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LEGAL DIMENSIONSOF PREVENTIVE DETENTION LAWS: A COMPARITIVE ANALYSIS BETWEENINDIAN AND AUSTRALIAN LAWS

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ABSTRACT- Preventive detention encroaches upon the personal liberty of the person, which is a general sense of the term refers to the basic principle of autonomy and freedom an individual possesses making personal liberty a lost right. The law is not reformative but violative of the constitutional guarantee. This paper argues that the criminal justice system is shifting its focus away from its core principle of being a precautionary measure to a punitive measure whereas it is categorized as a precautionary measure rather than a punitive measure. The object is held to be interception then punishment, but the idea that a person can be detained without trial on mere suspicion seems more draconian. Arbitrary powers available to the state have only added to gross misuse of the act leading to the grid of indefinite incarcerations.

Key words: **Preventive, Detention, Constitutional, Safeguards, Remedies.**

I. INTRODUCTION

The term 'preventive detention', also known as 'administrative detention' carries a vast connotation to it. India, being colonized by the British Empire for numerous centuries, has drawn most of its legal concepts as in practice since then. Preventive detention is widely used for the best interest of society. In this practice, an accused individual is put into custody (detention) before their trial, not for any punitive reason but to stop them from committing any offence or omitting any rule that might disturb the tranquility of the State and its people. It is done if anticipated that the accused will commit such actions that might be detrimental and disrupt any ongoing action undertaken by the State. In an 'arrest', charges are levied against the person but in 'preventive detention', the person is detained to restrict him from doing something that can cause a threat to the law and order of the State. The object of detention and detention laws is not to punish, but to prevent the commission of certain offences.[1] The tool of Preventive Detention loosely stands on the principle of *"Prevention is better than cure".*

Aim and Objective of the Study

From the above discussion, it becomes clear that preventive detention orders are necessary from the public interest point of view and it has to be balanced with the individual liberty of the people. In this very context only, judicial review of preventive detention orders becomes significant. In the present study, it would be endeavored to study judicial review of preventive detention orders to safeguard the individual liberty also keeping in view the interest of the State. The objective of the present research work would be to analyses and trace the judicial trends in preventive detention jurisprudence.

Hypothesis

To realize the aim and objective of the present study, a good hypothesis is necessary for research work. To that effect, the following workable hypothesis has been framed**:**

"By way of its guidelines, the Indian Judiciary indeed safeguards the individual liberty and at the same time protects the public interest/ interest of the State".

To substantiate the above-framed hypothesis, the following sub-issues are also addressed:

1) Historical development of preventive detention.

[1]*S. Mariappan* vs. *The District Collector*, Tirunelveli & Others (Writ Petition No. 10494 of 2014)

2) Meaning and need for preventive detention.

3) Constitutional provisions relating to preventive detention.

4) Preventive detention in India and Australia.

5) Judicial Review under Indian Constitution.

7) Judicial Review in preventive detention cases.

8) Judicial Techniques and creativity in laying down judicial safeguards.

II. METHODOLOGY

This research work is predominantly doctrinal and non-empirical in nature. The doctrinal research involves an analysis of case-laws, arranging, ordering, and systematizing legal propositions, and the study of legal institutions through legal reasoning or rational deduction.[2] The historical method has been used to trace the origin and development of preventive detention laws as well as the passing of preventive detention orders. The case law method is utilized for a better understanding of preventive detention orders and the various concepts. The Analytical method has been used whenever and wherever necessary. In addition to this, the comparative method is also used in the present research work.

Sources of the Study

To accomplish the objective of the present study and to frame the hypothesis, materials from both primary and secondary sources have been utilized. Various statutes like Constitution of India, National Security Act, 1980, Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (COFEPOSA), Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 and Tamil Nadu State Act No.14/1982 Act, etc. are referred as primary sources. The secondary sources referred to herein are Treatises, Commentaries, Law journals, Modem sources like websites such as SCC Online and various other law websites and Newspaper Reports have also been referred to whenever and wherever necessary.

Limitation of the Study

Though there are several Courts in our country, the Indian higher judiciary consists of a Supreme Court and High Courts at each State. In the circumstances, for convenience sake and as a sample study, the study is limited to the practice and analyzing the preventive detention jurisprudence as developed by the Supreme Court and the Madras High Court.

