carta British Bill of Right, 1688 to Prevention from Terrorism Act, 1974 and further various detention laws has been developed and introduced time to time as per the societal requirement to stop terrorism and safeguarding the individual rights.

DETENTION LAWS IN UK

U.K. witnessed first and for a most Preventive Detention Law through magna carta. At the time of king ship of famous King John of England on June 15, 1215 included protection of Civilians and Illegal Detention in the Magna Carta[2].
The Darnel's case which was decided in 1627[3] traces the history of English Constitution and the same was followed by several habeas corpus Acts[4] which were enacted later on. Five

[1] [AIR 1950 SC 27]
[2] https://www.bl.uk/magna-carta
[3] https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095821668, full text of the case also

petitioners were there before the King's bench who prayed to let them free. In the petition the basic challenge was arbitrary decision of preventive detention committed by the King which was reversed. The main ground of the Darnel case was that the detention of an individual vis-à-vis power of the King to detain any individual will be limited to the interest of security of the State.

That in the year 1628[5] the petition of Right 1628 was enacted and the same Act put limitation on the King's power which includes imprisonment without any cause to safeguard the individual rights.

In the year 1640 an enactment was introduced with respect to Preventive Detention Law in England popularly known as second Magna Carta,[6] this enactment was passed after long discussion made in Parliament and declared that any individual can apply the writ of Habeas Corpus petition if he is imprisoned or aggrieved by the order of the King or by Privy council or by councillor.

The idea of British Bill of Right, 1688[7] was somehow accepted by Monark Williams and Marry which received Royal Accent in the year 1689 the basic idea of adopting the British Bill of Right, 1688 was the purpose for determining the basic civil rights of individual including the act will be deciding who will be the next successor of crown of the country. That bill used to determine the controlling power of Monark and its unreasonable and cruel behaviour against the individual /citizen of the country[8]. For the protection of Individual Right and enjoyment of absolute right British Bill of Right, 1688 was first in its kind. During the period of Prince Charles the common people of the country were protected by House of Lords and at that time in England and equivalent bill was enacted which was similar to Magna carta the Bills of Right 1689[9].

Through reading of various literature it traces that an eminent English Jurist Sir William Blackstone was the first person who advocated and classified the personal rights of men into

available at https://www.britannica.com/event/Darnels-case

[4] http://www.legislation.gov.uk/primary+secondary?title=Habeas%20Corpus, History of various Habeas Corpus Acts are also available at https://www.loc.gov/law/help/habeas-corpus/uk.php

[5] https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/civilwar/collections/petition-of-right/

[6] Tyler, Amanda L. "A Second Magna Carta: The English Habeas Corpus Act and the Statutory Origins of Habeas Privilege." Notre Dame L. Rev. 91 (2015): 1949.

[7] https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction

[8] https://www.history.com/topics/british-history/glorious-revolution

[9] https://www.bl.uk/collection-items/the-bill-of-rights

absolute right. Earlier to the British Bill of Right there was inherent power of monarch and no individual right was there with respect to personal liberty in the country U.K. (England)[10].

Thereafter in the year 1803[11] Habeas Corpus Act was enacted by the Parliament of England and given power to the judges to adjudicate the matter related to writ of habeas corpus wherein the individuals who are aggrieved by the order of Court Martials. The Habeas Corpus Act 1804[12] was enacted by the Parliament to effectively administer the Justice System in England and Ireland by providing power to the court to issue writ of habeas corpus. The primary motive and objective for enactment of the Habeas Corpus Act was to expedite the effective administration of justice in England. Thereafter in the year 1816[13] the Habeas Corpus Act 1816 was enacted by U.K. parliament aiming to remove the rule of detention in non-criminal cases. U.K. Parliament had passed an identical enactment with respect to Habeas Corpus in the year 1862 which was popularly known as Habeas Corpus Act, 1862[14] which explained that the courts in England cannot issue writ outside the territory of England for any colonial jurisdiction wherein a court has been already established to grant such writ and also not to affect right of appeal to her majesty.

Later on in the interest of society and individuals in England it was found that it's a need to enact a legislation for habitual criminal, for the same the parliament of United Kingdom enacted a law Prevention of Crime Act, 1908[15] the Act states that if courts are in opinion that the offender's criminal habits will harm the social harmony and public order then to protect the interest of public courts may order to put in detention such criminals for more than one year[16].

