Preventive Detention: A Necessity

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Abstract: State, ever since, its emergence, has been concerned with the maintenance of law and order and protecting people from external aggression and internal threats, thereby, ensuring safety and security to its inhabitants. The authority to maintain law and order empowers the state to use coercive power. It also emanates from various laws that are enacted from time to time. More often than not, coercive laws are self-contradictory because on the one hand they guarantee rights to people and on the other hand, they take away the right of a person or persons. Therefore, it is not wrong to say that modern states are repository of contradictions and India is no exception. There are several undemocratic provisions in the Indian Constitution; preventive detention is one of them. It seeks to detain a person to prevent him/her from indulging in any activity which is likely to pose a threat to the security of the State. In Britain and America this provision was used during World War II while, in India it can be used even in peacetime. This provision has been extensively used against the political dissidents during the post-colonial period. Justice Mahajan of the Supreme Court of India has held that 'preventive detention laws are repugnant to democratic constitution and they cannot be found to exist in any of the democratic countries of the world'. The question that one can ask at this juncture is that why did the Government of 'independent' India retain preventive detention laws? And further, framed new ones. This research contribution examines the circumstances which compelled the Government to frame 'preventive detention' laws, and its use during national emergency and peace time.

Keywords: detention laws, preventive detention, India.

1. Introduction

The Government of independent India inherited 'preventive detention' laws from the Colonial Government (Kumar, 1991). As early as 1784, the East India Company Act allowed the detention of a person suspected of activities or carrying on correspondence prejudicial to the peace of British settlements in India. The oldest Preventive Detention statute was the Bengal State Prisoners Regulation of 1818. Defense of India Acts 1915 and 1939, and the Restriction and Detention Ordinance of 1944 were framed by the Colonial Government in the wake of first and second world wars. These laws empowered police to detain a person without trial on subjective satisfaction of executive authorities.

Preventive detention is not punitive but a precautionary measure. The object is not to punish a man for having done something but to interpret before he does it and to prevent him from doing it. Justification of such detention is suspicion or reasonable probability and not criminal conviction, which can only be proved through legal evidence. Preventive detention aims at protecting society from potential threats and destructions, whereas, punitive detention seeks to punish a person who is found by the judicial process to have committed an offence. Nevertheless, all preventive laws are punitive in nature because imprisonment - even for the purpose of prevention - is a punishment as it obstructs detained person's normal life. And similarly, punitive laws are preventive to some extent because punishment is given with a view to deter the convict from further committing offence.

2. Need of Preventive Detention

India's independence was accompanied by several challenges that threatened the unity, integrity and sovereignty of a nascent nation. The Government of India and the Constituent Assembly committed to maintain and strengthen unity and integrity of the country, and decided to provide for strong 'Preventive Detention' law, ironically, in the chapter on Fundamental Rights. Article 22 first provided that no person might be detained in custody without being informed of the grounds for his or her arrest or be denied counsel. Any such detained person had to be produced before a magistrate within twenty-four hours, and could not be detained longer without a

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magistrate's authority. Assembly members further provided that these general protections did not apply to individuals detained under any law providing for preventive detention. Even the limited protection granted - that no law could authorize preventive detention longer than three months unless an Advisory Board (composed of persons qualified to be High Court judges) held there was cause for further detention (Article 22(4) (a)) - was not absolute. It did not apply to laws made by Parliament prescribing the circumstances and classes of cases under which a person might be detained for longer than three months 'without obtaining the opinion of an Advisory Board' (Article 22(7) (a)). Persons held under Preventive Detention laws were to be told the grounds for their detention and allowed to make representation against them unless the arresting authority decided that disclosing the facts would be 'against the public interest' (Clause 6).

On the eve of India's independence, Communist were attempting to stage uprising in several parts of the country including Telangana and West Bengal. Communal riots had plagued the country. To curb all such destructive activities, Article 22 was immediately put to use. However, with the coming of the Constitution into force on 26 January 1950, a number of existing laws providing for preventive detention lapsed or were vulnerable to overturning as violations of the Fundamental Rights. To retain the legitimacy of such laws, President Rajendra Prasad issued the Preventive Detention (Extension of Duration) Order. Nevertheless, over the next one month, four High Courts declared the order unconstitutional, and states detention laws were challenged in High Courts. 500 Communist detenus in Calcutta were due for release on 26 February because otherwise they would have been held longer than 3 months without the advice of advisory board. To meet these challenges, Parliament, in its special session on Saturday, a day before the release of Communist detenus, unanimously passed Preventive Detention Act, under Item 9 and 3 of the Union and Concurrent list (Austin, 1979; Basu, 2001).