Meaning of Preventive Detention

Detention refers to confining a person within four corners. It is keeping a person in a secluded place like jail as against one's will and wish.[3] Detention is opposed to one's freedom. Keeping a person in jail is depriving him of his liberty. It is dishonoring of him. It is the antithesis of Civil Liberty. Arresting and detaining a person in connection with the commission of an offence is authorized under the Code of Criminal Procedure, 1973. He is entitled to be informed of grounds of arrest. It is his Constitutional Right. It is his Fundamental Right. It cannot be abridged. This is concerning the commission of a cognizable offence. Sometimes, when a person has committed a non-cognizable offence, under certain circumstances with the permission of the Magistrate he can be arrested.[4]Thereafter, within 24 hours, the arrested person has to be produced before a Magistrate for judicial custody, in case his further detention is necessary.[5] This is during an investigation into an offence. After the case is filed, he should be tried before a Competent Court for the offences/charges complained charged, as the case may be. If the offences/charges are proved, he shall be punished accordingly.[6] Thus, this arrest and detention are

[2] S.K. Verma, M.K. Afzal Wari, Legal Research and Methodology, 68 (Indian Law Institute, New Delhi, 2nd edn., 2001).
[3]Section 41, Code of Criminal Procedure, 1973.
[4] Section 155, ibid.
[5] Sec. 167, ibid See also Art.22 (2), Constitution of India.
[6] Sections 255,248 and 235, Code of Criminal Procedure, 1973.

punitive.[7] It is eventually, for the trial of certain offences. The accused is also entitled to consult a lawyer and entitled to be defended by a lawyer of his choice. It is his Constitutional Right. It is his Fundamental Right. It cannot be taken away.[8] These are salient features under Ordinary Criminal Law, which is punitive. An accused will have all the benefits of a regular, full, and fair trial. "Preventive detention" is detention by way of a preventive measure. It is an advance/anticipatory measure.[9] If a person remaining at large becomes prejudicial to the interest of the State/Public, as a precautionary measure, he will be detained in pursuance of a law authorizing such detention. It is 'preventive detention'. The law is 'Preventive Detention Law'. He will be detained in jail for a specific period as authorized under the preventive detention law. He becomes a 'Detenu'. There need not be framing of charges against him. He need not be tried for an offence. So, it is detention without a charge, without trial. Thus, it is draconian. In India, preventive detention is constitutionally permitted.[10] In our study, wherever we mention 'detention' it refers to preventive detention of a person under a preventive detention law and not regular detention of an accused concerning the commission of a crime under ordinary criminal law. Preventive detention laws are repugnant to democratic Constitutions and rarely are they found to exist in democratic countries in the world.[11]

Origin and Development of Concept of Prevention Detention

A-State is also a collection of individuals. A State without individuals/citizens is no State. A State exists because of its citizens. One of the attribute/requirements of a sovereign State is it having subjects (citizens). It is the duty and responsibility of a State to protect and safeguard the wellbeing and properties of the citizens. It is one of the primary duties of a state.

The state is bound to protect individual rights and personal freedoms. Danger to freedom may come from within, namely, fellow citizens. Danger to citizen's properties may also come from fellow citizens. There may be disorderliness, perils to public tranquility because of the antisocial activities of few individuals in the society. They may pose danger to the interest of the State. In such circumstances, whether it is a Police State or a Welfare State, it is the bounden duty of the State to protect the citizens and their properties from such perils. The State must maintain peace and harmony in the society. Under certain circumstances, regular, ordinary criminal law may not be suitable to contain nefarious activities of such undesirable elements. The State has to take some urgent and stringent measures. It has to take some anticipatory/preventive measures. In such circumstances, it has become necessary to empower the State by enacting suitable legislation to detain such undesirable elements in jail for a certain period. Thus, the detention laws were born. As it is against the liberty of the individual, it should be only a temporary measure, i.e., for a specified period. It should not be for an indefinite period/for a longer period.

Preventive Detention in India

In India, the advent of preventive detention laws is seen during the colonial British era. Britishers enslaved India by the trick and by the sword. Their main aim is profiteering. Initially, India was controlled by the East India Company. The company was very much interested in giving rich rewards/dividends to its valuable shareholders in England. It is a commercial venture. Under the East India Company Act, 1784, the Governor-General vested the power to detain persons in confinement. Slowly, the Company spread its tentacles by toppling several Kingdoms and annexing several States in India by war and also by their 'Doctrine of Lapse'. Later, in India, Britishers become a mighty despot. Ultimately, the rein of control was taken over by Queen-Empress Victoria. When the Britishers become Rulers of India, they also started evincing a keen interest in the welfare of the people. They have faced with concomitant dangers from undesirable elements. They are bound to maintain law and order and peace in the country. There was an upsurge in the freedom movement. Anti-social elements also surfaced. The Government of India was bound to take preventive measures. They need to be stringent. The need for preventive detention laws was felt. Defense of India (Criminal Law Amendment) Act, 1908 was passed. Government of India Act, 1935, a mini-Constitution, empowered the Legislature to enact preventive detention law.[12] In pursuance