For combating terrorism Parliament of England first introduced a written legislation in 1974 i.e. Preventive from Terrorism Act[17] and subsequently in the year 1939 the prevention of violence Act[18] was introduced. The act of 1939 declares that Govt. may detain people for a period of 7 years but later on the same act was repealed in 1973 thereafter Prevention of Terrorism Act was again reintroduced including the provisions of prevention of Violation Act in response to an incident wherein a Bombing has been held in two pubs in Birmingham which introduced again the seven years detention rule for a person who involved in the

[10] Blackstone, William. Commentaries on the Laws of England: Book I: Of the Rights of Persons. Jazzybee Verlag, 1844.
[11] Supra at footnote 2
[12] Ibid
[13] Ibid
[14] Ibid
[15] https://www.legislation.gov.uk/ukpga/1908/59/contents/enacted
[16] http://www.irishstatutebook.ie/eli/1908/act/59/section/4/enacted/en/html
[17] https://www.legislation.gov.uk/ukpga/1974/56/contents/enacted
[18] https://api.parliament.uk/historic-hansard/acts/prevention-of-violence-act-1939

activity of terrorism or even in suspicion of Terrorism. The Prevention of Terrorism Act introduced without access to a lawyer a person may be detained for 48 hours and further the Prevention of Terrorism Act was continuously renewed until 2000.

The Parliament of United Kingdom in accordance to the need of society in the year 2012 abolished its earlier preventive detention laws and rules which determines imprisonment to protect the public interest and replaced by extended determinate sentence (EDS) scheme under Section 226A of Criminal Justice Act[19]. Under this law the detention period is 10 years or more may be imposed in respect of certain specified offence. According to Criminal Justice Act a person serving under EDS scheme cannot be released by Secretary of Estate unless the case referred to Parole board who determine that detention is no longer required for the protection of public interest.

PREVENTIVE DETENTION LAWS POSITION IN CONSTITUTION OF INDIA:

Providing Safeguard to individuals against the powers misused by the police for arrest and detention the Indian Constitution envisaged the Article 22.

The clause(2) of Article 22 reads,

> *"Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."*

The meaning of arrest is to curtail the liberty of a person and movement of that person is restricted. The legality of the arrest can be questioned but for preventing the commission of the crime again the person whop has been detained can be charged under preventive detention laws.

That any person who has been detained under preventive detention laws the detaining authority shall communicate the grounds for detention of such person and the authority shall give the opportunity for representation against the order of the detention. In India the period for detention cannot be longer than 3 months except when an advisory board is of the opinion that the detention is required after 3 months also necessarily and there is a sufficient cause for the same. However, if the detaining deems thinks fit will not disclose the facts for detention if the authority considers that the same is against the public interest to disclose.

[19] https://www.legislation.gov.uk/ukpga/2003/44/contents

When there was British rule in India at that point of time when the Bengal Regulation III of 1818[20] (the Bengal State Prisoners Regulation) in which the power was vested with the government for detaining any individual on mere grounds of suspicion. Similarly, The Defence of India Act 1939[21] under Rule 26[22] the power was vested with the government that if any person which seems to be threat for safety of the country[23] as well as it can be threat for defence that person can be detained under defence act.

After independence when India enacted and adopted the Constitution of India in the year 1950 the framers of the constitution thought that constitutional recognition to preventive detention laws and thought fit to incorporate the preventive detention laws in the Fundamental Rights chapter to prevent the society from wrongdoers as well as safeguarding against the misuse of powers of preventive detention. So far as Article 22[24] is concerned that it is not a Fundamental Rights but it is incorporated to prevent the crime again and again and which will be in the interest of the society. That Shri Sardar Vallabhbhai Patel in the year 1950 introduced Prevention Detention Act before parliament of India, and strongly in the opinion that it is required to introduce such Bill.[25]

That after enactment of very first preventive detention law in 1950 was challenged in AK Gopalan v. State of Madras[26] and it was held constitutional except few provisions. Also under section 151 of CrPC, a police officer may arrest any person without orders from magistrate if he comes to know about an intention of committing any cognizable offence, subject to one condition that such commission of offence cannot be prevented without such detention.

The basic principal for Preventive detention as envisaged in Article 22 of Indian Constitution are, Security of state, maintenance of public order, maintenance of supplies and essential services and Defense, foreign affairs or security of India.

A person may be detained without trial only on any or some of the above grounds. A detainee under preventive detention can have no right of personal liberty guaranteed by Article 19 or Article 21

[20] https://www.latestlaws.com/bare-acts/state-acts-rules/punjab-state-laws/bengal-state-prisoners-regulation-1818/
[21] http://legislative.gov.in/sites/default/files/legislative_references/1939.pdf
[22] https://www.iwm.org.uk/collections/item/object/1500109747
[23] Faizur Rahman, "Preventive Detention an Anachronism", The Hindu, Sep 07'2004, New Delhi
[24] http://legislative.gov.in/sites/default/files/COI-updated.pdf
[25] http://egyankosh.ac.in/bitstream/123456789/39085/1/Unit-1.pdf
[26] A.K. Gopalan vs The State Of Madras, 1950 AIR 27.