The Act was challenged in the A.K. Gopalan Vs State of Madras case in the Supreme Court, on the ground of violation of freedom of expression and personal liberty. The Court upheld his detention but struck down Section 14 of the Act. This, they said, contravened Article 22(5), which provided that the grounds for detention should be given to detenus. The Act was amended in 1951, which provided that grounds for a detenus order and any representation made against it were to be given within six weeks to an Advisory Board, which might hear the detenu in person. If the Board finds insufficient reasons for detention they would be released. If the detention was upheld the detention could continue for such period as the government thinks fit. The membership of Advisory Boards was raised from two to three, and decisions were to be by majority vote. The Supreme Court upheld this Act, saying that it substantially satisfied the requirements of Article 22 (4). Successive detention laws were passed in 1952, 1954, 1957 and 1960. While enacting these laws, the government emphasized on maintaining public order and need to combat anti-social activities. The critics called these laws as barbarous, brutal and repugnant to democracy.

3. Preventive Detention During National Emergency

Government's power to detain and curtail liberty and other fundamental rights increased massively during National emergency proclaimed by Dr. S. Radhakrishnan on 26 October 1962, under Article 352. He promulgated Defense of India Ordinance. He also invoked Article 359, and thereby suspended the right to move the court for the enforcement of the Fundamental Right under Article 21 and 22. On 7 November 1962, the Government of India Issued Defense of India Rule (DIR) under the Defense of India Act (DIA). On 11 November 1962, the President of India suspended a third Fundamental Right, Article 14 or the 'Equality before law and equal protection of law'. These laws enormously increased the Government's power to curtail civil liberties and to regulate citizen's affairs. The first of the two 1962 ordinances empowered the Government to make rules for securing the defense of India, public safety, public order, the efficient conduct of military operations, and supplies and services essential to the life of the community. Under the Defense of India Rules, the Government could arrest and try persons contravening them in order to prevent tampering with the loyalty of persons entering the service of the Government and spreading false reports 'likely to cause disaffection or alarm ... or hatred between different classes of the people of India', and to ensure the protection of ports, railways, and so on (48 items) (Austin, 2000).

With the withdrawal of China, the demand for revocation of emergency and restoration of civil liberties increased. The leader of Swatantra Party, C. Rajagopalachari, Jan Sangh, CPI and BAR association severely attacked suspension of Fundamental Rights. C. Rajagopalachari was of the opinion that continuance of emergency and the power of DIA in light of the withdrawal created a crisis for democracy. Jan Sangh said that the slogan of Congress Party of one nation, one party and one leader smacked of fascist tendency. The Government disagreed and in October 1963 extended the emergency for a period of three years. The Government continued to use DIA and rules in preference to Preventive Detention (PD) still in

force. Some 700 Communists were arrested in 1964 in anticipation of uprising during election in Kerala in 1965. There were detentions under the DIA during the 1965 language riots in Madras. DIA was further used during war with Pakistan. After the end of Indo-Pak war, Mc Setalvad, and MPs demanded revocation of emergency and DIA. National Emergency lapsed on 31 December 1967 when the government did not seek its renewal apparently because dissension within the Congress. Preventive Detention of 1950 lapsed in 1969 precisely for the same reason. In 1971, the Parliament enacted 'Maintenance of Internal Security Act (MISA)' and in 1974 came the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act - popularly known as the COFEPOSA. While the MISA was directed against subversive political activities, the COFEPOSA was also directed against subversive political economic activities. The 19 months of Emergency Rule witnessed grave misuse of MISA and COFEPOSA. Political dissidents were put behind bars without fair trial (Basu, 2001). The Janata Government came to power with an electoral pledge that preventive detention laws shall be repealed. The Janata repealed the MISA but COFEPOSA continued to exist.