[7] *Rex* vs. *Holliday* (1917) A.C.260.
[8] Art.22 (1), Constitution of India. See also Section 303, Code of Criminal Procedure, 1973.
[9] *Commissioner of Police* vs. *Anita* AIR 2004 sews 4750.
[10] Art.22(3) Constitution of India.
[11] *A.K. Gopalan* vs. *State of Madras*, AIR 1950 SC 27.
[12] Item I, List II, VII Schedule to the Act.

of that Defence of India Act, 1939 was enacted and Defence of India Rules, 1940 was framed. It enabled the Executive to detain persons.[13]

Subsequently, after India w1nnmg freedom it had its own Republican Constitution viz., Constitution of India, 1950. Originally, Article 15-A was introduced in the Constituent Assembly empowering the Parliament to enact preventive detention laws. During the debate, it was very much criticized as a Rowlatt Act of 1918.[14] Ultimately, after suitable modification, it was passed as Article 22 in the Constitution of free India.

Constitutional Provisions Regarding Prevention Detention in India

Article 22 of the Constitution of India provides for the passing of preventive detention laws. Several procedural safeguards are provided in Article 22(4) to (7) in the Constitution of India. Central and State Governments have been given concurrent power to enact preventive detention laws.[15]

Preventive Detention Laws and their applicability

In pursuance of its power, the Central Government passed the Maintenance of Internal Security Act, 1971 (in short, MISA), Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (In short, COFEPOSA),[16] the National Security Act, 1980 (in short, NSA),[17] the Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980[18] and the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988 (in short, NDPS Act).[19] Each state has also passed such preventive detention laws. In the State of Tamil Nadu, the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, Slum-grabbers, and Video Pirates Act, 1982 was passed.[20] Subsequently, Forest Offenders were included. Recently, Cyber Law Offenders are also included in the Act by way of the 2014 Amendment. In pursuance of their power under preventive detention laws, the 'Detaining Authority' passes 'detention orders' when there exist specific grounds for passing such orders. The constitutional validity of the preventive detention laws was upheld by the Supreme Court.[21]

Improper Use and Safeguards

As stated earlier, by its very nature, preventive detention laws are draconian as they envisage keeping persons in jail without a charge, without a trial for a prescribed period. In course of time, a large number of preventive detention orders came to be passed by the detaining authorities without following the procedures provided in the Constitutional provisions and the particular preventive detention laws.[22] There was non-application of mind by the detaining authorities before passing the detention orders. Ultimately, the liberty of the individual has been abridged. Jails started flooding. It also included innocent persons. There was large-scale misuse of power under Preventive detention laws. Men in power utilized this power to silence their political opponents. Under the pretext of safeguarding the interest of the State individual liberty was at stake. The freedom of the individual is very important. Personal freedom and life have been guaranteed in Article 21 of the Constitution of India.[23] Article 21, appears in Part III of the Constitution of India which deals with Fundamental Rights. Thus, the right to life and liberty has been made a Fundamental Right. It was once thought that the 'procedure' stated in Article 21 of the Constitution of India refers to an express provision in a Statute.[24] The state started abridging the liberty of the individual even by an unjust procedure. This has been overcome by the Supreme Court in R. C. Cooper

[13] 14 Rule 26, Defence of India Rules, 1940.
[14] CAD p.1529.
[15] Entry 9, List I and Entry 3, List III, VII Schedule to the Constitution of India.
[16] Act No.52 of 1974.
[17] Act No.65 of 1980.
[18] Act No.7 of 1980.
[19] Act No.46 of 1988.
[20] ActNo.14 of 1982.
[21] *Haradhan Saha* vs. *State of West Bengal*, AIR 1974 SC 2154:1975 (3) SCC 198.
[22] Art.22(5) to (7) of Constitution of India.
[23] Art.21 says: No person shall be deprived of his life or personal liberty except according to the procedure established by law.
[24] *A.K. Gopalan* vs. *State of Madras* AIR 1950 SC 27.

vs. Union of India.[25] A new era has been ushered in the annals of Indian Human Rights Jurisprudence in the celebrated judgment of the Supreme Court in Maneka Gandhi vs. Union of India.[26] In this case, the Supreme Court held that a law or procedure curbing the liberty of the individual must be 'fair', 'reasonable', and 'just'. Any order, direction to keep a person in confinement if it is 'unfair', 'unjust', 'unreasonable', was held to militate against Article 21 of the Constitution of India. Thus, Maneka Gandhi effected a dynamic change in the Indian Human Rights Jurisprudence. When preventive detention orders are passed without following the mandatory provisions of the particular preventive detention law, Constitutional procedures and the procedure adopted by the detaining authority is unfair, unjust, inequitable, and unreasonable, such detention orders are considered as running counter to the basic freedom of the individual guaranteed in Article 21 of the Constitution of India.