In case of Union of India v. Paul Manickam[27], the Supreme Court observed that such detention is not to punish someone but to obstruct him from committing any crime. Also under Section 22 of our constitution protection against any arrest and detention is put which provides for the right to be informed about the grounds and right to counsel is set out.
Under the Prime minister ship of Indira Gandhi, Maintenance of Internal Security Act[28], 1971 was passed which gave unlimited powers to detain any person indefinitely, search and seizure without warrant and more. The act was highly criticized because it was used to detain and harass citizens, journalists and other dissenting persons who spoke against the govt. Soon enough, it was scraped by the next government[29].

Following the Khalistan movement in 1984, The Terrorism and Disruptive Activities (TADA) was implemented to prevent terrorist activities. It was modified in 1987 and applied on whole India. Unlike normal situations, the police was not required to bring the detainee within 24 hours under this act and could be detained for up to 1 year with the burden of proof on the accused contrary to normal provisions which puts the burden on the prosecution. Confessions made to the police were admissible in the court too and the police could attach the properties of the accused if wished so.

Another Act namely "The National Security Act, 1980"[30] was being misused by the government for preventive detention, the said act has not defined the "public order" and "state security" which were the grounds of detention under preventive detention laws.

There were various legislations enacted in India by the parliament like the Maintenance of Internal Security Act (MISA)[31] was enacted in 1971, Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) in 1974[32], Smugglers and Foreign Exchange Manipulators Act (SAFEMA) in 1976, the Terrorism and Disruptive Activities (Prevention) Act (TADA) in 1985, National Security Act (NSA) 1980[33], the Prevention of Black-marketing and Maintenance of Essential Commodities Act 1980, Prevention of Terrorism Act (POTA) 2002. But Prevention of Terrorism Act (POTA) 2002 was subsequently repealed on 21.09.2004. Now, preventive detention in India is governed by Unlawful Activities (Prevention) Act with amendments made in 2008 and 2019[34].

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[27] Union of India v. Paul Manickam & Anr: AIR 2003 SC 6422.
[28] The Maintenance of Internal Security Act, 1971.
[29] Ganguly, Sumit; Diamond, Larry; Plattner, Marc F. (13 August 2007). The State of India's Democracy.
[30] http://legislative.gov.in/sites/default/files/A1980-65_0.pdf
[31] https://www.indiacode.nic.in/bitstream/123456789/11097/1/maintenance_of_internal.pdf
[32] https://dor.gov.in/sites/default/files/Conservation%20of%20Foreign%20Exchange%20and%20Prevention%20of%20Smuggling%20Activities%20Act%201974.pdf
[33] https://www.indiacode.nic.in/handle/123456789/10850?view_type=search&sam_handle=123456789/2505
[34] https://www.indiacode.nic.in/handle/123456789/1470?view_type=browse&sam_handle=123456789/1362

> *"Confinement imposed generally on a defendant in criminal case who has threatened to violate the law while awaiting trial or disposition or of a mentally ill person who may harm himself or others" –*
> *Black's Law Dictionary.*

The Apex Court of India in Ahmed Noormohmad Bhatti V. State of Gujarat[35], held that merely on the ground that the power under section 151 of Criminal Procedure Code 1973 of the police cannot be unreasonable merely on the ground that police authorities might misuse such power of arrest and detention.

That under Article 22 any person who has been detained under Preventive detention laws can make representation to the advisory board and the advisory board shall be consisting of person who are or have been or are qualified to be appointed as judge of High Court, and the advisory board will review whether the detention is justified or not. And if the advisory board is of the opinion that the detention is required of the individual then the government will fix the period of detention vice-versa if the advisory board is of opinion that the detention is not proper then the detenu will be released forthwith.

That in the matters of Sambhu Nath Sarkar V. State of West Bengal[36], vagueness of the grounds of detention under the Maintenance of the Internal Securities Act, 1971 which envisaged five grounds for preventive detention which may lead to a detention period of 21 months without any reference to advisory board which was held unconstitutional and further the apex court held that Section 17A of the Maintenance of the Internal Securities Act, 1971 is not satisfying the requirement laid down in Clause 7(a) of the Article 22 of the constitution of India.

In the case of A K Gopalan Vs. State of Madras[37], Mr. Gopalan filed a writ of Habeas Corpus under Article 32 of the constitution against his detention in Madras Jail. He challenged his detention maibnly on the ground that the detaining authority did not disclose the grounds for detention which is violative of Art 14, 19, 21 and 22 of the Constitution of India. 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 ultra vires. It was further held that Article 21 is applicable to preventive detention and Preventive Detention Act 1950 permits

[35] 2005 (3) SCC 647
[36] (1973) 1 SCC 856
[37] AIR 1950 SC 27

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 the case of Kharak Singh V. State of UP[38], the petitioner has challenged that although he was released in the case of Dacoity but he was under surveillance under regulation 236 of the UP Police Regulation and was also challenged that personal liberty was not only limited to bodily restraint or enforcement. The Apex court held that Regulation 236(b) which authorises "Domiciliary visits" is strucked down as un constitutional. an unauthorised intrusion into a person's home and disturbance caused to him thereby violated his right to personal liberty enshrined in Article 21.