4. Preventive Detention Laws - Post Emergency Period

The decade of 1980s was the period when several laws virtually freezing civil and political liberties were passed. In 1980, the 'National Security Act (the NSA)' was introduced which enhanced the district magistrates and police commissioners power to arrest and detain any person without trial in September 1981, the Essential Services Main¬tenance Act (ESMA) was promulgated. On 3 May 1983, the Lok Sabha passed the Central Industrial Security Force (CISF) Bill, transforming the character of security forces. The Act empowered any member of the CISF to arrest a person without a warrant or orders from a magistrate. The Amendment states that no member, without previous sanction of the Central Government or the prescribed authority can become a member of any political party or Trade Union. The National Security (Second Amendment) Ordinance 1984, the Prevention of Narcotic Drugs and Psychotropic Substances Act, 1988, have given wide powers to the police and other state agencies (Hargopal and Balagopal, 1998).

These Preventive Detention laws, already in force, proved insufficient to deal with terrorism raising tentacles in Punjab and other parts of the country. Henceforth, Union Government enacted 'Terrorist and Disruptive Activities (Prevention) Act (TADA)' in 1985, ostensibly to contain terrorism in Punjab. However, the enforcement of TADA in all parts of the country has, in effect, taken away the right to life guaranteed in the Constitution of India. TADA was one of the most repressive and draconian laws passed by the post-Independence regime. The cases of detentions, police atrocities and encounter deaths invited severe criticism of TADA; consequently, TADA lapsed in 1997.

Beginning of a new millennium witnessed steep surge in terrorist activities all over the world. India was not untouched with this development. Several attacks on high security public institutions included the attack on the Legislative Assembly of Jammu and Kashmir and the 13 December 2001 attack on the Indian Parliament. As if these were not enough, terrorist carried out another dastardly attack on New York World Trade Centre on 11 September 2001, where thousands of people were killed. This incident was severely criticized by world leaders. US pledge and later waged a war against terrorism, in all its forms. At the same time, the UN Security Council also adopted a resolution condemning the attack in strongest terms and called Member States to cooperate in the war against terrorism (The Guardian, 2002; UN Press, 2001).

It was in this background that the Government of India decided to enact another law to deal with the menace of terrorism. Prevention of Terrorism Act (POTA) which replaced Prevention of Terrorism Ordinance (POTO) in 2002, filled the legal vacuum in dealing with terrorism created by the expiry of TADA. POTA provided more stringent provisions relating to bail, confessions, definition of terrorist acts, banning of terrorist organisations and interception of electronic communication. Like other Preventive Detention laws, POTA was also used against political dissidents. The first victim of POTA was not a terrorist but Vaiko, the leader of MDMK) (ToI, 2002). The United Progressive Alliance (UPA), the then Government, which was led by the Congress Party repealed POTA in 2004. However, to justify its commitment to fight against terrorism, it imported several provisions of POTA into Unlawful Activities Prevention Act (UAPA) through an amendment (Singh, 2008). Thus TADA, POTA and UAPA are Extraordinary Laws; enacted to respond to specific situation arising out of extraordinary circumstances. Nevertheless, these anti-terrorism laws are both preventive and punitive in nature. Preventive Detention laws have been widely used and more often, misused in so-called disturbed areas. The objective of Preventive Detention laws was to curtail the rights of a few for safeguarding the rights of many. However, these laws have failed in their basic objectives. Despite their failure, I do not intent to say that they are useless rather wish to

point out that like other laws, Preventive Detention laws are also not properly implemented. Judicious strategy of K.P.S. Gill, and proper implementation of laws ended terrorism in Punjab. If implemented properly, this history can indeed repeat itself in Kashmir.

5. Conclusion

Preventive detention gives immense power to executive. History is witness to its draconian use against the people, who have supposedly conspired against the state or society. Though Preventive detention is a necessity in some cases yet it is open to misuse. An authoritarian government can create havoc through the use of Preventive detention laws as happened during emergency 1975-77. The use of preventive detention laws in normal time is most undemocratic feature of Indian polity. Since independence till date the unity and integrity of the country has been consistently threatened by antinational forces creating fertile ground for use of preventive detention laws. However, it should be used as the last option.

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