Constitutional Remedies

As against preventive detention orders, besides the Advisory Board, the Constitution provides certain effective procedural safeguards.[27] The detenu who has been detained in illegal detention can approach the concerned High Court by filing a Habeas Corpus Petition (HCP) for issuing a 'Writ of Habeas Corpus' (literally meaning 'produce the body') under Article 226 of the Constitution of India, which provides for enforcement of Fundamental Rights and also for 'any other right'. The right to move the Supreme Court to enforce the Fundamental Rights itself has been made a Fundamental Right in Article 32 of the Constitution of India.[28] Further, Special Leave of the Supreme Court can also be obtained under Article 136 of the Constitution to challenge the orders of the High Court passed in such Habeas Corpus Petitions. Besides this, the Supreme Court also has the power to interfere in Civil and Criminal matters.[29] Through this medium, the Supreme Court and the State High Courts review the exercise of the power of preventive detention by the Executive. In the 13th Century, equality of law and protection against the arbitrary exercise of power has been won by the Britishers from King John on the banks of the River Thames. It is the great Magna Carta. It has become a basis of the Rule of Law and Supremacy of Law.[30] Its counterpart in the USA is the Bill of Rights, 1688. Long back, in the U.S.A., the Supreme Court in Marberry vs. Madison,[31] Chief Justice John Marshall declared that in a country based on a written Constitution, it is the power of the judiciary to review the enactments of the legislature and the orders of the Executive. This has become the basis for the concept of judicial Review'. This doctrine has been recognized in the Indian Constitution.[32] The Supreme Court and the High Courts, judicially scan the validity of the preventive detention orders. The judiciary developed certain techniques to test the legality of those orders. They cataloged them under violation of substantive provisions of the Constitutional and the enabling preventive detention laws and procedural irregularities. Preventive detention orders passed in violation of substantive provisions of the law were considered illegal. They are void ab initio. In this respect, they drew much from the various principles evolved in Administrative Law. In certain circumstances, when the procedural safeguards in-built in the particular detention laws are infringed and were violative of basic Human Rights. They were held to be illegal.[33] The High Court under Article 226 of the Constitution of India and the Supreme Court under Article 32 of the Constitution of India freed the affected detenus from such illegal detentions. They become guardians of the people and sentinels of Civil Liberties.[34] Nowhere in the world except in India, has a provision for enacting preventive detention laws been made an integral part of the Constitution of India. This has been remarked as unfortunate by Hon'ble Justice Mukerjee.[35] However, its constitutional validity having been upheld by the highest Court of this country, it has come to stay in the Statute book. But its improper application, misuse, and abuse also have been witnessed. Its consequences are disastrous as it takes away the liberty of the individual. On the one hand, preventive detention law cannot be erased from the statute book because under certain circumstances indeed it is needed to protect the interest of the State. But at the same time, liberty of the individual is

[25] AIR 1970 SC 564.
[26] AIR 1978 SC 597.
[27] Art.22 (4)(7), Constitution of India.
[28] Part III, Constitution of India.
[29] Art.132, 133 & 134, Constitution of India
[30] Prof. A.V.Dicey, The Law of Constitution, 10 (Allahabad Law Agency, Haryana, 2nd edn. 2008).
[31] U. S. (Cranch 1) 137 (1803).
[32] H.M. Seervai, Constitutional Law of India, 25 (Tripathi Publication, Bombay, 4th Edn. 1991).
[33] *Menka Gandhi* vs. *Union of India* AIR 1978 SC 597.
[34] M.P. Jain & S.N. Jain, Principles of Administrative Law 1957 (Lexis Nexis Butterworths Wadhwa, Nagpur, 7th Edition, 2011).
[35] See Supra Note-9.

sacrosanct as man is not for bread alone. The Liberty of the individual is more important than food. Individual liberty must be jealously guarded. There arises the need to provide safeguards and to consider when the provisions of the preventive detention laws are to be applied and when they should not be applied. In this regard, the Indian Judiciary plays a significant role. Through its judicial activism and dynamism, the Indian Judiciary contributed much in the field of Preventive Detention Jurisprudence and it had witnessed many developments in Public Law. This is the ambit, purport, and scope of this research study.