The Supreme Court's role of explaining the constitutionality of preventive detention has been enormous and positive. The use of preventive measures from being victimised with unlawful use of preventive detention has been safeguarded massively by Writ Habeas Corpus. Double Jeopardy too stands consistent from Petitioner's defence point.

Prevention of Terrorism Act was passed in 2002 to control the terrorism activities in the country in response of various attacks by the terrorists in India as well as U.S.A. This act replaced TADA and got repealed in 2004 by an ordinance.

First passed in 1967, Unlawful Activities Prevention Act is amended seven times by now to be tailored as anti-terror law, with the latest amendment in 2019. Under this unlawful activity is any act which is intended to disrupt the territorial integrity and sovereignty of India. It was amended to focus on the separatist movement of Jammu and Kashmir in 2004 and legality of several organizations was held null. It gives provision of warrantless detention, bail restriction with death penalty and life imprisonment as maximum punishment. It also provides to hold nationals as well as foreigners for their offences and the offenders could be tried in the same manners as it was committed in Indian Territory. With the latest amendment, Parliament sets some grounds to hold a person as terrorist and empower the police to attach and seize their properties.

Habeas Corpus – Article 32 and 226 empowers the Supreme Court and High Court respectively to issue writs. Habeas Corpus which means "to produce the corpus". In the Habeas Corpus writ petition any person can file the writ even if the person who is filing the Writ Petition is not the relative of the person detained, this writ petition can be filed against state and also against an individual person who has detained the person for which the Habeas

[38] AIR 1963 SC 1295

Corpus is filed. The writ has been described as "a great Constitutional privilege of the Citizen" or the first security of civil liberty" Deepak Baja V. State of Maharashtra[39].

In the caser of State of Tamilnadu, The Secretary to Government, Public (Law and Order-F) and another V. Nabila & others[40], the Hon'ble Supreme Court has set aside the High Court's order quashing of detention order and the Hon'ble Supreme Court observed that the detained person was in custody since Sept 2012 and thereafter in Dec. 2021 the detention order was passed and in the month of April 2013 high Court has quashed the same. But in the meantime a long time was already passed. And further the apex court observed that even after setting aside the order passed by the High Court, the detained person shall not be arrested to serve the remaining period of detention as the detention period has already been elapsed in the April 2014.

In a recent case[41] the Hon'ble Supreme Court has held that in a question which was revolving around Section 3(2) of the Telangana Prevention of Dangerous Activities Act, 1986[42] which started a wider discussion on the true import of "public order" and the Hon'ble Supreme Court held that a possible apprehension of breach of law and order cannot be a ground to move under a preventive detention statute.

CONCLUSION:

That in India various legislation has been enacted to prevent crime again and again for which various preventive detention laws. But at the same time the constitutional courts are vested with the powers to see whether the detention is legal or not. Sometimes police authorities are misusing these laws by illegally detaining the individual under these laws. And sometimes even the legislatures enact certain provisions of laws which is violative of fundamental rights and un constitutional. The constitutional courts are meant to check the balance between the personal liberty of a citizen guaranteed under Article 21 of the Constitution of India with law and order in the society. The Constitutional Courts have to see whether the detention is justified or not, whether the grounds for detention are tenable or not and also whether, the disclosure of the fact which authority considered to be against public interest to be disclosed is justified or not.

[39] AIR 2009 SC 628
[40] 2015 (12) SCC 127
[41] Banka Sneha Sheela v. State of Telangana, 2021 SCC OnLine SC 530
[42] Telangana Prevention of Dangerous Activities of Boot-leggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders Land-Grabbers, Spurious Seed Offenders, Insecticide Offenders, Fertiliser Offenders, Food Adulteration Offenders, Fake Document Offenders, Scheduled Commodities Offenders, Forest Offenders, Gaming Offenders, Sexual 1 Offenders, Explosive Substances Offenders, Arms Offenders, Cyber Crime Offenders and White Collar or Financial Offenders Act, 1986

To protect the law and order of any society should be given paramount importance by any state. However this should not be achieved by restrictions on someone's freedoms and right to live and liberty as guaranteed by our constitution. In history of preventive detention laws, same is criticized and has always been in controversy as it violates the basic natural rights of a human based on only assumptions and apprehension of a crime which is not even committed. The line between the constitutional fundamental rights of a citizen and the state responsibility of protecting its citizens should be drawn very carefully and the state must strike a balance between them.

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