

Preventive Detention and Major Laws in India

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Preventive Detention :

Detention deprives a man from his most prized possession that his personal liberty which is sacrosanct of all fundamental rights. As the name suggests Preventive detention means to detain a person by virtue of power conferred upon an authority in whose opinion it is necessary to detain a person in order to prevent him from committing certain crimes which are prejudicial to the interest of nation viz. National Security or Defence, Public order and the like. When the word ‘detention’ is coupled with the word ‘preventive’ it becomes ‘preventive detention.’ Its basic purpose is to catch the offender before he is likely to commit the crime of grave nature that his acts are of such a nature that if his personal liberty is not restrained at that point, he can become a potential danger to nation itself .

Necessity of such a provision:

Our Constitution has recognized this concept of preventive detention law in India vide Article 22 with protective safeguards to control misuse of these laws.¹ When our Constitution Assembly was discussing these provisions, there were lots of disagreements over this particular provision. Dr. Ambedkar remarked that the protagonists of the individual liberties should be happy that this Article has been made a part of Indian Constitution whereas those who are opponents in the matter may not be happy with its introduction. It has by its introduction has covered up the loss suffered by India by non- introduction of ‘due process of law’.² It was observed that it is necessary to have this provision to effectively deal with Crimes threatening the existence of State or with those who pose a threat to the sovereignty and integrity of the State.

¹ P.M.Baxi, *The Constitution of India*, Article 22,57(2010).

² David H. Bayley, *Preventive Detention in India*, 5 (1962)

But question arises that how to justify the detention of a man before actual *actus reus* has taken place. It is like presumption so strong against a person which results in his incarceration with limited rights left for him. For this purpose his past conduct, circumstances at that point are taken into consideration. Hence a great care and caution should be taken by the authorities before passing an order of detention against a person as it involves infringement of his right to personal liberty. Unless ‘sufficient cause’ for detention is there, i.e. compelling circumstances are there, a person should not be detained.

Protective Safeguards:

Article 22 (1),(2) provide for general law as to protection against arrest and detention in certain cases that an arrested person has a :

- (i) Right to be informed of grounds of arrest ‘as soon as may be.’
- (ii) Right of consultation, to be defended by a legal practitioner of his own choice.
- (iii) to be produced before nearest magistrate within twenty four hours of arrest excluding journey time from the place of arrest to the Magistrate’s court.³

Exceptions to Article 22(1),(2)

The above mentioned provisions shall not apply to :

- (i) An enemy alien
- (ii) To the preventive detention detainee⁴

Article 22 (4) to (7) further deal with methods to deal with the detainees under preventive detention laws and also provide for procedural safeguards to be followed in such cases. Certain rights have been conferred upon the detainees by the Constitution itself like:

- (i) Right to have review by Advisory Board.⁵

³ *Supra* note 1

⁴ *The Constitution of India*, Article 22(3)

⁵ Article 22(4)(a)

(ii) Right to communication of grounds of arrest to the detenu

(iii) Right to representation⁶

It is pertinent to mention here that while clause (4) of Article 22 says that a person can't be detained for a longer period than three months. Article 22 (4) (a) says that if in Advisory Board's opinion detention beyond three months is required owing to 'sufficient cause,' then he can be detained beyond such period. In no case detention shall exceed the maximum period of detention prescribed by preventive detention law made by Parliament by virtue of power conferred upon it by Constitution Article 22 (7). Hence Article 22 (7) is an exception to Article 22 (4).

Further, a careful perusal of Article 22 (7) reveals that Parliament has been conferred upon power to make law and prescribe the circumstances and classes of cases under which a person can be detained for longer period than three months without opinion of Advisory Board. Hence again clause (7) (a) is an exception to clause (4) of Article 22. The maximum period of detention⁷ and procedure to be followed by Advisory Board is to be prescribed by the Parliament.⁸

Following major Preventive Detention laws are at present in force in India:-

Major Preventive Detention Laws In India:-

At present following are the major Preventive Detention laws that are prevalent in India

- 1) Unlawful Activities (Prevention) Act,1967
- 2) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act,1974
- 3) The National Security Act,1980
- 4) Conservation of Foreign Exchange and Prevention of Black Marketing and Maintenance of Essential Commodities Act,1980
- 5) The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act,1988

⁶ Article 22 (5)

⁷ Article 22 (7) (b)

⁸ Article 22(7) (c)

1) Unlawful Activities (Prevention) Act, 1967

Under this Act first of all a declaration is to be made qua an association that it is unlawful by the Central government by notification in official Gazette. After that with in thirty days of publication of notification the notification is referred to the Tribunal for the purpose of adjudication whether or not there is sufficient cause for declaring the association unlawful. There is limitation of six months to confirm or cancel the notification. The order of Tribunal shall be published in the official Gazette. If declaration made by the Tribunal is confirmed by an order then it shall remain in force for two years from the date on which the notification becomes effective.⁹ After the Mumbai Attacks parliament enacted Unlawful Activities (Prevention) Amendment Act, 2008. It allows for detention of alleged militants for up to 180 days instead of 90, special courts to try suspects, sweeping police powers and the possibility of financial clampdown on suspects.¹⁰

2) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974

Under Section 3 of the Act power has been conferred upon appropriate Government to make detention order with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with view to preventing him from

- i) Smuggling goods
- ii) Abetting the smuggling of goods or
- iii) Engaging in transporting or concealing or keeping smuggled goods or
- iv) Harboursing persons engaged in smuggling goods or in abetting the smuggling of goods

When any detention order is made by the State Government, it shall forward the same to the Central Government within ten days with a report. A person detained under this Act shall be communicated grounds of detention as soon as may be within the terms of Article 22(5) of the

⁹ The Unlawful Activities (Prevention) Act,1967

¹⁰ Iqbal Singh, “An Analysis of India’s Unlawful Activities (Prevention) Amendment Act,2008”, *Indian Law Review*, Vol.1,81-113 (2009)

Constitution of India within five days in ordinary cases and within fifteen days in exceptional circumstances.