Importance of the Study

Now, preventive detention laws have come to stay. Article 22(4) to (7), of the Constitution of India, incorporates certain procedural safeguards for the benefit of the detenus. It is intended to allow the detenu to give his representation as against the preventive detention orders. Without further delay, the detaining authority should communicate the grounds of detention to the detenu and give him a reasonable opportunity to make his representation against the detention orders. The Government should enable him to make his effective representation. This is a constitutional procedure guaranteed in the Constitution itself. There cannot be a Central or State Preventive detention law dispensing with this Constitutional mandate. Earlier, the view about Article 21, 22 of the Constitution of India was that they are independent and separate. It was the view about Article 22(3) of the Constitution of India which permits enacting of Preventive detention laws. Now, there is a shifting stand in this view.[36]In Rekha vs. State of Tamil Nadu and Another,[37] the Supreme Court took a vibrant view concerning Article 21 and 22 in connection with preventive detention. Article 21 provides Fundamental Right to personal liberty. Article 22(3) does not contain any Fundamental Rights. It takes away the Fundamental Right of personal liberty guaranteed in Article 21, Constitution of India. Article 21 is basic. It is soul of the Indian Constitution. It guarantees a valuable, basic human right, while Article 22(3) is quite opposed to it. Therefore, Article 22 cannot be read in isolation. It must be read along with Article 19 and 21. Article 22 which permits preventive detention should be considered as an exception to Article 21 and an exception can apply only in rare and exceptional cases and cannot override the main rule. To prevent their potently dangerous power, namely, power of detention, preventive detention law should be strictly construed, confined to narrow limits. However, there are many instances of detaining authorities mindlessly passing detention orders in breach of Constitutional safeguards. In Rajammal vs. State of Tamilnadu and Another,[38] when there was an unexplained delay of 5 days in considering the detenu's representation the Supreme Court set aside the detention order passed under Tamil Nadu Act No.1411982. Further, in Rattan Singh vs. State of Punjab and others[39] when the jail authorities have failed to forward the representation of a COFEPOSA detenu to the Government, a three-Judge Bench of the Supreme Court set aside the detention. In Buhari vs. State of Tamil Nadu and others[40] without applying his mind when the detaining authority mechanically passed detention order under COFEPOSA, it was set aside by a Division Bench of the Madras High Court. In the High Court, the detenus files Habeas Corpus Petitions (HCPs) under Article 226 of the Constitution of India questioning the legality of the detention orders and a Division Bench consisting of two Judges of the High Court examines the validity of the preventive detention orders both on substantive as well as procedural aspects and when they suffer from illegality the detenu is set at liberty/freed from illegal detention/confinement. The researcher himself as a sitting Judge of the Madras High Court had to deal with several such writ petitions filed by the detenus under preventive detention laws such as NSA, COFEPOSA, Act No. l4/ 1982.[41] In Savarimuthu vs. State of Tamil Nadu and others[42] in the High Court, this researcher set aside the detention order of a COFEPOSA detenu since his detention has not been informed to the close relatives of the detenu and as such it had violated Article 22(5) of the Constitution of India. In Tharmar vs. State of Tamil Nadu and others,[43] since the relevant materials were not placed before the Advisory Board, this Researcher set aside the detention of a COFEPOSA detenu. In this connection, the Researcher followed a previous decision of the Madras High Court rendered in Rajeshwari vs. Joint Secretary to Government.[44] In Kalpana and Others vs. State of Tamil Nadu and another[45] when a batch of

[36] AIR 1950 SC 27, AIR 1970 SC 564 Also See Supra Note-2.
[37] See Supra Note-12.
[38] AIR 1999 SC 684.
[39] 1981(4) SCC 48/: AIR 1982 SCI.
[40] 2010 (2) LW (Crl.) 952.
[41] *R. Shanmugaval* vs. *State of Tamil Nadu* 2013 (1) LW (Crl.) 161.
[42] 2012 (5) CTC 192.
[43] 2012 (2) LW (Crl) 670.
[44] 2000 (3) CTC 97.

writ petitions was filed challenging the detention of several persons under Tamil Nadu Act No.l4/1982, it was found that there was complete non-application of mind by the detaining authority in passing the preventive detention orders and the Madras High Court freed the detenus. The above cases are few examples of how the liberty of the individual has been so lightly taken away under the garb of detention orders passed under preventive detention laws. It comes to light that in many cases, the power of preventive detention has been improperly exercised by the detaining authority, there was non-observance of mandatory requirements of law incorporated in the Constitution and the particular enabling enactments both Central and State, ultimately, resulting in a spate of illegal detention orders being passed, resulting in the jailing of persons who ought not to have been so jailed. As already stated, this being detention without a charge, without a trial, it is anathema to civil liberty, personal freedom, Rule of law, human values, human right and it is unbecoming of Executive Conduct in a democratic country, slowly, they tend to become a despot, playing havoc in the life and liberty of the individual. In the circumstances, this study becomes important to analyses the issues concerning this aspect and to find out solution and suggestions for the Executive/State, a warning in using their power under preventive detention laws with a view to harmonies the two extremes, namely, interest of the State and protection of the personal liberty of the individual.

Prevention Detention Laws in Australia

The example of Australia neatly sums up many of the dilemmas in the contemporary fight against terrorism. The 1978 Hilton bombing is generally regarded as the only terrorist event that has occurred on Australian soil.[46] It sharply raised the awareness of the potential threat posed by terrorism and finally led to official review of national security law and policing.[47] The Australian Security Intelligence Organization (ASIO) was accordingly established to produce national threat assessments in the field of terrorism and politically motivated violence.[48] In addition to a developed web of security organizations, the criminal law also provides for several national security offences such as the offences of treachery, sedition, and treason are dealt with under the Crimes Act 1914. Additionally, Australia is a party to many international conventions which target different types of terrorist activities and which have been incorporated into federal legislation, such as aircraft hijacking, murder and bombing.[49] Apart from these features, on 11 September 2001, Australia did not have any general counter-terrorism laws at the Commonwealth level, and of all the Australian state jurisdictions, only the Northern Territory had enacted any general crimes of terrorism at that time.[50] Like much of the world, Australia was greatly unsettled by the terrorist attacks in New York and Washington in September 2001 which prompted the concern that the current system was not sufficient to deal with the threat of terrorism.[51] The Commonwealth Parliament has enacted more than 40 new counter-terrorism laws since 2002, a response frequently described by commentators as

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[45] 2013 (2) ML.J (Crt) 417.

[46] In the early hours of 13 February 1978, a bomb exploded in the back of a garbage truck, killing two garbage men and a policeman. At then, the leaders of twelve Asian and Pacific member nations were staying for the Commonwealth heads of Government Regional Meetings. No one claimed responsibility for the bombings at the time. Jenny Hocking, Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy (UNSW Press, 2004) 83-4.

[47]Jenny Hocking, above n 47, 84-8; Cameron Stewart, 'Hilton Bomb Induced Anti-Terror Squad', The Australian, 1 January 2010.

[48] The original purpose and structure of ASIO was first proposed by Justice Hope in 1979 in the Protective Security Review Report, in which Justice Hope designated the major responsibility for ASIO. Later that year, Australian Security Intelligence Organization Act 1979 (Cth) was passed setting out ASIO's original functions and special powers. Stewart, above n 48.

[49] Chemical Weapons (Prohibition) Act 1994 implements Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction; Crimes (Aviation) Act 1991 implements Convention on Offences and certain other Acts Committed on Board Aircraft (the Tokyo Convention of 1963), Convention for the Suppression of Unlawful Seizure of aircraft (the Hague Convention of 1970) and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the Montreal Convention of 1971); Crimes (Biological Weapons) Act 1976 implements Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction; Crimes (Hostages) Act 1989

[50]Criminal Code Act (NT), pt III, div 2.

[51] The necessity to introduce new anti-terrorism laws is discussed in Gregory Rose and Diana Nestorovska, Australian Counter-Terrorism Offences: Necessity and Clarity in Federal Criminal Law Reforms (2007) 31 Criminal Law Journal 20.

"over-reactions".[52] These different anti-terrorism laws create a very complex system. The first package of new anti-terrorism laws into the Commonwealth Parliament in March 2002 introduced a new part entitled "Terrorism" into the Criminal Code 1995, creating a range of individual terrorism-related offences, ancillary offences, and a regime targeting terrorist organizations. The ASIO Legislation Amendment (Terrorism) Act 2003 increased the powers of ASIO to obtain intelligence about terrorist activity in Australia and to investigate possible offences. The Suppression of the Financing of Terrorism Act 2000 was enacted to prevent the movement of funds for terrorist purposes and to enhance the exchange of information about such financial transactions with foreign countries, while other provisions aim to enhance the investigative power of the Australian Federal Police ('AFP').[53] The amended Criminal Code Act 1995 criminalizes preparatory acts, so that terrorism suspects may be arrested and prosecuted by law enforcement authorities before a terrorist act is completed and causes harm to individuals, their property, and society generally.[54]

Generally, these legislative amendments indicate the government's deliberate policy shifting from punishing criminal conduct to the prevention of that conduct. As such, Australia created a new anti-terrorism laws regime with a core theme of pre-emption.[55] In February 2004, the then Australian Attorney General, Phillip Ruddock, defended the government's legislation effort and emphasized the necessity of preventing future attacks saying, "the law should operate as both a sword and a shield – how offenders are punished but also the mechanism by which crime is prevented."[56] The London underground bombings in July 2005, however, gave rise to a further rushed round of new anti-terrorism laws. Then Prime Minister John Howard argued that the AFP needed additional preventative detention measures to "better deter, prevent, detect and prosecute acts of terrorism."[57] Accordingly, new preventative detention measures were agreed on by members of the Commonwealth, State and Territory Governments ('COAG') in September 2005.[58]

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[52] George Williams, 'Challenging Ideas: Inspiring Action, Amnesty International Australia Public Forum', Amnesty International Australia Public Forum, 2008

[53] See detailed discussion of the major anti-terrorism laws in Australia enacted after 2002 in Philip Ruddock MP, 'Australia's Legislative Response to the Ongoing Threat of Terrorism' (2004) 27 (2) University of New South Wales Law Journal 254; Anthony Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001-2005' (2007) 10 Flinders Journal of Law Review 81.