Section 8 of the Act deals with Constitution of Advisory Board to whom the reference is made of a detention order within five weeks from the date of detention order who after considering the material placed before it make a report as to the fact that whether or not there is sufficient cause for detention of the person concerned. Detention order shall be revoked if there is no sufficient cause for the detention in the opinion of Advisory Board.

Section 10 of the Act provides for the maximum period of detention which is one year from the date of detention or the specified period, whichever period expires later in case of detention order under section 8 in cases falling under section 9 of the Act a period of two years from the date of detention or the specified period whichever period expires later.¹¹

3) The National Security Act, 1980

Under this Act the power of detention has been conferred upon appropriate Government which may be Central or the State Government as the case may be. If the appropriate Government is satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the Defence of India, the relations of India with foreign powers or the security of India or if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India it is necessary so to do, make an order directing that such person be detained. Apart from it detention order can be made on the ground of doing activities prejudicial to the security of State, maintenance of public order, or acting in any manner prejudicial to the maintenance of supplies and services essential to the community.

Vide Section 8 of the Act the grounds of detention are to be disclosed to the person affected by the order within not later than five days in ordinary cases and within not later than ten days in exceptional circumstances. The detenu shall be afforded an earliest opportunity for making a representation against the order to the appropriate government.

¹¹ The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974

Section 9 provides for the constitution of Advisory Boards to whom reference is to be made vide Section 10 of the Act within three weeks from the date of the detention order along with report. After receiving confirmation from Advisory Board that there is sufficient cause for detention the detention can be continued otherwise it is to be revoked.

Section 13 of the Act provides for maximum period of detention which is twelve months from the date of detention subject to modification by the Appropriate Government.¹²

4) The Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act,1980

Under this Act the appropriate Government has the power to make detention order with a view to prevent a person from acting in any manner prejudicial to the maintenance of supplies of the commodities essential to the community. Whenever any person is detained under this Act, officer concerned shall make a report to the appropriate government along with the grounds of detention and his opinion in the form of a report and no such order shall remain in force for more than twelve days unless approved by State Government provided where grounds of detention have been communicated within five days to ten days there detention order can remain in force for fifteen days without approval from the State Government.

Vide Section 8 of the Act the grounds of detention are to be disclosed to the person detained and Section 9 of the Act deals with constitution of Advisory Boards and vide Section 10 of the Act reference is to be to the Advisory Board within three weeks of the date of detention along with grounds of detention and representation of the detenu along with the report of the concerned officer. The Advisory Board will give its report to the Appropriate Government as to whether or not there is sufficient cause for detention. Section 13 of the Act provides for the maximum period of detention which is six months from the date of detention if the detention order is confirmed after opinion from Advisory Board.¹³

5) The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act,1988

¹² The National Security Act,1980

¹³ The Prevention of Black Marketing and Maintenance of Supply of Essential Commodities Act,1980

The power to make detention order has been conferred upon Appropriate Government. A person can be detained under this Act with a view of preventing him from engaging in illicit traffic in narcotic drugs and psychotropic substances. If an order of detention has been made by State Government it shall forward it to Central Government within ten days thereof along with its report. The detenu should be communicated the grounds of detention as soon as may be after the detention within five days in ordinary case and within fifteen days in exceptional circumstances.

Section 9 of the Act provides for the constitution of Advisory Boards to whom reference is to be made within ten days of detention order and it is to make a report after considering the materials placed on record and after hearing the detenu that whether there is sufficient cause for detention within eleven weeks from the date of detention. A detention order is to be revoked if there is no sufficient cause for it.

Section 11 of the Act provides for maximum period of detention which is confirmed from Advisory Board under S.9 (f) is one year from the date of detention and cases falling under S.10 after confirmation from Advisory Board is two years from the date of detention.¹⁴

It has been held that too much secrecy in preventive detention cases should be avoided. The public has interest in knowing generally about the operation of preventive detention laws and on what grounds persons are subjected to such detention and how do the Advisory Boards view the allegations, the grounds, the representations, in what kind of cases do these Boards seek more information from the appropriate government, in what kind of circumstances if all do Advisory Boards report that there is no sufficient cause of detention, in all these and many other enquiries by the public deserve to be answered as far as consistent with the security. They can be satisfied by lifting the blanket provision of secrecy.¹⁵

¹⁴ The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988

¹⁵ Pradyumna K. Tripathi, "Preventive Detention: The Indian Experience," *The American Journal of Comparative Law*, Vol. 9, No 2, 225 (Spring 1960).

Hence, from above discussion it becomes clear that the concept of Preventive detention is an integral part of our Constitution. Although the task of harmonizing the conflicting interests appears to be difficult but Constitution makers have provided the checks by way of Advisory Boards and the scheme of checks and balances is there to safeguard the interests of individuals and judiciary is there standing like a pillar to review in case any of the stakeholder fails to exercise its power without due diligence. Apex court has come down heavily upon the authority which has tried to exceed its power so that individual liberty is not sacrificed on the altar of ‘security of state’ and ‘public order’ and on various other grounds of the like nature.