[54] These preparatory acts including "providing or receiving training connected with terrorist acts", "possessing things connected with terrorist acts", "collecting or making documents likely to facilitate terrorist acts" and "acts done in preparation for, or planning, a terrorist act". Criminal Code Act 1995 (Cth), ss 101.2, 101.4, 101.5, 101.6.

[55] Katherine Nesbitt, 'Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis' (2007-2008) 17 Boston University Public Interest Law Journal 1, 73; see also Nicola McGarrity, 'Testing Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia' (2010) 24 Criminal Law Journal 92, 93.

[56] Phillip Ruddock, Attorney General of Australia, 'Legal Framework and Assistance to Regions, presentation before the Regional Ministerial Counter-Terrorism Conference in Bali'.

[57] Susan Harris-Rimmer and Nigel Brew, 'Proposals to Further Strengthen Australia's Counter-Terrorism Laws', quoting the Hon John Howard MP's statement.

[58] Apart from a preventative detention regime to allow detention of a person without charge, the Antiterrorism Act (No.2) 2005 introduced a number of new mechanism including: New Division 104 – Control Order in the Criminal Code Act 1995; an extension of the definition of a terrorist organization to enable prohibition of organizations that advocate terrorism (Division 102 of the Criminal Code Act 1995); revised sedition offences (Division 80 of the Criminal Code Act 1995); increased the search powers of the AFP to obtain information and documents related to terrorism and serious crimes (amendments to the Crimes Act 1914); extension of financing of terrorism offences (Division 103 of the Criminal Code Act 1995) and amendments to the Financial Transaction Reports Act 1988, Proceeds of Crime Act 2002, and Surveillance Devices Act 2004), and increased warrant periods for Australian Security Intelligence Organization (ASIO) and non-return of seized items if in the interest of national security (amendments to the ASIO Act 1979, Customs Act 1901, Customs Administration Act 1985, and Migration Act 1958). Hon. Phillip Ruddock MP, Attorney-General, 'Second Reading: Anti-Terrorism Bill (No.2) 2005', House of Representatives, Debates (3 November 2005) 102. See further discussions of the Anti-Terrorism Bill (No.2) 2005 also Andrew Lynch, 'Legislating with Urgency – The Enactment of the Anti-Terrorism Act [No 1] 2005' (2006) 31 Melbourne University Law Review 747, 771; Jenny Hocking, 'The Anti-Terrorism Bill (No 2) 2005: When Scrutiny, Secrecy and Security Collide, Democratic Audit of Australia' (November 2005).

The Commonwealth Anti-Terrorism (No.2) Act 2005 introduced a new Division 105 - Preventative Detention Orders ('PDOs') into the Criminal Code Act 1995, allowing preventative detention at the federal level of up to 48 hours, with the possibility of extending this up to a maximum of 14 days under complementary State or Territory laws.[59] The preventative detention regime in the Act aims to be "purely administrative in nature."[60] An initial PDO under which an individual can be detained for up to 24 hours may be applied for by any policy officer and issued by a senior member of the AFP. A continued PDO which extends the period of detention up to a total of 48 hours requires approval from a serving or retired Federal or State Supreme Court judge, a Federal Magistrate, or a lawyer holding an appointment to the Administrative Appeals Tribunal as President or Deputy President.[61] Although judicial officers may serve as "issuing authorities", they may only do so in their personal capacity, not in their official capacity as a member of the court. Both [62]the initial and a continued PDO may be issued because the PDO is necessary to prevent an imminent terrorist act from occurring or to preserve evidence relating to a terrorist act.[63]

These new orders significantly extend the powers of state authorities and frequently limit review by parliament or judicial bodies.64 The PDO regime has been criticized for violating Article 9 of the ICCPR,65 which guarantees the right to liberty and security of person, freedom from arbitrary arrest and detention, the right of a detained person to be promptly informed of the reasons for their detention and brought before a judicial officer without delay.66 As of May 2010, 37 individuals had been arrested and charged with criminal offenses within the Australian legal system.67 Notably, during all the investigation and intelligence collecting process, neither a PDO at the federal level nor at the state level has ever been applied for by the authorities.68

[59] Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT), s 21; Terrorism (Community Protection) Act 2003 (Vic) part 2A, ss 7, 8; Terrorism (Police Powers) Act 2002 (NSW) Part 2A, s 26K; Terrorism (Preventative Detention) Act 2005 (SA), s 10; Terrorism (Preventative Detention) Act 2006 (Qld), s 12; Terrorism (Emergency Powers) Act (NT), s 21K; Terrorism (Preventative Detention) Bill 2005 (Tas), s 8; Terrorism (Preventative Detention) Act 2006 (WA), s 13.

[60] Nesbitt, above n 56, 75.

[61] Criminal Code Act 1995 (Cth), ss 100.1(2), 105.12.

[62] Criminal Code Act 1995 (Cth), s 105.19(2). The reason for this is avoidance of the constitutional implications of the strict separation of judicial power under the Commonwealth Constitution. *Grollo* vs. *Palmer* (1995) 184 CLR 348, 362-363 (Brennan CJ, Deane, Dawson and Toohey JJ).

[63] Criminal Code Act 1995 (Cth), s 105.1.

[64] Similar argument has repeatedly been stated in various United Nations' reports on arbitrary detention or secret detention. For example, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the right to Development - Joint Study of Global Practices about Secret Detention in the context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; The special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; The Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; And the Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin (19 February 2010) UN Doc A/HRC/13/42, 4.

[65] See, e.g, Claire Macken, 'Preventative Detention and the right of Personal Liberty and Security under the International Covenant on Civil and Political Rights, 1966' (2005) 26(1) Adelaide law review 1, 1-2.

[66] International Covenant on Civil and Political Rights, adopted on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9 ('ICCPR').

[67] McGarrity, above n 56, 92.

[68] Under another important pre-emption regime in Australia, to date, only two control orders have been issued. The first control order was issued against Joseph 'Jack' Thomas in August 2006 who was found guilty in the Victorian Supreme Court of receiving funds from a terrorist organization and possessing a falsified passport. The second control order issued in Australia was against David Hicks in December 2007 who pleaded guilty before a US Military Commission to the offence of providing material support to terrorism and was then transferred to Australia to serve the remaining sentence in Adelaide. US Department of Defense, 'Detainee Convicted of Terrorism Charge at Guantanamo Trial', Media Release (Mar.30, 2007) http://www.defense.gov/releases/release.aspx?releaseid=10678.

III. SUGGESTIONS

Benefits and Dangers of Preventive Detention

Because of the particular situation prevailing in our country, the preventive detention laws have come to stay and it has been accepted as a necessary evil. No doubt, it makes inroads into the personal liberty of the individual, with the available limited judicial control, the judiciary is striking a balance between individual liberty and the interest of the State and ultimately, seeks to make the rulers to govern the people on principles of Good Governance.

As preventive detention is against civil liberty as it enables the executive to detain persons without a charge and trial. It is dangerous and draconian. In this country, constitutionally, the power of preventive detention has been conferred on the executive with some objective- to protect the people and the State from internal and external aggression and also to maintain public peace and tranquility. However, this draconian power has been misused, abused by the executive to silence the political enemies, to detain ordinary people who could be very well dealt with under ordinary criminal law. There is large-scale misuse of this power of preventive detention resulting in deprivation of personal freedom, personal liberty, and human rights of the people.

IV. CONCLUSION

It is vital for a developing country to protect scarce resources and to safeguard peace and order. Since independence on the grounds of gender, class, race, religion, etc. India has suffered many rebels. Mostly through these preventive detention methods and national security laws, India has been able to safeguard its freedom, integrity, and autonomy. Preventive detention laws are not always equal, just and rational and need to be modified or amended to blend in with the Right to Life and Freedom. Some critics have criticized safety as being central to the conception of human rights. India is an enormous nation with long boundaries and comprises many identities that are animated by the surrounding nations. Under these terms, it is under these security-related laws, acts, and provisions that the responsibility for protecting India's freedom, integrity and sovereignty lies.

Where the Preventive Detention Act shall be introduced within the context of the entry into law without violating any of its terms or limitations, the legislation cannot be imposed on the spectacular grounds that it is circulated to interfere with human liberties. In this regard, moral judgment should be made, because life and personal freedom from large social spheres must be protected at the one end of the continuum and, at the other end, the life and personal freedom of a detained individual must be taken into consideration

specify. So long as the preventive detention law is made within the legislative entry and does not violate any of the conditions or restrictions on that power, such law cannot be struck down on the specious ground that it is circulated to interfere with the liberties of the people. One cannot, therefore, contend that preventive detention is impermissible under the Indian Constitution Though it is now well settled that the right in part III of the constitution are not mutually exclusive and therefore, a law of preventive detention under Article 22 must also satisfy Articles 14, 19 and 21, it is also equally settled that a law of preventive detention cannot be held unconstitutional for the reason that it violates Articles 14, 19, 21 and 22. The constitutional philosophy of personal liberty is an idealistic view. The curtailment of liberty for reasons of states, security, public order, disruption of national economic discipline, etc. is envisaged as a necessary evil administered under strict constitutional restrictions.

The state must compensate the acquitted detenu instead of the Josses in terms of life, health, income, relations, social status, and profession, etc. There should be a mechanism to ensure that all the rights provided by the constitution of India are made available all the time to the detenu during the period of detention. Allegations of abusive conduct should be taken seriously and there should be an investigation by the competent authority. There should be an independent body of law to look after these cases.

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